SUPREME COURT OF QUEENSLAND

CITATION:	*Pacific Coast Investments P/L v Cowlishaw* [2005] QSC 259
PARTIES:	**PACIFIC COAST INVESTMENTS PTY LTD ACN 063 723 008** (applicant) v **GEM ANN COWLISHAW as trustee under INSTRUMENT NO 702834357** (respondent)
FILE NO/S:	SC 9841 of 2004
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 September 2005
DELIVERED AT:	Brisbane
HEARING DATE:	5, 6 September 2005
JUDGE:	McMurdo J
ORDER:	**1. The owner for the time being of Lot 2 on RP 101547 in the County of Stanley, Parish of Enoggera, Title Reference 13593134, together with such persons as permitted by that owner, will have a statutory right of user in respect of the land described as Lot 3 on RP 81648 in the County of Stanley, Parish of Enoggera, Title Reference 12916077, by way of a right of way over such part of that land which is marked as "Easement A" on a plan numbered 11461-4 prepared by J B Goodwin, Midson & Partners, and dated 18 November 2003** **2. The right of way will provide a right to pass, whether by vehicles or upon foot, and at all times by day and by night for all purposes connected with the use and enjoyment of the car park presently upon the dominant land** **3. The statutory right of user will be subject to the following conditions:** **(a) No truck of greater than two tonnes will be allowed to use the easement** **(b) The owner of the dominant tenement will at its cost maintain the easement area substantially in its present condition**

4. **The applicant pay to the respondent the sum of $80,000 by way of compensation or consideration and that the applicant remove, at its expense, the fence constructed pursuant to the order 18 November 2003**

CATCHWORDS: REAL PROPERTY – EASEMENTS CREATION – BY EXPRESS AGREEMENT OR UNDER STATUTE – where applicant purchased land with a two storey building built along the only street frontage – where the applicant constructed a car park at the rear of the property – where the applicant subsequently leased the building to a real estate agency – where the real estate agency staff utilised the car park via a driveway on the respondent's land – where the building on the respondent's land was used for an accounting practice and was zoned for use as a business of professional office – where the respondent consented to the use of the driveway for the construction of the applicant's car park and the applicant laying further concrete on the driveway – where the applicant applied for a statutory right of user in respect of the respondent's land under s 180 of the *Property Law Act* 1974 (Qld) – whether an easement was "reasonably necessary" – whether it was consistent with the public interest that the dominant land be used in the manner proposed – whether the respondent could be adequately recompensed in money for any loss or disadvantage which the respondent may suffer from the imposition of the obligation – whether the respondent's refusal to agree to accept the imposition of an obligation of user was unreasonable

Property Law Act 1974 (Qld), s 180

Ex parte Edward Street Properties Pty Ltd [1977] Qd R 86, discussed
Hanny v Lewis (1998) 8 BPR 16, 205; [1998] NSWSC 385, considered
Application by J J Kindervater [1996] ANZ Conv R 331, cited
Re Seaforth Land Sales Pty Ltd's Land (No 2) [1977) Qd R 317, referred to
Re Towerpoint Pty Ltd; Re Diridge Pty Ltd [1991] Q Conv R 54, discussed
Tregoyd Gardens Pty Ltd v Jarvis & Anor (1997) 8 BPR 15, 845, referred to

COUNSEL: M D Martin for the applicant
F G Forde for the respondent

SOLICITORS: LeMass Solicitors for the applicant
Holland & Holland for the respondent

[1] **McMURDO J:** This is an application for an order for a statutory right of user pursuant to s 180 of the *Property Law Act* 1974 (Qld). The applicant seeks a right of way for vehicles to travel down one side of the respondent's land to and from its land. The application is opposed upon several grounds. The respondent disputes that the applicant has proved any of the matters about which, according to s 180(3), the court must be satisfied before an order of this kind can be made. There is also a dispute as to what amount should be awarded by way of compensation or consideration if there is to be an order.

