

SUPREME COURT OF QUEENSLAND

CITATION: *Brown v Jackson* [2015] QSC 355

PARTIES: **MORTON DOUGLAS BROWN**
(Applicant)
v
FIONA JACKSON
(Respondent)

FILE NO/S: Brisbane No 10002 of 2015

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 15 December 2015

DELIVERED AT: Brisbane

HEARING DATE: 4 December 2015

JUDGE: Boddice J

ORDER: **The parties are to prepare minutes of orders in accordance with these Reasons.**

CATCHWORDS: REAL PROPERTY – EASEMENTS – PARTICULAR EASEMENTS AND RIGHTS – RIGHTS OF WAY – where the respondent owned both the property on which her house was located, and the property on which the applicant’s driveway was located – where a grant of easement entitled the applicant to a right of way over the property on which his driveway was located – where the respondent had constructed new gate at the entrance to the easement, on the basis of security concerns – where the applicant complained about the construction of that gate – whether such a construction was permitted by the terms of the grant of easement – whether the new gate constituted a real, serious and substantial interference by the respondent with the applicant’s right of way

Stewart v Cooper [1986] Tas R (NC) N1
Trewin v Felton [2007] NSWSC 851

COUNSEL: S McNeil for the applicant
D J Campbell QC, with B A Hall, for the respondent

SOLICITORS: Short Punch & Greatorix for the applicant
Minter Ellison Gold Coast for the respondent

- [1] Morton Douglas Brown lives in a large residential property at Southport in the State of Queensland. He has been the registered owner of the property for 25 years. Fiona Jackson is the registered owner of an even larger residential property located adjacent to Mr Brown's property. She purchased that property in 2013, for use as her family home. At present, however, she and her family spend a considerable period of each year out of the country, due to her husband's work commitments.
- [2] Although Mr Brown and Ms Jackson are neighbours, relations between them are far from neighbourly. A dispute has arisen over Mr Brown's driveway, which is situated on Ms Jackson's property but subject to an easement granting Mr Brown use of it to access his property. Mr Brown's property is otherwise landlocked. In July 2015, Ms Jackson arranged for the installation of an electronically-operated aluminium gate across the entry to Mr Brown's driveway. Prior to its construction, pedestrian and vehicular access down Mr Brown's driveway was unimpeded.
- [3] Mr Brown seeks an order for the removal of the gate installed by Ms Jackson and an injunction restraining Ms Jackson from installing any further obstruction across the driveway to his property. At issue is whether Ms Jackson has any legal entitlement to install the gate and, if so, whether that gate so constructed constitutes a substantial interference with Mr Brown's use of the easement. A subsidiary issue is whether proposed repaving of Mr Brown's driveway by Ms Jackson, in pavers consistent with her own driveway, would constitute a substantial interference with Mr Brown's use of the easement.

Background

- [4] The properties in question are located in a quiet residential area of Southport, close to the Nerang River. Both properties have large grounds. Each has its own tennis court and swimming pool. Electronically-controlled gates at the entrances to each property prevent vehicular or pedestrian access without the prior consent of the owner.
- [5] The Jackson property is surrounded by a substantial fence. On the boundary adjacent to Mr Brown's driveway, this fence is 2.1 metres high. It is constructed of masonry pillars with spiked metal railing inserts. The Jackson property and Mr Brown's driveway are separated both by this boundary fence, and by shrubbery adjacent to the fence. At Mr Brown's end of the driveway, which is paved and over 40 metres in length, there was a set of large iron gates.
- [6] Although Ms Jackson has owned her property since 2013, she did not take any steps to limit vehicular and pedestrian access along Mr Brown's driveway until July 2015. The impetus for taking such steps is said to have been a burglary at Mr Brown's property. The description of that incident suggests the burglars were at the property for some considerable period of time, having previously made visual observations utilising Mr Brown's driveway. The property was ransacked, and one of Mr Brown's vehicles was used to transport a large quantity of property stolen by the perpetrators.

