PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Scherbakov v Brisbane City Council* [2020] QPEC 29
PARTIES:	**DMITRY SCHERBAKOV AND JULIJA SCHERBAKOV** (Applicants) V **BRISBANE CITY COUNCIL** (Respondent)
FILE NO/S:	719/20
DIVISION:	Planning and Environment
PROCEEDING:	Hearing of an application
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	22 May 2020 (*ex tempore)*
DELIVERED AT:	Brisbane
HEARING DATE:	22 May 2020
JUDGE:	RS Jones DCJ
ORDER:	**1. The application is dismissed.** **2. I will hear further from the parties if necessary as to any consequential orders.**
CATCHWORDS:	PLANNING LAW – EASEMENT – definition of "premises" – application for declaration that the subject premises excludes the land identified as easement A – application for declaration that development application was properly sought
LEGISLATION:	*Acts Interpretation Act 1954* (Qld) *Building Units and Group Titles Act 1980* (Qld) *Planning Act 2016* (Qld) *Planning and Environment Court Act 2016* (Qld)
CASES:	*Gallagher v Rainbow & Ors* (1944) 179 CLR 624 *Northern Territory in City Developments Pty Ltd & Anor v The Registrar-General of the Northern Territory & Ors* [2001] NTCA 7

	Pro-Vision Developments Pty Ltd v Ku-Ring0Gai Municipal Council [2003] NSWLEC
	Re Ellenborough Park (1956) 1 Ch 130
COUNSEL:	MJ McDermott for the applicants
	M Batty for the respondent
SOLICITORS:	Nicholson's Lawyers for the applicants
	City Legal for the respondents

1. This proceeding is concerned with an application for declarations that, first, the subject premises, for the purposes of the application, excludes an area of land identified as easement A on plan SP28867, easement number 717434222, and a declaration that the development application was one properly made under the *Planning Act 2016* (Qld) ('Planning Act').

2. It is uncontroversial that the Court has the power to make the declarations sought, should the evidence warrant, pursuant to sections 240 of the Planning Act and section 11 of the *Planning and Environment Court Act 2016* (Qld).

3. By way of some background, the applicants are the registered proprietors of land situated at 49 Daisy Street, The Grange, more properly described as Lot 168 on registered plan 19915. The subdivision of land involving the creation of Lot 167 and 168 was registered in or about 1985. However, some time prior to that, in or around the mid-1940s, a large dwelling had been constructed which now spans both of those lots. The subject easement was created to secure and protect that part of the dwelling encroaching onto the subject land.

4. The subject easement was registered on or about 8 August 2016. Pursuant to that easement, the dominant tenement is defined to mean the land described as the benefited land in Item 2 of form 9, the easement document. The servient tenement is defined to mean the land described as the servient tenement, the burdened land, in item 2 of form 9 of that easement document.

5. The grantee is described, among other things, to include the successors in title and assigns of the grantee. The grantor is defined to include the successors in title and assigns of the

grantor, being the registered owner, from time to time, of the servient tenement, or the land which it forms part, from time to time.

6. It is also stated that the grantor grants to the grantee over the servient tenement to permit such encroachment to remain for the lifetime of the building erected as at the date of the granting of the easement.

7. Pursuant to easement, the grantor's obligations are to ensure that: first, the easement granted to the grantee shall be quietly held and enjoyed by the grantee, and the benefit shall be received and taken without any interruption or disturbance by the grantor or any person rightfully claiming by, through, or under, or in trust for the grantor, and; that the grantor shall refrain from using the servient tenement in a manner likely to obstruct or unreasonably hinder the use of the servient tenement by the grantee, and; in any lawful use of the servient tenement, the grantor will exercise all due care and diligence for the safety of the encroachment.

8. The encroachment, under the easement document, is declared as that part of the building intended to be wholly situated within the dominant tenement, but which encroaches on the servient tenement. The nature and extent of the encroachment and easement are shown in the survey plan and photographs at pages 166, 211, and 245 of exhibit 2. To state the obvious, the creation of this easement has made the future development of Lot 168 difficult, not only for the proprietor of the land, but also the Council.