The applicant's land

[2] The applicant's land is at 15 South Pine Road, Alderley. It is almost rectangular in shape and has an area of 508 square metres. A two storey building occupies about half of the land and is built to the boundary on South Pine Road, which is the only street frontage. At the rear of the building, there is a concrete slab which is used by the building's tenant for car parking. There are seven car spaces.

[3] The applicant purchased this property in October 1997. The area behind the building was not then a car park. The only construction upon it was a separate building used as a toilet facility. The applicant had that building removed when constructing the car park. Although there is some uncertainty as to precisely when the car park was constructed, it is common ground that it was some time between late 1999 and when the present tenant moved into the applicant's building in March 2002. The tenant is a company which carries on the business of a real estate agency. It has 12 people engaged as commission agents, and two as property managers, each of whom comes and goes from the premises and needs a car. There is some suggestion that the tenant does not need the car park, but parking only in the nearby streets, I find, would be problematical. Parking is restricted on South Pine Road outside this building to effectively three car spaces which can be used for no more than two hours at any time. The building is very close to the busy intersection of South Pine Road and Samford Road. Parking in nearby streets leading off South Pine Road is relatively scarce. The principal of the tenant company, Mr Clair, says and I accept, that it would not have taken a lease of this building without the benefit of the car park.

[4] The vehicular access to that car park is a driveway on the respondent's land. It is that driveway which is the subject of this application. Vehicles cannot reach the car park from the land's street frontage because the building extends across the entire width of the land.

The respondent's land

[5] The respondent, Mrs Cowlishaw, is the registered owner of 116 Alderley Avenue. That street runs off South Pine Road. The rear of her land abuts the car park area of the applicant's land. On her land there is an old timber building, which is heritage listed[1] because it was built in 1913 as the Council Chambers for the then Shire of Enoggera. The building is used by her estranged husband for the offices of his accounting practice and about 12 people work there. The respondent is also an accountant and she worked there until about March or April 2003, when she and Mr

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1 Meaning that it is on the Heritage Register of the Brisbane City Council

Cowlishaw separated. Since then, she has invoiced Mr Cowlishaw for amounts of rental, none of which he has paid.

[6] At one stage during the hearing the parties seemed to accept that this use of the respondent's land was a non-conforming use. However, once Mr Kay, a town planner called by the respondent, had given evidence, the parties accepted that the current use is consistent with its zoning and that the property could be used for any business or professional office.

[7] The land is largely rectangular, save that the rear half has a width, at 18.3 metres, which is about a metre more than the width of the front half. The building on the respondent's land is positioned very close to one of its side boundaries, leaving room for the concrete driveway which runs the length of the other side from Alderley Avenue through to the applicant's car park. The driveway not only provides access to the car park but to a concreted area on the respondent's land behind the building, where two cars can be parked. The driveway in the rear half is 5.1 metres wide so that possibly a vehicle or two could be parked to one side of it with enough room for another vehicle to pass. There is an area underneath the front of the building which is used for car parking as well as an area between the building and Alderley Avenue.

[8] The respondent's land was purchased in 1998. The respondent says that she holds it as a trustee for a discretionary trust, the trust deed for which is in evidence. As the applicant accepts, Mr Cowlishaw is not a legal or equitable owner of the land.

The dispute arises

[9] The construction of the applicant's car park could not have gone unnoticed by the respondent. It involved some substantial works over at least many weeks and it required the use of the respondent's driveway for access. That occurred undoubtedly with the respondent's consent. The applicant's Mr Smith, and perhaps also his co-director Mr Loel, had discussions with Mr Cowlishaw in which he said that he agreed to this use of the driveway. The respondent strongly disputes that she was bound by anything which Mr Cowlishaw said. But the applicant's case is not in contract; it does not seek to hold her to some agreement by him. What is clear is that the car park was constructed before the respondent stopped using her building and left it occupied by Mr Cowlishaw. Clearly she took no objection to the construction of the car park and the use of her driveway for that construction. Nor did she object to the applicant's laying some further concrete on her land, so that the car park was merged with the concrete area at the rear of her building and whereby her driveway was widened in some places. The respondent does not suggest that as all this was happening, she believed that the applicant had in mind some other access to its car park.