Evidence

- [7] Ms Jackson and her husband each swore affidavits. Mr Jackson also gave evidence at the hearing. Each said the burglary, together with other events on and around the Gold Coast, caused them to have significant concerns for the safety of their family. As a result, they have undertaken substantial upgrades to the security of their property. A significant number of cameras have been installed to provide CCTV surveillance for all of the boundary fences. They also installed security lighting and a sophisticated alarm system.
- [8] Despite these security arrangements, Ms Jackson and her husband remain concerned about the risk criminal offenders may use Mr Brown's driveway to access their property via its adjoining boundary. The substantial length of the driveway means offenders could access Ms Jackson's property from the driveway without being observed from the street itself. The gate that has been constructed addresses this security concern. It will prevent uninvited visitors accessing Mr Brown's driveway, either on foot or by car.
- [9] Mr and Mrs Jackson's contention that limiting access to the driveway will assist in the security of their adjoining boundary fence is supported by a security expert, Francis Populin. He gave evidence that installation of a gate at the start of Mr Brown's driveway would further enhance security of the perimeter of the Jackson property.
- [10] Ms Jackson says the driveway also presents a safety hazard in its present form. The existing paving is over 20 years old and is uneven. Mr Brown and visitors to his property may fall and injure themselves whilst using the driveway. Ms Jackson is concerned about her legal liability in those circumstances. She wishes to minimise the hazard by repaving the driveway at her own expense.
- [11] Mr Brown also swore affidavits and gave evidence at the hearing. He did not accept the validity of the concerns expressed by Mr and Mrs Jackson. Whilst his property was the subject of a significant burglary, the installation of the gate does not materially enhance the security of the Jackson property. The Jackson property and Mr Brown's driveway are already separated by a high perimeter fence, which itself deters potential offenders from using the driveway to access the Jackson property.
- [12] Mr Brown also contends the gate installed by Ms Jackson substantially interferes with access to his property. Mr Brown cannot see the end of the driveway from any part of his property. He therefore cannot see who is at that gate. In contrast, Mr Brown can see any person standing at his gate at the end of the driveway adjacent to his property. That allows him to readily determine if he wishes to permit access to his property. He can also leave his gates open for expected visitors. Further, if he is not home when parcels are delivered, they can be left safely at those gates, without being obvious from the street.
- [13] Mr Brown contends the substantial inconvenience created by the installation of the gate by Ms Jackson is not met by the provision of remote electronic access and CCTV surveillance. Mr Brown regularly uses his large garden, pool and tennis court. He would not be able to view any footage produced by the CCTV surveillance cameras at any of these locations. He would have to return to the inside of his home to undertake that task before opening the gate. The suggestion this technology could be accessed using a

smartphone does not overcome the inconvenience. He is a seventy year-old man who has no desire to utilise modern technology.

- [14] Mr Brown also did not accept there was any need to repave the driveway. The existing pavers were well-maintained and in good condition. They were not uneven. They did not present any safety hazard. To repave in those circumstances was unreasonable. It would prevent access to his property whilst it was being undertaken.

The easement

- [15] Relevantly, the memorandum of transfer provides:

“... do hereby transfer and grant ... for the time being of all that piece of land ... full and free right and liberty for herself and them her and their agents, servants, visitors, workmen, licensees and tenants or any of them and every other person or persons from time to time and at all times hereafter at her and their will and pleasure by night or by day for all and any purpose with or without horses, cattle and other animals, carts, wagons, motor-cars, carriages and other vehicles of every description laden or unladen to go pass and repass in, through, along or over that piece or parcel of land situated in the County and Parish aforesaid being Subdivision B of re-subdivision two of subdivision one and of re-subdivision A of subdivision two of portion forty-five containing seven perches and six-tenths of a perch and being part of the land contained in Certificate of Title Number 246307 Volume 1445 Folio 47 and the said Lizzie Kate Murray-Prior Doth hereby for herself, her executors, administrators and assigns (and so as to bind the said land lastly hereinbefore described and the parson [sic] or persons from time to time entitled to or interested in the same (covenant) with the said Marie Theresa Lightoller here [sic] executors, administrators and assigns that she the said Lizzie Kate Murray-Prior and her executors, administrators and assigns for the person or persons entitled or interested as aforesaid will not at any time hereafter build over or upon or obstruct or cause to be built over upon or obstructed same Subdivision B of re-subdivision two of subdivision one and of re-subdivision A or subdivision B or re-subdivision two of subdivision one and of re-subdivision A or subdivision two of portion forty-five or any part or parts thereof and will at the request in writing of the said Marie Theresa Lightoller or the person or persons for the time being entitled to the said re-subdivision three of subdivision one of portion forty-five her, his or their duly constituted agents keep the said subdivision B of re-subdivision two of subdivision one and of re-subdivision A of subdivision two of portion forty-five for all time open to the sky and free from all obstructions and will remove all obstructions of whatever kind now or at any time hereafter being upon the same.”

