SUPREME COURT OF QUEENSLAND

CITATION:	*Mount Cathay Pty Ltd v Lend Lease Funds Management Limited & Ors* [2012] QCA 274
PARTIES:	**MOUNT CATHAY PTY LTD** ACN 010 482 461 (appellant) **v** **LEND LEASE FUNDS MANAGEMENT LIMITED** ACN 000 335 473 (first respondent) **THE BODY CORPORATE FOR THE HAPPY VALLEY COMMUNITY TITLE SCHEME NO 17279** (second respondent) **VA DUONG MOC &** **CHAN CU MOC** (third respondents)
FILE NO/S:	Appeal No 3506 of 2012 SC No 1670 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 October 2012
DELIVERED AT:	Brisbane
HEARING DATE:	11 September 2012
JUDGES:	White and Gotterson JJA and Philip McMurdo J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be dismissed.** **2. The appellant pay the costs of each of the respondents.**
CATCHWORDS:	EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – MATTERS AFFECTING GRANT – GENERALLY – where the appellant claims that the respondent should not have been awarded an injunction absent proof of actual loss caused by the appellant's interference – whether proof of an actual loss is necessary for the granting of an injunction REAL PROPERTY – EASEMENTS – EASEMENTS GENERALLY – CREATION – BY EXPRESS AGREEMENT OR UNDER STATUTE – DOMINANT

TENEMENT AND UNCERTAINTY – where the appellant claims that the first respondent is not entitled to complain about obstruction of the easement as it is not a registered owner of the dominant tenement in question – whether the fact that the easement is not recorded on the titles of each individual lot owner precluded them from separately applying for the injunction

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PARTIES – where the third respondent claims that there was no proper basis for their joinder in these proceedings – whether it was just and convenient to join the party to enable the Court to effectively adjudicate the matter

Land Title Act 1994 (Qld), s 85A, s 184, s 185, s 200, s 201
Real Property Act 1861 (Qld)
Uniform Civil Procedure Rules 1999 (Qld), r 69

Fanigun Pty Ltd v Woolworths Ltd [2006] 2 Qd R 366; [2006] QSC 28, cited
Finlayson v Campbell [1997] NSWSC 374, considered
Gallagher v Rainbow (1994) 179 CLR 624; [1994] HCA 24, considered
Hutton v Hamboro (1860) 175 ER 1031; [1860] EngR 145, considered
Keefe v Amor [1965] 1 QB 334, cited
Platt v Ciriello [1998] 2 Qd R 417; [1997] QCA 33, considered
Rhone v Stephens [1994] 2 AC 310; [1994] UKHL 3, cited
Rufa Pty Ltd v Cross [1981] Qd R 365, cited
Rural View Developments Pty Ltd v Fastfort Pty Limited [2011] 1 Qd R 35; [2009] QSC 244, cited
Sattel v The Proprietors - Be Bees Tropical Apartments Building Units Plan No 71593 (No 2) [2002] 2 Qd R 427; [2001] QCA 560, considered
Thorpe v Brumfitt (1873) 8 LR Ch App 650, considered
Treweeke v 36 Wolseley Road Pty Ltd (1973) 128 CLR 274; [1973] HCA 27, considered
Westfield Management Pty Ltd v Perpetual Trustee Co Ltd (2007) 233 CLR 528; [2007] HCA 45, considered

COUNSEL: Leave given for Dr Lee (director) to appear on behalf of appellant
S Brown SC, with P Ahern, for the first respondent
M Conrick for the second and third respondents

SOLICITORS: Leave given for Dr Lee (director) to appear on behalf of appellant
Freehills Lawyers for the first respondent
Praeger Ellem Solicitors for the second and third respondents

[1] **WHITE JA:** I have read the reasons for judgment of Philip McMurdo J and agree with his Honour's reasons and the orders which he proposes.

[2] **GOTTERSON JA:** I agree with the orders proposed by Philip McMurdo J and with the reasons given by his Honour.