[10] But in August 2004 Mr Cowlishaw saw fit to park in the driveway in order to obstruct cars entering and leaving the car park. The police were called and there was some relative quiet until early October, when the driveway was blocked again. The applicant obtained an interlocutory injunction on 19 November 2004, under which the respondent had to make access available to the applicant's tenants between 7.30 a.m. and 7 p.m. Monday to Saturday. At that stage they were the estate agency and an internet café occupying some of the upper floor of the applicant's building. There were certain other conditions including one whereby the

respondent was to install an electric gate across the driveway so that access could be limited to drivers using one of the six keys issued to the applicant. Under that regime, use of the car park has continued.

[11] Mr Cowlishaw gave evidence that the use of the driveway had caused great difficulties for him and his work. I accept that probably there has been some use of the driveway which is not according to the terms of this order. For example it has been used by pedestrians, which the order does not allow. I do not accept that the use of the driveway has caused any substantial difficulty, as Mr Cowlishaw asserted, by his being unable to undertake his work and conduct his practice from the respondent's building. No doubt the existence of this litigation has made Mr Cowlishaw particularly alert to the use being made of the driveway. Although he is not an owner, he shows some proprietorial concern for the respondent's side of this dispute. He tended to exaggerate his concerns: for example, I do not accept that his work could be disrupted by the noise of shoes on the concrete of the driveway. There is no precise evidence as to the number of times cars go along the driveway in any day, but the amount of traffic would be no more than what would be expected from seven car parking spaces behind a small office building. There is also a driveway on the other side of the respondent's building, on the next door land where there is a block of units. There is very little room between the respondent's building and that driveway, yet it does not seem to cause Mr Cowlishaw any difficulty.

Is an easement reasonably necessary?

[12] Section 180 provides, in part, as follows:

> "**180 Imposition of statutory rights of user in respect of land**
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> (1) Where it is reasonably necessary in the interests of effective use in any reasonable manner of any land **("the dominant land")** that such land, or the owner for the time being of such land, should in respect of any other land **("the servient land")** have a statutory right of user in respect of that other land, the court may, on the application of the owner of the dominant land but subject to this section, impose upon the servient land, or upon the owner for the time being of such land, an obligation of user or an obligation to permit such user in accordance with that order.
>
> …
>
> (3) An order of the kind referred to in subsection (1) shall not be made unless the court is satisfied that--
>
> (a) it is consistent with the public interest that the dominant land should be used in the manner proposed; and
> (b) the owner of the servient land can be adequately recompensed in money for any loss or disadvantage which the owner may suffer from the imposition of the obligation; and
> (c) either—
>
> (i) the owner of the servient land has refused to agree to accept the imposition of such obligation and the owner's refusal is in all the circumstances unreasonable; or
> (ii) no person can be found who possesses the necessary capacity to agree to accept the imposition of such obligation."

[13] In terms of s 180(1), the applicant argues that it is reasonably necessary in the interests of effective use of its land, as it is presently used with a commercial building and a car park associated with it, that an obligation of user be imposed upon the respondent's land. Indeed the applicant would say that it is absolutely necessary because otherwise the car park is not accessible and there could be no use of it. And it argues that the use of its land for a car park is a use in a "reasonable manner".

[14] The first of the respondent's counter arguments heavily relies upon a passage from *Hanny v Lewis* (1998) 8 BPR 16, 205; [1998] NSWSC 385. In considering the similar provision in New South Wales, Young J said:

> "As a general approach to applications under this section the court must bear in mind that property rights are valuable rights and the court should not lightly interfere with the property rights of the defendants. It is in the public's interest that landlocked land be utilised. However, the section does not exist for people to build right up to the boundary of their property or to build without adequate access and then expect others to make their land available for access."

