SUPREME COURT OF QUEENSLAND

CITATION:	*McDowall v Reynolds* [2004] QCA 245
PARTIES:	**ALBERT THOMAS McDOWALL** (applicant) v **JOHN KEITH REYNOLDS** (respondent)
FILE NO/S:	Appeal No 3179 of 2004 MRAA 10 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Application for extension of time
ORIGINATING COURT:	Land and Resources Tribunal
DELIVERED ON:	23 July 2004
DELIVERED AT:	Brisbane
HEARING DATE:	13 July 2004
JUDGES:	Davies JA, McPherson JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application dismissed;** **2. Applicant to pay respondent's costs of and incidental to the application.**
CATCHWORDS:	APPEALS – EXTENSION OF TIME – where applicant appealed to wrong body – extension of time applied for three months late – unexplained delay of six weeks after being told of mistake – whether extension of time should be given REAL PROPERTY – EASEMENTS – where applicant's right of way under mining lease over respondent's property was obstructed by respondent digging a ditch – whether cause of action is trespass or nuisance – whether there is any evidence of quantum of damage PROCEDURE – COSTS – whether if nominal damages were awarded to applicant that would be a basis to make costs order in applicant's favour *Land and Resources Tribunal Act* 1999 (Qld), s 50 *Beaumont v Greathead* (1846) 2 CB 494, cited *Holford v Bailey* (1850) 13 QB 426; 116 ER 1325, cited *Moreland Timber Co v Reid* [1946] VLR 237 applied

Paine & Co v St Neots Gas & Coke Co [1939] 3 All ER 812 applied

COUNSEL: C J Ryall for the applicant
R M Treston for the respondent

SOLICITORS: Bottoms English (Cairns) for the applicant
Murray Lyons (Cairns) for the respondent

[1] **DAVIES JA:** I agree with the reasons for judgment of McPherson JA and with the orders he proposes.

[2] **McPHERSON JA**: This is an application for an order extending the time within which to file a notice of appeal from the decision of a Deputy President of the Land and Resources Tribunal given on 5 December 2003. Rule 748 of the UCPR provides for the notice of appeal to be filed within 28 days, which was not done in this case. In fact, it was not until 8 April 2004 that the application to extend time was filed and not until June that it was served on the respondent.

[3] In the past the Court has not been unduly strict about extending time limits for appealing especially when the respondent suggests nothing in the way of prejudice arising from delay of a few days. Here, however, the delay since the decision has been not inconsiderable and no explanation for it is provided for the period from 23 February 2004. In these circumstances it is appropriate to examine the issues likely to arise on the appeal and to make some sort of assessment of the prospects of success of the appeal if it is allowed to proceed.

[4] The defendant Reynolds, who is the respondent to this application, is the registered proprietor in the Mossman district of two allotments of land described as Portions 110 and 81 on part of which he grows sugar cane. The applicant plaintiff McDowall is the holder of a mining lease ML 5402 of a part of Portion 110 on which he has for many years quarried limestone. Access to the mine is authorised by means of a road across Portion 110 which is designated on a plan (no 35832) registered with the Department of Natural Resources and Mines. The lease was not made available to this Court at the hearing, but there was no dispute about the existence of the road access. It appears to have its source in s 126(1)(b) of the *Mining Act 1968* conferring on the holder of a mining tenement (which includes a mining lease like ML 5402) the right of ingress to and egress from the leased area. The parties have treated it as conferring rights equivalent to those of an easement or right of way, and for present purposes we will do so too.

[5] In 1980 Mr Reynolds dug a deep ditch, six feet deep and six feet wide, across the road, which effectively blocked access to the mine. The result was to prevent Mr McDowall from removing and selling limestone from the mine along that route. There is a finding below that until 1989 access to the mine was then gained across Lot 81 until the use of that route was also stopped by Mr Reynolds. Proceedings were started in various courts in Queensland some of which are still under way. The proceedings now before us were commenced in the mining warden's court at Mareeba in October 1992 and were, it seems, transferred to the Land and Resources Tribunal after it was established. The primary relief sought was an injunction, which on 5 December 2003 was granted by the Deputy President, following hearings at Atherton and Mossman on 29 and 30 September last year and inspection of the site.

Mr Reynolds was ordered to restore access to ML 5402 by installing a pipe with compacted gravel filling for the whole width of the right of way. That injunction or order is not the subject of any appeal or application to extend time for appealing before this Court.

[6] What is in issue is Mr McDowall's claim for damages for trespass in the proceedings in which the injunction was granted. The Deputy President appears to have thought that she was being asked to award equitable damages in lieu of or in addition to the injunction granted, and, in the exercise of her discretion, she refused to do so. It is essentially against this aspect of her decision that it is now sought to appeal.