[3] **PHILIP McMURDO J:** The parties are the owners of adjoining properties in Fortitude Valley, between the railway station and Wickham Street. There is a registered easement which provides a pedestrian right of way through part of the appellant's building, in favour of the respondents' building. Last December, the appellant blocked that right of way, by locking fire doors at the respondents' end of the easement. In the judgment under appeal, a permanent injunction was granted, requiring the appellant to open and keep open the doors. The appellant says that for four reasons, only one of which was put to the primary judge, that order was wrongly made.

[4] A description of the properties is necessary. There is a retail development called the Valley Metro, which is made up of shops, a food court and a multi-level car park and which effectively houses the Fortitude Valley railway station. It has a frontage to Brunswick Street. But there is also access to and from the Valley Metro via the easement in question. The appellant's property is next to the Valley Metro and to its south east. On the opposite side of the appellant's property is the building which is described in the submissions as the Moc building. It has a frontage to Wickham Street. When this easement was granted and registered in 1984, it consisted of one parcel of land, the whole of which was described as the dominant tenement.

[5] There is a footbridge which crosses Wickham Street between the Moc building and the McWhirters building. For many years people have walked between the McWhirters building and the Valley Metro building (including the station) by a path across this bridge and through the Moc building and that part of the appellant's building which is subject to the easement. That was until last December, when the appellant locked the fire doors at the end of the easement where it meets the Moc building.

[6] In 1995, the Moc building was subdivided under a strata title subdivision which created four lots and some common property. Three of those lots are owned by the third respondents. The second respondent is the body corporate under this scheme. The first respondent, which I will call Lend Lease, is the owner of the fourth lot, which constitutes only a very small percentage of the Moc building because it consists of a storeroom with an area of about three square metres.

[7] It was Lend Lease which applied to the primary judge for this injunction. Before the primary judge there was no debate about who was entitled to the benefit of this easement or the extent of the use which ought to be protected. The only question concerned the physical condition of the floor of the easement area. The appellant said that the flooring was in disrepair and was unsafe. Lend Lease agreed that it required some repair. The body corporate undertook to the Court to effect that repair and Lend Lease undertook to pay for it at a cost of $20,000. But the appellant argued that no injunction to enforce the easement should issue absent an undertaking by the respondents that they would continue to maintain the condition of the area. It argued that this obligation of ongoing maintenance came from the terms of the grant of easement. The primary judge did not accept that argument.

No undertaking for the ongoing maintenance of this walkway was required by her Honour. Upon the undertakings which were offered by Lend Lease and the body corporate (for the repair of the flooring), it was ordered that the appellant would open and keep open the fire doors during the hours of 6.00 am and 8.00 pm each day, unless the doors needed to be closed in the event of a fire hazard and except to the extent that access needed to be restricted in order for that repair of the flooring to be undertaken.

The easement

[8] The easement was granted by Overells Limited, the then owner of the appellant's land, in favour of the State Government Insurance Office (Queensland), the then owner of the Moc building. It is necessary to set out most of the memorandum of grant:

> "OVERELLS LIMITED (hereunder called 'the Grantor' which expression shall include the successors and assigns of the Grantor where the context permits or requires) being the registered proprietor of an estate in fee simple … in all that piece of land … containing 33.49 perches being [the appellant's land] (hereinafter referred to as 'Servient Tenement') … hereby grants and transfers unto the said STATE GOVERNMENT INSURANCE OFFICE (QUEENSLAND) (hereinafter called 'the Grantee' which expression shall include the successors and assigns of the Grantee where the context permits or requires) or other the registered proprietor or proprietors for the time being and from time to time of the land described in the Schedule hereto (hereinafter referred to as 'the Dominant Tenement' which expression shall include each and every part of the Dominant Tenement and as such may be subdivided or consolidated from time to time) the following full and free rights and liberties in respect of that part of the Servient Tenement described and delineated as ENTB on Plan No 93171 and having an area of approximately 115 square metres (hereinafter called 'the Easement') for the Grantee and other the registered proprietor or proprietors for the time being and from time to time of the Dominant Tenement namely;
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> 1. To erect and maintain two ramp-walkways together with lock-up doorways and appurtenances as a means of access, egress and regress to and from the Dominant Tenement at each end of the easement.
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> 2. To have the said ramp-walkways supported at their upper extremities by the walls presently erected upon the Servient Tenement.
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> 3. To install in the ceiling or roof over the easement and to attach and have supported by the structure of the Grantor's building such pipes wires cables ducts and appurtenances as may be reasonably required by the Grantee for the passage or provision of water gas electricity air waste telephone alarm and other services to and from the Dominant Tenement and to maintain service repair alter and replace the same from time to time.