The respondent submits that the use of the rear of the applicant's land for a car park is not a "use in any reasonable manner", at least partly because the applicant "bought the land with the full knowledge that its vehicular access to the rest of the property had been compromised by a desire to obtain maximum shop street frontage". Undoubtedly the applicant did buy this land knowing that the building which is still upon it would prevent any vehicular access to the rear except through another property. But according to s 180, that need not be fatal to an applicant. Undoubtedly, courts approach this jurisdiction mindful that property rights are in question and which should not be interfered with lightly. And where an applicant has pursued a course where there is a necessity for a right of way which could have been avoided by some other development of its land, that could be a significant discretionary consideration in the operation of this section. But in the passage in *Hanny v Lewis*, Young J was indicating a general approach rather than prescribing some further condition for the exercise of this jurisdiction.

[15] It is possible to use the applicant's land without any use of the car park. Until the estate agency became a tenant, the building was used by other tenants who presumably managed without any on-site parking. A number of possibilities, such as certain types of shops, come to mind as uses for which on-site parking might be convenient, but not reasonably necessary. However, an applicant does not have to demonstrate that each and every use (in any reasonable manner) of its land is one for which the obligation of user is reasonably necessary. Instead, an applicant can point to a particular use and seek to make its case in relation to it: *Re Seaforth Land Sales Pty Ltd's Land (No 2)* [1977] Qd R 317 at 320-321 (Hanger CJ); *Application by J J Kindervater* [1996] ANZ Conv R 331 (Derrington J); see also *Tregoyd Gardens Pty Ltd v Jarvis & Anor* (1997) 8 BPR 15, 845 (Hamilton J). As Hanger CJ said in *Seaforth* at 321 the expression "effective use in any reasonable manner of any land" within s 180(1) must be read with s 180(3)(a) which provides that an order is not to be made unless the court is satisfied that it is consistent with the public interest that the dominant land should be used *in the manner proposed* and that these words:

> "contemplate that the applicant will come to the Court with a particular proposal – a proposal to use the land in a particular manner; and … it is this manner which is referred to in subsec. (1). The applicant must show that in the interests of effective use of the land in this particular manner, the grant of statutory right of user in some form is reasonably necessary."

[16] Undoubtedly the applicant is seeking to use its land in a way which was not possible given the state of its improvements at the time that the applicant purchased it. And it is doing so for a perceived commercial advantage. But of themselves they are not considerations which are adverse to the application. One proper purpose of s 180 is to facilitate a new or further use of land, subject of course to the qualifications which are expressed within the section, and in particular within s 180(3).[2]

[17] The particular manner of use upon which the application is based is the present use of the applicant's land, which is the commercial building with its car park at the rear. In my view that is clearly a use in a reasonable manner of the land. Despite what they would now suggest, Mrs and Mr Cowlishaw must have thought so when they allowed or purported to allow the driveway to be used in the construction of the car park.

[18] How then could it not be necessary that its car park be accessible by the respondent's driveway? At this point the respondent argues that it is not reasonably necessary to use *its* driveway, because the applicant could use the driveway which serves the home unit building next door to the respondent's land. I accept that it is physically possible to connect that driveway with the applicant's car park, although there is some difference in their respective levels. The respondent says that this would be a better solution at least because her driveway would not be used. The proposition underlying this submission seems to be that where it is reasonably necessary for the effective use of the dominant land that there be an obligation of user imposed upon one of two possibilities as the servient land, then s 180(1) cannot be satisfied in relation to whichever possibility the applicant selects by its application. That proposition must be rejected. As Hamilton J said in *Tregoyd Gardens* in relation to a similar submission:

> "It cannot be the intention of the Act that if an easement would be equally efficacious over two pieces of land it cannot be granted over either because it cannot be said that it is necessary for it to be granted over *that* piece of land as opposed to the other."