9. On or about 25 November 2019, the applicants through their agent lodged a development application for a material change of use, being a development permit for a new dwelling house in the traditional building character overlay. The proposed material change of use is described as being for a dwelling house.

10. On 12 December 2019, the Council advised the applicants, through their agent, that the development application was not one properly made, pursuant to section 51(5) of the Planning Act. Most relevant to this proceeding were the Council's views that the development application required the consent of the persons who enjoyed the benefit of the easement. Second, that the application was not otherwise one properly made, because what was proposed was, in reality, a use falling under the definition of a dual occupancy for the

purposes of the Brisbane City Plan 2014. It was also said that what was proposed was not a dwelling house for the purposes of the planning regulations.

11. In their originating application, the applicants contend that they are entitled to the relief sought because: first, the proposed use is not a dual occupancy within the definition of the Planning Scheme; second, the applicants had provided all material required for the application to be considered properly made, including the appropriate fee, etcetera; third, on a proper construction of the Act and the development application, the definition of "premises" is limited to that part of the land the subject of the application, which excludes the easement, and/or; fourth, the premise should exclude consideration of the encroachment, which is properly a use of the adjoining land and not a use of the subject land; fifth, as a consequence of the third and fourth matters referred to, the proposed use is for a dwelling house, and; finally, the respondent has failed to assess the properly made development application and should do so.

12. That part of the applicants' case concerning what would or would not constitute "premises" can, in my respectful view, by quite readily disposed of. The term "premises" is not defined, as far as I am aware, within the Planning Scheme itself. It is, however, defined in the Planning Act to relevantly mean:

> *Land, whether or not a building or other structure is on the land.*

13. Under the same Act, land is defined to include, relevantly here:

> *An estate in, on, over or under land.*

14. For the sake of completeness, I would observe that under the *Acts Interpretation Act 1954* (Qld) ('AIA'), land is defined to include:

> *Messuages, tenements and hereditaments, corporeal or incorporeal, of any tenure or description, and whatever may be the interest in the land.*

15. Pursuant to the Certificate of Title, the applicants are described as joint tenants holding an estate in fee simple in Lot 168 on registered plan 19915. That estate in fee simple is

encumbered by a number of registered interests, including mortgages, but most relevantly by the subject easement, which is described as burdening the land to Lot 167 on registered plan 19915.

16. That the estate in fee simple in Lot 168 is encumbered by the easement, in my view, does not, subject to the terms and conditions of the easement document itself, detract from the fact that, relevantly here, the subject premises is the land. Accordingly, the development application cannot proceed on the basis that the easement protecting the encroachment does not form part of the subject premises.

17. It would, in my view, also follow that the Council could not proceed in any assessment of the development application in a manner that would, in effect, permit it to be decided on the basis that it was a matter that had to be or ought to be ignored. Accordingly, in my view, the third and fourth propositions cannot be maintained.

18. Turning then to the balance of the matters raised on behalf of the applicants, in paragraphs 31 to 38 of the applicant's written submissions, the definition of the premises is set out. Thereafter, a number of observations about that definition are made and in paragraph 33(b) it is then said that the definition of premises may exclude buildings or structures present on the land, and this gives rise to a "potential" interpretation that excludes the encroaching building. I emphasise here the word "potential".

19. Thereafter, reference is made to the definition of land under the Planning Act and, again, a number of observations are made. It is then asserted, in paragraph 37 and 38, that in context, "the word premises in the Act is that of a term with broader utility, and which forms a key component of the definition of development for a material change of use of premises." It is then said, given the "possibility" – and I emphasise the word "possibility" – of the definition of premises including less than the entirety of a lot, when considered in that context, reference can be made to the explanatory notes to the Planning Bill to confirm the proper interpretation of the definition of premises.