> 4. For the Grantee and its tenants and its and their servants, agents, invitees, licensees, workmen and all others having the like right to go pass cross and re-cross … along and over the Easement … except during such times, if any, as the proprietors for the time being of the Servient Tenement and the Dominant Tenement shall agree in writing that the Easement should be closed and subject to the terms of any such Agreement in writing Provided Always and it is hereby agreed that the Grantor shall have the right, on six (6) months' notice in writing to the Grantee, to reconstruct the said walls at its own expense and to provide alternative support for the Easement …"

The Schedule identified the Grantee's land as that area of 1261 square metres which I have called the Moc building.

The maintenance question

[9] The appellant's argument, as put to the primary judge and by different counsel in the appellant's written submissions to this Court, was that the memorandum of grant obliged the grantee to keep the dominant tenement in a proper state of repair. The argument referred to the reference to "maintain" in cl 1 as well as the reference to "maintain service repair …" in cl 3. Ordinarily, the burden of a positive covenant does not run with the land.[1] But for the appellant, it was argued that the respondents, although not parties to the memorandum of grant, could not take the benefit of the grant without being bound by a condition (for repair) contained within it, for which the appellant cited *Rufa Pty Ltd v Cross*[2] and *Fanigun Pty Ltd v Woolworths Ltd*.[3]

[10] However as the primary judge held, the memorandum of grant does not oblige the grantee to maintain or repair the walkway; rather it permits it to do so. Clauses 1 to 4 are preceded by words: "grants … the following full and free rights and liberties … for the Grantee". I also agree with the primary judge's view that the word "maintain" in cl 1 refers to a requirement to continue to keep in place the structures the subject of that clause, rather than a requirement to keep them in good repair. The appellant sought to draw some assistance, in relation to the meaning of "maintain" from *Sattel v The Proprietors - Be Bees Tropical Apartments Building Units Plan No 71593 (No 2)*.[4] But that concerned the meaning of that word in a particular statutory context and, as the primary judge said, it provided no assistance here. And this was and is a secondary point. The fundamental difficulty for this argument of the appellant is that the memorandum of grant imposed no obligation of maintenance or repair upon the grantee, so that it cannot be said that, by necessary implication, the enjoyment of the easement was made conditional upon the performance of such an obligation.

The use of the easement

[11] I go then to the new arguments within appellant's written submissions. At the hearing of this appeal, leave was granted for the appellant to be represented by

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1 *Rhone v Stephens* [1994] 2 AC 310; *Rural View Developments Pty Ltd v Fastfort Pty Limited* [2011] 1 Qd R 35 at [15].

2 [1981] Qd R 365.

3 [2006] 2 Qd R 366.

4 [2002] 2 Qd R 427.

Dr Lee, who is not a lawyer but who is a director of the company. At least his principal submission was the one which was put to the primary judge. But I did not understand that he abandoned any of the appellant's written submissions.

[12] The first of these arguments was in reliance upon *Westfield Management Pty Ltd v Perpetual Trustee Co Ltd*,[5] where an easement was construed as allowing for access to the dominant tenement but not across the dominant tenement to facilitate travel beyond it. It conferred a right of way "to go pass and re-pass … to and from the said lots benefited or any such part thereof across the lots burdened". In the judgment of the High Court (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ) this passage from the judgment of Hodgson JA in the same case was endorsed:

> "Although the words 'to and from [the dominant tenement] or any such part thereof' do not exclude the possibility that the right should extend to going *to* the dominant tenement and then going across it to further land, and then returning across the dominant tenement and then going *from* it across the servient tenement, the words tend to suggest that it is access to and from the dominant tenement that is the purpose of the [E]asement, and not access to further land reached only by going across the dominant tenement. Certainly, if it had been intended that the grant extend to the authorisation of others to go across the dominant tenement to further properties, the words 'and across' could readily have been added."[6]

[13] In the present case, the grantee was given the right to erect and maintain walkways as a means of access, egress and regress "to and from the dominant tenement …". And cl 4 permitted "the Grantee and its tenants and its and their servants, agents, invitees, licensees, workmen and all others having the like right to go pass cross and re-cross … along and over the Easement …".