It does not appear that the use of the driveway belonging to the home units would provide a stronger case for an order under this section. Neither would it provide an easier and more convenient means of access to the applicant's land. In addition, the home unit building is used by the Queensland Government for the housing of disabled persons. The evidence does not permit an evaluation of the ways in which that particular facility could be adversely affected by the imposition of a right of way on its land.

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[2] See Queensland Law Reform Commission Report No 16 (which recommended the enactment of this statute) at p 102

[19] In my conclusion then, the applicant has established that it is reasonably necessary in the interests of effective use in a reasonable manner of its land that the applicant should have a statutory right of user in respect of the respondent's land.

Section 180(3) considerations

[20] The first of these is that the applicant must establish that "it is consistent with the public interest that the dominant land should be used in the manner proposed". In my view it is plainly consistent with the public interest that the applicant's land be used as it is used. In particular the public interest is served by the applicant providing parking within its own site, rather than adding to the demand for parking on South Pine Road or in nearby streets. There is no respect in which the public interest could be adversely affected by this use of the applicant's land.

[21] The applicant must prove that the respondent "can be adequately recompensed in money for any loss or disadvantage which [the respondent] may suffer from the imposition of the obligation". The respondent argues that the applicant has failed to prove this, and relies upon a passage from the judgment of Andrews J in *Ex parte Edward Street Properties Pty Ltd* [1977] Qd R 86 where he said at 90:

> "Evidence of the value of the proposed dominant land and of the proposed servient land (or diminution in value) is surely relevant as a part of the applicant's case upon the question of compensation apart from other considerations."

From this it is argued that an applicant must adduce evidence of the value of its land and the effect of the right of user, if granted, upon that value, such that absent that evidence, an applicant cannot satisfy the matter prescribed by s 180(3)(b). I cannot accept that submission. The effect upon the value of the dominant tenement could be relevant in the assessment of what *consideration* is just in terms of s 180(4)(a) which provides:

> "4) An order under this section (including an order under this subsection)—
> (a) shall, except in special circumstances, include provision for payment by the applicant to such person or persons as may be specified in the order of such amount by way of compensation or consideration as in the circumstances appears to the court to be just; …"

In *Re Towerpoint Pty Ltd; Re Diridge Pty Ltd* [1991] Q Conv R 54-389, Thomas J saw the benefit that would result to the dominant land as being relevant in the assessment of "compensation or consideration" under subsection (4) and it appears that it was in that sense that Andrews J saw the relevance of evidence of the value of the dominant tenement. But the matter referred to in subsection (3)(b) is one of compensation for a loss or disadvantage to the owner of the servient land, for which the impact on the value of the dominant land is irrelevant.

[22] Each of the parties led valuation evidence. The applicant's evidence is of limited assistance, because it does not address the impact upon the value of the servient land as commercial premises, but instead assumes a use for residential purposes. The present use is commercial and the conversion of this building to a residence would be expensive and according to the respondent's valuation evidence, not

warranted by the likely return. I accept the evidence of the respondent's valuer, Mr Sellar. According to his evidence, the respondent's land can still be let to a commercial tenant if this easement is imposed, but the value of the respondent's land would be diminished, because the hypothetical investor would expect a relatively higher return for the increased risk in obtaining the same rental, from the negative impact which the easement could have upon potential tenants. In particular, I accept that in this way the value of the respondent's land would be diminished from its present value of approximately $440,000 to something of the order of $360,000.