20. In my view, there is no need to refer to the explanatory notes. The definition of what constitutes a premises is sufficiently clear to not warrant delving into any extrinsic material. I

would note that, in any event, I do not consider that the extracted portions of the explanatory notes referred to offer any real assistance to the applicants.

21. I will turn, then, to the next complaint raised by the Council, namely, that when properly characterised, the application is for a dual occupancy. It is necessary, then, to consider the definition of that term. Under the Planning Act, a dual occupancy is relevantly defined to mean:

> *A residential use of premises for two households involving two dwellings that are detached, on separate lots, that share a common property.*

22. Various examples of uses that might fall within that definition or outside of it are given, but it is unnecessary to go into them.

23. That definition, I would point out, is also, for all intents and purposes, replicated in the Brisbane City Plan 2014. Again, for reasons that I will come to in a moment, it is not necessary to finally determine this point. I will, nonetheless, make some further observations.

24. Here, in the event that approval was given, there would be two households. There would also be two detached dwellings on separate lots. According to Mr Ovenden, a town planner who was relied on by the Council, once developed, the following visual features would be apparent. Within a 20 metre frontage: two detached dwellings, one behind and offset from the other, two vehicle cross-overs to Daisy Street, potentially two carports at the frontage, two letterboxes on Daisy Street, four wheelie bins to be provided on the curb for bin collection, and separate utility connections, for example, separate water meters, telephone connections etc. According to Mr Ovenden this would result in the proposed development appearing as a dual occupancy.

25. Having regard to what I have already said, as raised with Mr Batty, counsel for the Brisbane City Council, whether or not there would, in fact, be a dual occupancy really focuses on whether there would be a sharing of common property, because that is clearly a material part of the definition of that use.

26. Before going on, I would note that it would seem that most of the features Mr Ovenden referred to would be present when residential development occurred on a battle-axe shaped lot, and yet such development would not be described as involving a dual occupancy. Indeed, in this context, Mr Batty accepted that if that part of the encroachment in fact, formed part of Lot 167 and not part of Lot 168, this proceeding would have been unnecessary, at least insofar as having to deal with declarations of the type being sought.

27. Not surprisingly, I was not directed to any definition of what might constitute common property, and in this context, I would note that the definition prescribed under the *Building Units and Group Titles Act 1980* (Qld) is unhelpful. Unsurprisingly, property is defined, pursuant to the AIA. Property is defined to mean:

> *Any legal or equitable estate or interest (whether present or future, vested or contingent, or tangible or intangible) in real or personal property of any description (including money), and includes things in action.*

28. It is quite clear, in my view, that the easement would be property. The question then becomes, is the easement common property? The resolution of this question would require a consideration of the rights and obligations created under the easement itself. The applicants remain the sole registered proprietors, holding in fee simple the subject land. Therefore, the only common property, for the purposes of the definition of what constitutes a dual occupancy, would be the easement itself.

29. There are, of course, common features associated with that easement. The applicants and the parties who enjoy the benefit of the dominant tenement are both subject to the easement. Also, the encroachment forms part of the one structure that is physically located on both parcels of land.

30. There are, however, enormous differences in the rights and obligations created under the easement. Under the easement, the grantor has granted to the grantee over the servient tenement – that is, the area of the easement protecting the encroachment – the right for that encroachment to remain and, further, the grantor's obligations include that they shall permit the grantee to hold and enjoy the benefit of the easement, without any interruption or

disturbance, and to refrain from using the servient tenement in a manner likely to obstruct or unreasonably hinder that use by the dominant tenement.