Relevant law

- [16] Generally, unless there is a provision to the contrary, a right of way easement which is sufficiently wide to permit its purpose will not prevent the servient owner from fencing the easement, with the dominant owner accessing the right of way by means of gates at

such points as reasonably meet his or her requirements.¹ Brereton J summarised the ordinary rule in *Trewin v Felton*.²

“... ordinarily, in the absence of a specific provision in the terms of the easement, and except where their circumstances otherwise indicate, the servient owner is entitled to fence the right of way, provided that sufficient points of access through gates are allowed to permit reasonable use of the right of way; that the dominant owner is not entitled to have right of way remain unfenced; and the dominant owner is not limited to a single point of access and does not irrevocably elect to use only one point of access by initially determining to do so, but may from time to time vary the points at which access is exercised to and from the right of way. Further, the servient owner may gate the right of way, provided that the gate does not unreasonably obstruct use of the right of way.”

[17] Whether the general rule is applicable to any particular right of way easement depends on the circumstances of the case. In considering the particular circumstances, a distinction is often drawn between rural and urban areas.³ The individual circumstances of each case also includes a consideration of the nature and effect of a gate and whether such a gate, although easily opened, causes a substantial interference along the land which is the subject of the right of way.⁴

[18] In *Stewart v Cooper*, Neasey J set out the guiding principles for determining a substantial interference with a right of way:

- “1. In the case of a right of way over private land, the owner of the dominant tenement does not have a right of access to and use of the right of way wholly unobstructed by any limitation placed upon such use by the owner of the servient tenement.
2. Only a substantial interference with the right of way is actionable, that is, one which is ‘a real substantial interference with the enjoyment of the right of way’.
3. That as long as the owner of the dominant tenement is given reasonable access to and use of the right of way, there is no substantial interference with enjoyment of it.

The question whether there is a substantial interference with the use and enjoyment of the right of way is of course one which depends upon the facts and circumstances of the case.”⁵

Submissions

[19] Mr Brown submits that the terms of the grant of Easement are clear and unambiguous. It expressly provides for his free and unrestricted passage over the land. It also expressly

¹ *Trewin v Felton* [2007] NSWSC 851 per Brereton J at [28].

² [2007] NSWSC 851 at [36].

³ *Buckley v Timbury & Anor* [2013] NSWSC 1009.

⁴ *Carlson v Carpenter* (1998) 8 BPR 15, 909.

⁵ [1986] Tas R (NC) N1.

prohibits any obstruction. There is therefore no basis to apply any *prima facie* presumption that the servient owner has an entitlement to construct a gate at the entrance to the easement. Such a presumption only arises in the absence of a specific provision in the terms of the easement.

- [20] Alternatively, Mr Brown submits that even if such a presumption does arise, the gate installed by Ms Jackson causes a real, serious or substantial interference with his use of the driveway. It is constructed of material that cannot be seen through or around. It is powered by electricity under the control of Ms Jackson. The remote control cannot be operated from within Mr Brown's property. Mr Brown has to walk to a position adjacent to the entrance to the driveway from his property to operate the remote. There is no intercom allowing him to identify who is at the gate.
- [21] Mr Brown also submits that the proposed repaving of the driveway is unnecessary and will cause a real and substantial interference with his use of the driveway. The existing paving is in good condition. It poses no safety risks. The desire to repave stems from Ms Jackson's wish to make the driveway appear part of her property.
- [22] Ms Jackson submits that a proper construction of the Grant of Easement supports the conclusion that it is a right of way easement. The primary purpose of such an easement is to permit passage along it. It is not designed to give Mr Brown the rights of a proprietor. The terms of the easement did not prevent the construction of the gate, unless that construction constitutes a real and substantial interference with Mr Brown's right of way.
- [23] In determining what is a real and substantial interference regard can be had to technology. Here, there are valid security reasons for the construction of the gate. The availability of remote and video technology render its installation not a real or substantial interference with Mr Brown's right of way.
- [24] Ms Jackson also submits that as the paving on the easement is now in excess of 20 years old, it is a reasonable maintenance measure for that paving to be replaced at her expense. That repaving would be completed expeditiously. It would not result in a real or substantial interference with Mr Brown's use of the easement.