[14] It is at least arguable that the grant does not permit the easement to be used to travel to the dominant tenement in order to travel across it to another property or properties. That argument might seem unrealistic, when it is considered that this easement has long been used as part of the pedestrian path between the McWhirters building and the Valley Metro building. However, as was held in *Westfield Management Pty Ltd v Perpetual Trustee Co Ltd*, an instrument registered under the Torrens system must be construed without reference to material extrinsic to the instrument and which might have established the intention or contemplation of the parties to it.[7]

[15] Assuming for the moment that the rights of the grantee were limited as the appellant now suggests, it does not follow that the order made by the primary judge should be disturbed. If Lend Lease is entitled to use the easement only for access to its storeroom, nevertheless that use of the easement had been precluded by the actions of the appellant and the order which was made was reasonably necessary to facilitate even that use. The evidence which Lend Lease tendered before the primary judge did not refer to any particular detriment from its being denied access to its storeroom and instead referred to the use which the public had made of this easement as part of the path between the two shopping centres. But there was no argument which was made to the primary judge to the effect that the injunction

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5 (2007) 233 CLR 528.

6 (2007) 233 CLR 528 at 534 [18].

7 (2007) 233 CLR 528 at 538-541 [35]-[45].

should not be granted because it would facilitate an unlawful use of the servient tenement, that is to say a use which went beyond the terms of the easement. Had that argument been advanced, it would have been necessary for the primary judge to make findings of fact as to whether the injunction was being sought for the purpose of facilitating such an unlawful use of the easement and, if granted, would be likely to do so. Because this point was not raised, the respondents, in particular Lend Lease, had no opportunity to contest those factual issues. It would be unfair for this Court to draw inferences which would determine those issues adversely to Lend Lease. Therefore, this argument as to the extent of the rights given to the grantee, upon the proper interpretation of the instrument, cannot assist the appellant here. The judgment under appeal would not preclude this argument of excessive use being made in other proceedings, such as if the appellant sought to restrain a certain use of the easement.

[16] It should be noted that rather than complaining that excessive use had been made of the easement, the appellant submitted to the primary judge that it was in the interests of pedestrians using this easement that "when traversing this busy thoroughfare", they should not have to run the risk of an unsafe flooring. The use of the easement to pass through the dominant tenement was then accepted by the appellant and advanced as a reason for requiring the respondents to keep it in good repair.

Damage to Lend Lease: was proof necessary?

[17] The second of the appellant's new arguments that is no injunction should have been granted absent proof of damage to the applicant, Lend Lease. The argument cites a passage from the judgment of McTiernan J in *Treweeke v 36 Wolseley Road Pty Ltd*,[8] where reference was made to some of the authorities on what is the required interference with the full enjoyment of an easement for it to be actionable. McTiernan J there set out passages from *Gale on Easements*, 14th ed (1972), where it was said at pp 351-353:

> "It is not every interference with the full enjoyment of an easement that amounts in law to a disturbance; there must be some sensible abridgment of the enjoyment of the tenement to which it is attached, although it is not necessary that there should be a total destruction of the easement …
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> As regards the disturbance private rights of way, it has been laid down that … in the case of a private right of way the obstruction is not actionable unless it is substantial … Again it has been said that for the obstruction of a private way the dominant owner cannot complain unless he can prove injury; unlike the case of trespass, which gives a right of action though no damage be proved."

McTiernan J then cited *Thorpe v Brumfitt*, where Sir W M James LJ said that a plaintiff cannot complain of a hindrance to a right of way "unless he can prove an obstruction which injures him".[9] But then McTiernan J again referred to *Gale on Easements*, apparently accepting this passage:

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8 (1973) 128 CLR 274 at 280-281.

9 (1873) 8 LR Ch App 650 at 656.