[7] The confusion may have been due in part to the fact that at and before the hearing the parties apparently did not recognise that the appropriate form of action for wrongful interference or "disturbance" of an easement is for damages for nuisance. See 14 *Halsbury* §§ 132-133 (4th ed). Obstructing the use of a right of way is an example specifically mentioned by Blackstone (3 Bl Com 220); and *Saint v Jenner* [1973] Ch 275 is a modern case where damages were awarded for impeding use of a right of way. An action for trespass to land is not available to the dominant against the servient owner of a right of way because the former does not have possession but merely the right to use the way: cf 14 *Halsbury* § 132 note 3. It has been said that the right as owner of the easement the claimant would be asserting "of necessity excludes the possibility of possession of the servient tenement": *Paine & Co v St Neots Gas & Coke Co* [1939] 3 All ER 812, 823 (Luxmoore LJ). Without possession of the land, or the right to it, Mr McDowall had and has no right of action to damages in trespass: *Moreland Timber Co v Reid* [1946] VLR 237, 239, 244. He has no more than an incorporeal hereditament which, except in the case of a *profit a pendre* (see *Holford v Bailey* (1850) 13 QB 426; 116 ER 1325) does not confer a right to sue for damages for trespass to land against the person rightly in possession. See notes to Bullen and Leake, *Precedents of Pleadings*, 3rd ed, at 416-417; 11th ed, at 640.

[8] Mr McDowell was, as I have implied, nevertheless entitled on the evidence before the Tribunal to damages for nuisance. His difficulty is that he failed to prove he had sustained any loss, or the amount of the loss sustained. A letter was tendered on his behalf addressed to him by Rankine & Sons of Mossman confirming their agreement to pay $5 per tonne for limestone mined at his quarry to be weighed at the Mossman Mill, and containing an expression of a hope of mining at least 1000 tonnes over the next two years. This certainly suggests that at one time there was a market for limestone from Mr McDowall's mine. Unfortunately, the letter is dated 8 January 1985, which is seven years or more before these proceedings were instituted in October 2002. There is no reason to suppose that Rankine & Sons or anyone else were still in the market as potential purchasers of limestone at any time relevant to the assessment of damages in these proceedings. When the letter was tendered at the hearing, the solicitor appearing for Mr Reynolds objected to its admission saying that his client relied on the Statute of Limitations. He had received no earlier intimation that damages were being claimed for losses sustained more than six years before the action was commenced despite the fact that orders for particulars of loss and for documents in support of it had earlier, and more than once, been made by the Tribunal. When asked whether he proposed to give any evidence personally about the damages claim, Mr McDowall's lay representative in the proceedings (who was his grandson) said that he "couldn't give any evidence at

this time". The Deputy President was left with nothing but the letter of January 1985 from which to calculate the loss for which damages were being claimed, which in the applicant's written submissions at the hearing were confined to the period from February 1992 to the date of the injunction sought.

[9] Without evidence about the nature and quantum of Mr McDowall's loss, if any, it would have been impossible for the Deputy President to assess and award damages for nuisance arising out of the disturbance to his use of the right of way. This prompted a discussion at the hearing before us about Mr McDowall's right to nominal damages for the undoubted breach of his rights occasioned by digging the ditch across the access road. *McGregor on Damages* (16th ed 1997) §§ 426-429 says that an award of nominal damages has traditionally had two functions. One is as a means of vindicating a legal right. This has ceased to be critical with the more frequent use of the remedy of injunction and since the introduction in the mid-19th century of a power to make simple declarations of right. In the present case, that function was served by the Deputy President's order no 1 that Mr McDowall was entitled to ingress to and egress from ML 5402 by the right of way recorded in plan 35832, and by her order no 2(b) that Mr Reynolds restore access to ML 5402 by installing a pipe and placing gravel in the drain he had dug.

[10] Its second function is to enable costs of the proceedings to be awarded in favour of a successful plaintiff who has not otherwise claimed or recovered damages. Such damages have been described as "a mere peg on which to hang costs" : *Beaumont v Greathead* (1846) 2 CB 494, 499, per Maule J. As *McGregor* § 429 points out, the need for such an order has now become less pressing since the Rules have (as they now do in Queensland) conferred a general discretion as to costs.

[11] In proceedings in the Land and Resources Tribunal, the statutory rule is that each party must bear their own costs unless the Tribunal considers, in the special circumstances of the proceeding, that an award for costs is appropriate: *Land and Resources Tribunal Act 1999*, s 50. The Deputy President considered that, although the litigation had had a most unfortunate history, she did not accept that it was the fault entirely of one party. She held that, while the matter had been before her, the actions of neither party constituted special circumstances justifying an award of costs. Assuming that the Tribunal can under a provision like s 50 properly make an order for payment of costs based simply on an award of nominal damages, no such award was sought in the present case. Mr McDowall's amended draft notice of appeal does not challenge the order with respect to costs made by the Deputy President, except perhaps as being incidental to the appeal against the order dismissing the claim for substantial damages. It was not suggested before us that costs should have been awarded to Mr McDowall, but rather that the proceedings should be remitted to the Tribunal for damages to be assessed. On the evidence as it stands and stood before the Tribunal, there is no basis for such an Order. It is not suggested that there should now be a completely new trial of that issue, which is what the applicant needs but cannot have, and has not asked for.

[12] For these reasons, it is my opinion that the appeal has no prospects of success, and that the time for filing the notice of appeal should not be extended. It follows that the application should be dismissed with costs. The applicant's written outline accepts that he would have been liable for the costs of this application if it had succeeded, and he must bear them now that it has failed.

[13] The orders are:

1. Application dismissed.
2. Applicant to pay respondent's costs of and incidental to the application.

[14] **MULLINS J:** I agree with the reasons for judgment of McPherson JA and the orders which he proposes.