Discussion

- [25] Both Mr Brown and Mr Jackson, when giving their evidence, impressed me as genuinely believing the reasonableness of their respective positions. I do not doubt Ms Jackson also genuinely believes her actions are reasonable, having regard to her security concerns. Sadly, neither side seems able to see the genuineness of the other's viewpoint. However, a determination of the issues does not require any resolution of those opposing viewpoints. That determination is reached by a consideration of the terms of the Grant of Easement.
- [26] The Grant of Easement is unambiguous. It gives Mr Brown full and free right to access his property along the land the subject of the Easement. The grant also expressly provides that the Jacksons, as the owners of the land the subject of the Grant of Easement, will

keep that area of land free from all obstructions and will remove all obstructions of whatever kind. (emphasis added)

- [27] Such a Grant of Easement is more than a right of way. It excludes an entitlement for the Jacksons to install anything which would “block or close up or make difficult of passage”⁶ along that of land. Such an exclusion constitutes a specific provision in the terms of the easement preventing the servient owner from constructing gates to that easement. In that respect, authorities to the effect that a grant of a right of way still permits the servient owner to enclose that right of way with appropriate gates are distinguishable.⁷
- [28] Even if I am wrong in that construction of the terms of the easement, I would still grant Mr Brown the requested relief. The installation of the gate by Ms Jackson constitutes a real, serious and substantial interference with Mr Brown’s access to the easement. Whilst many authorities support the conclusion that the mere construction of a gate on a right of way easement does not, of itself, constitute a real or substantial interference with a person’s right of way pursuant to that easement, each of those cases depended on its own particular circumstances. The particular circumstances in the present case amply support the conclusion that the installation of the gate by Ms Jackson does constitute a real and substantial interference with Mr Brown’s access along the easement.
- [29] The easement is of a substantial length. The gate installed by Ms Jackson cannot be seen from any part of Mr Brown’s house or its surrounding gardens and amenities. A person delivering a parcel to Mr Brown’s property, which apparently occurs on a regular basis, would be required to leave it in the street open to all, or to leave without delivering it, requiring that Mr Brown either collect it subsequently or arrange re-delivery. Prior to the construction of the new gate, the parcel could be left adjacent to Mr Brown’s gate, in an area where it is not seen from the street.
- [30] At present, Mr Brown can see people standing at his gate from most areas of his grounds. Mr Brown would be required to carry a smart device allowing him access to video surveillance of the gate, in order to be able to identify persons when deciding whether to allow them access through the gate. Alternatively, he would have to return to inside his home. These constraints are real and substantial for a 70 year old man who has enjoyed access to his property without such constraints for many years. The provision of technology does not overcome these substantial constraints; for Mr Brown, the use of technology is an additional imposition.
- [31] The stated basis for the imposition of these constraints is insufficient to justify such a real and substantial interference with Mr Brown’s use of the easement. People accessing that easement from the street cannot readily access the Jackson property. It has a substantial fence physically separating it from Mr Brown’s driveway. Substantial security measures are already installed, which warn of any breach of this perimeter fence. The installation of the gate does not substantially enhance that warning mechanism.
- [32] The remaining matter in dispute is the repaving of the driveway. There is scant evidence that the present driveway presents a genuine safety risk. Photographs tendered at the

⁶ Macquarie Dictionary definition of “obstruct”.

⁷ See generally *Trewin v Felton* [2007] NSWSC 851 and the authorities discussed therein.

hearing do not support Ms Jackson's contention that the driveway paving is so uneven that it constitutes a risk to Mr Brown and his visitors. The proposed repaving would prevent Mr Brown from accessing his driveway whilst that work was being undertaken. That would be a real and substantial interference in circumstances where, on the present evidence, there is no justification for that work to be undertaken.

Conclusion

- [33] Mr Brown has an unambiguous right to not only access the land the subject of the Grant of Easement, but also to have any obstruction created by Ms Jackson removed forthwith. The gate installed in July 2015 constitutes such an obstruction. Mr Brown is entitled to orders requiring its immediate removal and preventing the construction of any further obstructions. He is entitled to the relief sought in his application.
- [34] There is no sufficient basis to make the declaration sought in Ms Jackson's application. Her application is dismissed.
- [35] There is no reason why Ms Jackson should not pay Mr Brown's costs of both applications, including any reserved costs.
- [36] The parties are to prepare minutes of orders in accordance with these Reasons.