31. In *Pro-Vision Developments Pty Limited v Ku-Ring-Gai Municipal Council* [2003] NSWLEC 226, Justice Lloyd was required to give consideration to the nature of an easement. In that case, his Honour referred to the earlier decision of the High Court in *Gallagher v Rainbow & Ors* (1994) 179 CLR 624, where, at page 633, Justices Brennan, Dawson and Toohey said:

> *The principle is that an easement is no mere personal right; it is attached to the dominant land for the benefit of that land. To the extent that any part of the dominant land may benefit from the easement, the easement will be enforceable for the benefit of that part unless the easement, on its proper construction, benefits the dominant land only in its original form.*

32. As has also been identified, an easement is a privilege without profit which the owner of one neighbouring tenement has of another, existing in respect of their several tenements, by which the servient owner is obliged to suffer or not do something on his land for the advantage of the dominant owner. In this context Lloyd J then went on to compare or identify some common features of an easement and a covenant, and after identifying that there was a degree, "of overlap", his Honour went on to say:

> *There is not, however, a complete overlap between an easement and a covenant, particularly a negative covenant. Whilst both easements and covenants require a dominant tenement and a servient tenement (or land which is benefited and land which is burdened), a restrictive covenant obliges the proprietor of the servient tenement not to use the land in some way in which he or she would be otherwise entitled. By way of contrast, an easement such as that in the present case is a right which entitles the holder of the benefit of the easement to some non-exclusive use of the servient tenement.*

33. The language used to describe the dominant tenement having a privilege which the servient tenement is obliged to suffer, or gives a right of non-exclusive use which the servient tenement is obliged to suffer or is burdened with, is consistent with the language used in the easement document, where the dominant tenement is described as the benefited land and the servient tenement as the burdened land.

34. In *Re Ellenborough Park* (1956) 1 Ch 130 at 170, the Court of Appeal, per Lord Evershed, Master of the Rolls, cited with approval a passage from Dr Cheshire's "Modern Real Property" 7th edition, where it was said, after referring to fundamental principles concerning easements that:

> *We may expand the statement of the principle thus: a right enjoyed by one over the land of another does not possess the status of an easement unless it accommodates and serves the dominant tenement.*

35. That passage has been more recently cited with approval by the Court of Appeal of the *Northern Territory in City Developments Pty Ltd & Anor v The Registrar-General of the Northern Territory & Ors* [2001] NTCA 7, per Justice Angel.

36. In the case of an easement such as this, where one party obtains and enjoys a considerable advantage in respect of the land owned by another party, who, in turn, is obliged to suffer that advantage without consideration, it is difficult to see how it could properly be said that these properties share common property, accepting for the time being that the easement might constitute common property.

37. Here, there is no apparent sharing of any benefit or uses associated with the easement. That lies solely with the dominant tenement. On the other side of the coin, there is no sharing of obligations under the easement. The burden of the obligations imposed under the easement all lie with the servient tenement. In my view, in such circumstances, it would be difficult to see how it could be reasonably said that there is a sharing of any common property. With all that said, it is not necessary for me to express a final view on the matter.

38. The next matter raised by the Council was that the consent of the dominant tenement was required. Yet again, it is unnecessary for me to finally determine this matter, but I will again make some observations. It was submitted on behalf of the Council that the consent of the beneficiaries of the subject easement was required to section 51(2)(c) of the Planning Act. That section relevantly provides that:

The application must be accompanied by the written consent of the owner of the premises to the application, to the extent that the premises are not excluded premises.

39. Excluded premises are defined in general terms to mean, relevantly here:

premises that are a servient tenement for an easement, if the development is consistent with the easement's terms.

40. In this case, the premises are clearly a servient tenement for an easement. The question, then, is whether the premises is or is not properly described as excluded premises for the purposes of the Act. It was submitted on behalf of the Council that the subject premises are not excluded premises because the proposed development is not consistent with the terms of the easement. That is so, according to the Council, because the proposed development involves only minimal setbacks from the proposed driveway and from the existing dwelling.

41. It is also asserted that what is proposed would be inconsistent, because it involves the construction of a carport which would lie in front of the existing dwelling which encroaches onto the subject land.

42. It is said that when these matter are taken into account, the construction and use of the proposed development could not allow the grantee to enjoy the dwelling house without interruption or disturbance and, accordingly, what is proposed is not consistent with the terms of the easement.