> "In *Hutton v Hamboro*,[10] where the obstruction of a private way was alleged, Cockburn CJ laid down that the question was whether practically and substantially the right of way could be exercised as conveniently as before. In *Keefe v Amor*[11] Russell LJ said that the grantee of a right of way could only object to such activities of the owner of the land, including retention of obstructions, as substantially interfered with the use of the land in such exercise of the defined right as for the time being was reasonably required."[12]

McTiernan J set out those passages to explain why, in that case, the respondent had complained only in respect of a particular interference with its right of way. His judgment is not authority for the proposition that some quantifiable loss must be proved in this context.

[18] The present question is not whether damages can be awarded absent proof of an actual loss. It is whether the equitable jurisdiction to restrain a legal wrong requires proof of an actual loss. As to injunctions, the position is as set out in the current edition of *Gale on Easements*:[13]

> "14-58 Before a perpetual injunction can be granted to restrain a private nuisance or the disturbance of an easement, the court as a general rule requires the party to establish its legal right and the fact of its violation. But when these things have been established, then, unless there be something special in the case, the party is entitled as of course to an injunction to prevent the recurrence of that violation …
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> 14-59 To obtain an injunction, proof of actual damage is not necessary where a right of property has been infringed … Again, where the wrong is of a recurring nature an injunction may be obtained even though the actual damage is slight. The Court, however, will not interfere by injunction where the violation of a legal right is trivial."
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> (Footnotes omitted)

[19] This accords with the judgment of Young J in *Finlayson v Campbell*,[14] where, after an extensive discussion of the authorities, he posed the question as whether there had been a substantial interference with the easement.

[20] The appellant's submission seeks some assistance from *Platt v Ciriello*,[15] where Ambrose J said that in *Thorpe v Brumfitt*, it had been held that the dominant owner could not complain about the obstruction of a private way unless he could prove an actual injury. But as *Thorpe v Brumfitt* itself illustrates, it is necessary to consider the remedy which is sought by the grantee. In *Thorpe v Brumfitt*, it was said that an injunction could issue to restrain an obstruction caused by several persons, acting independently of each other, where their acts in combination might cause "a serious inconvenience", although the act of any one of those persons of itself would not

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10 (1860) 2 F & F 218 at 219; (1860) 175 ER 1031 at 1032.
11 [1965] 1 QB 334 at 347.
12 (1973) 128 CLR 274 at 281.
13 18th ed, (2008).
14 [1997] NSWSC 374.
15 [1998] 2 Qd R 417.

cause damage to the complainant.[16] In other words, an injunction could be granted against a defendant in order to prevent a "serious" interference with the right of way, although the acts of the defendant had not caused a loss.

[21] The present case was not a claim for damages. It claimed an injunction to prevent the continuation of a substantial rather than trivial interference with the easement, because the consequence of the appellant's action had been to preclude any use of the right of way. That interference with the legal right was to be prevented by an injunction, unless there was some proper discretionary basis for refusing it.

Lend Lease: its entitlement to the easement

[22] The remaining argument is that Lend Lease is not an owner of the dominant tenement, but that instead, the only registered owner of the dominant tenement was the second respondent. That is said to follow from the fact that the benefit of the easement is recorded on the second respondent's title to the common property but it is not recorded in the same way on the title of Lend Lease to its lot (nor is it recorded on the title to the lots owned by the third respondents).

[23] The easement was granted for "the Grantee … which expression shall include the successors and assignees of the Grantee where the context permits" and the dominant tenement was defined to "include each and every part of the Dominant Tenement and such as may be subdivided or consolidated from time to time".

[24] Therefore, upon registration of the strata title subdivision of the Moc building, each owner of a lot as well as the body corporate became entitled to the easement, according to the express terms of this easement and the reasoning in *Gallagher v Rainbow & Ors*.[17] Indisputably this easement was granted in favour of any owner of a subdivided portion of what was originally the dominant tenement. The question is whether that was affected by the fact that the benefit of the easement was not recorded on the titles of the individual lot owners.