43. At least at face value, contrary to the submissions made, the easement does not provide for the enjoyment of the existing dwelling house per-se without any interruption or disturbance. As has already been pointed out, the grantor's obligations are to ensure the easement shall be quietly held and enjoyed by the grantee without any interruption or disturbance by the grantor, and the grantor is to refrain from using the servient tenement in a manner likely to obstruct or unreasonably hinder the use of the servient tenement.

44. The grant of the easement is that the grantor grants to the grantee, over the servient tenement, to permit such encroachments to remain for the lifetime of the building erected on the land. What is proposed would seem to in no way, impact on the purpose of the easement, that is, to

permit the encroachment to remain on the servient tenement for its lifetime. Nor would it appear to cause any interruption or disturbance to the easement granted, nor hinder the use of the easement. The encroachment and its use would not, it appears, be interfered with in any physical way.

45. It may be the case that what is proposed might impact in a negative way on the amenity of the existing dwelling that may not be to the point. For the purposes of the Planning Act, a premises will only be an excluded premises when the development to be carried out on the servient tenement is not consistent with the easement's terms.

46. As I have already indicated, the purposes of the easement is for the encroachment to remain for the lifetime of the building erected within it, without interruption, disturbance or hindrance. Nowhere within the easement document is it expressly stated, or would necessarily implicit that a development must not in any way impact on the amenity of the use of that part of the dwelling house protected by the easement.

47. I should note that I was referred to two particular cases by Mr Batty in his written submissions at paragraph 44 and 45. It is unnecessary for me to deal with those cases in any detail, having regard to the concessions made by Mr McDermott, counsel for the applicants. I would, however, note that it might well be that those cases might well be distinguishable on the basis that they deal with physical impacts or impacts on the amenity or enjoyment of the leases.

48. The reason why it was unnecessary for me to finally decide those other matters was because Mr McDermott, on more than one occasion, stated to the effect that if his client lost the construction of the premises point, then they could not succeed[1] because the applicants would not be able to satisfy the definition of a dwelling house as defined under the planning regulations.

49. A dwelling house is defined to mean:

> *A residential use of premises involving –*

[1] T1-12 L 27-41, 14 L7-22, 34 L6-8.

50. relevantly here –

> *one dwelling for a single household and any domestic outbuildings associated with the dwelling.*

51. That requires, of course, a consideration of what constitutes a dwelling. A dwelling is defined to mean:

> *All or part of a building that: (a) is used or capable of being used as a self-contained residence and; (b) contains food preparation facilities, and a bath or shower, and a toilet, and a washbasin, and facilities for washing clothes.*

52. Here, there would clearly be, if the proposed development went ahead, a residential use of premises, being the whole of Lot 168, including, of course, the easement encumbering that land. However, Mr McDermott said that he could not, on behalf of his client, rebut the Council's assertion that there would be, in reality, – in the event that the subject application went ahead – more than one household contained within the premises.

53. Mr Batty quite fairly pointed out that the applicants might have been able to nonetheless succeed on the point if there was evidence placed before me that might satisfy me that that part of the dwelling encroaching into Lot 168 could not be described as a self-contained residence, but the applicants had failed to do so, and the application must necessarily be dismissed.

54. It appeared to me that there may have been evidence that might have allowed me to draw the reasonable inference that that part of the dwelling encroaching onto the subject land might not properly be able to be described as a self-contained residence. However, I was not taken to that evidence nor invited to draw that inference. While I consider it unlikely, I suppose one could not rule out the existing dwelling comprising of two self-contained flats, one of which is located within the easement on the subject land and what the consequences of that might be.

55. It is with some reluctance that, having regard to my conclusions concerning the proper meaning of the word "premises" for the purposes of the Act and the Planning Scheme, and

the concessions made by Mr McDermott, I have no real choice other than to dismiss the application.

56. The orders of the Court will then be that the application will then be dismissed and, if necessary, I will hear from the parties as to any consequential orders.