[25] Section 184(1) of the *Land Title Act* 1994 (Qld) ('**the LTA**') provides that a registered proprietor holds its interest subject to registered interests affecting its lot but free from all other interests. This easement has been a registered interest under the LTA from the Act's commencement. It was registered under the previous statute, the *Real Property Act* 1861 (Qld). By s 200 of the LTA, anything registered under the 1861 Act is as effective under the LTA as if it had been done under that Act. And by s 201 of the LTA, each interest in freehold land held by a person immediately before its commencement, and recorded under the 1861 Act, is taken to be an interest held by the person in the freehold land register. Therefore the memorandum of grant is and has at all times been a registered instrument and the appellant's property is and has at all times been owned subject to that easement and according to its terms, including its definition of the dominant tenement. The fact that the registrar has not recorded the details of this easement against the lots held by the first and third respondents does not affect the operation of s 184(1).

[26] Section 85A(1) of the LTA provides that when an easement is registered, there must be recorded in the appropriate registers particulars of the lot burdened by the easement and any lot benefited by the easement. On one view, that requirement applies only as and when an easement is being registered. Upon another view, it

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16 (1873) 8 LR Ch App 650 at 656-657.

17 (1994) 179 CLR 624 at 631-634.

requires these particulars to be recorded for an easement whenever registered. If the former view is correct, s 85A did not apply to this easement. Although s 85A was not addressed in the appellant's submission, it may be that the author had in mind the latter view and that there was some consequence from the fact that the particulars of all of the lots benefited by the easement had not been recorded. But if s 85A, which was introduced by an amendment in 1997 and after the subdivision of the dominant tenement, did apply to this easement, it was because the easement was already a registered instrument. Section 85A does not provide that the existing registration of an easement in some way should be suspended, pending the recording of those particulars under s 85A. On either view of s 85A then, it did not affect the existing registration of this easement. The easement has effect as if it was duly registered under the LTA.

[27] Alternatively, if the easement is not a registered interest in favour of each of the respondents, nevertheless the appellant would hold its land subject to the easement in favour of all of the respondents, because the interests of the first and third respondents would be that of persons "entitled to the benefit of an easement [of which the] particulars have been omitted from, or misdescribed, in the freehold land register", as that term appears in s 185(1)(c) of the LTA.

[28] It follows that this submission must be rejected. But it should be noted that a further difficulty for the appellant was that the submission overlooked the fact that the body corporate supported the relief for which Lend Lease applied. And it gave an undertaking to the Court for that relief to be granted. Indisputably, it is a registered owner of the dominant tenement.

[29] As already noted, the appeal was argued by Dr Lee and at least his principal submission was that which was made unsuccessfully to the primary judge. I did not understand his address to raise anything which had not been within the appellant's written submissions.

Third respondents: their position

[30] Lend Lease brought its proceedings only against the appellant. The second and third respondents were joined, or sought to be joined, by the appellant. The second respondent filed a notice of address for service on the date of the hearing before the primary judge. The third respondents resisted being joined and such part of the proceeding which concerned them was at first adjourned to a date to be fixed. But the ultimate outcome included an order that the application to join them be dismissed. The appellant was ordered to pay their costs as well as those of Lend Lease and the body corporate.

[31] They submit that there was no basis for an application to join them to these proceedings, foreshadowing an application for indemnity costs in respect of this appeal.

[32] In my view, there was a proper basis for their joinder under r 69 of the *Uniform Civil Procedure Rules*, although no claim had then been made by the appellant against them. They were parties whose presence before the Court was at least desirable, just and convenient to enable the Court to adjudicate effectually and completely on all matters in dispute connected with the proceeding.[18] That is

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[18] r 69(1)(b)(ii).

because the essential question before the primary judge was one of the proper interpretation of the grant of easement. As they were amongst the parties entitled to the benefit of that easement, they could have been properly joined so that that question of interpretation could be decided between all parties affected by the easement. Therefore the attempt to join them was not a step which would warrant the imposition of indemnity costs. The problem was that they were brought in so late, so that the proceedings as against them at first had to be adjourned. But that of itself would not warrant indemnity costs.

Orders

[33] The appeal should be dismissed and the appellant should be ordered to pay the costs of each of the respondents.