[23] It may be the case that Mr Cowlishaw feels that he is unable to continue to work from this building if an easement is granted, but the particular impact upon Mr Cowlishaw is irrelevant for he is not the owner. The respondent's interest is effectively as the landlord of commercial premises, for which she could be compensated by an award corresponding with Mr Sellar's evidence. She does suggest that she may wish to return to work again from this building, but it is not demonstrated that she would suffer some loss in that event, beyond the loss in capital value. And the capital loss assessed by Mr Sellar assumes no loss in rental. To give the respondent some compensation for the chance of lost rental beyond the $80,000 capital loss would involve some double counting. The respondent can be adequately recompensed, and the applicant has proved the matter required by s 180(3)(b).

[24] Next there is an issue of whether the applicant has proved what is required by subsection (3)(c). Plainly the respondent has refused to agree to accept the imposition of an obligation of user. She has not indicated that she would agree to on certain terms but not on others: her refusal is unqualified. Yet one argument advanced for her is that her refusal is reasonable, because she has not been made a reasonable offer. She argues that the applicant must prove that by the commencement of the proceedings, there had been a reasonable offer which she had refused. The applicant had offered to pay her $30,000 as the consideration for this easement by the time the proceedings were commenced. She argues that because that consideration was inadequate, it was not a reasonable offer and she had not unreasonably refused to agree to the easement at what she says is the critical point in time: the commencement of the proceedings.

[25] In my view that misconstrues the subsection. The preconditions to the exercise of the power under s 180 must exist when the power is exercised; they need not have existed when the proceedings were commenced. By the conclusion of the hearing, the applicant had made it clear that it sought an order for the imposition of an obligation of user upon condition that it pay such amount as was assessed to be just compensation or consideration pursuant to subsection (4)(a). In particular the applicant made it clear that if the amount of $80,000, derived from the respondent's valuation evidence, was considered to be just compensation, the applicant sought an order upon condition that that amount be paid. And the respondent made it clear, by the many submissions on her behalf as to why no order should be made, that she refused to agree. Accordingly, the only question under subsection (3)(c) is whether that refusal is in all the circumstances unreasonable. I conclude that it is. The respondent can be and will be adequately compensated. The exercise of the applicant's rights under the proposed easement, consistently with the terms of the easement, should occasion no difficulty. I can see no rational basis for the respondent's refusal, and that view is fortified by the fact that the respondent was

clearly content at some stage to have this car park constructed in a way in which it was going to be linked to the street by her driveway. And I am persuaded that there has been nothing in the events since the driveway was used for the car park which would provide any reasonable basis for the respondent's refusal.

[26] It follows that the applicant has established each of the matters required by s 180(3). The remaining questions are ones of the terms of the orders to be made.

Compensation

[27] As I have found, the value of the respondent's land is likely to be diminished by about $80,000. There is no evidence as to the amount by which the value of the applicant's land is likely to be increased. That amount of $80,000 appears to be an amount by way of compensation which is just. Other than that diminution in value of her land, the respondent should not suffer any pecuniary loss at least if the applicant is ordered to provide for the ongoing maintenance of the driveway. There should be no unfair rates burden upon the respondent because presumably the rateable value of her land will be decreased by the imposition of the right of way. To the extent that there is some additional insurance cost because more vehicles will be passing along the driveway, the effect will be offset by the applicant bearing all of the cost of the maintenance of the driveway which the respondent would still use to reach her own parking area at the back of her building.

Orders

[28] As I have mentioned, under the interlocutory order of 19 November 2004, a gate was installed across the driveway. I do not see any need for that to remain in place. Its presence is likely to lead to further dispute. The owner of the dominant land ought to be able to permit persons to come and go from the car park whether or not they happen to have with them what is needed to unlock the gate.

[29] There has been some dispute as to whether the driveway can be used by pedestrians as well as cars. I do not see any likely detriment to the respondent from people being allowed to pass on foot along the driveway if for a purpose connected with the use and enjoyment of the car park. I do see the potential for further dispute if there is a complete embargo upon any pedestrian access.

[30] Under the interlocutory order access is limited to certain hours and is not available on Sundays. Under a permanent regime, limitations of that kind are not warranted, especially given that the respondent's premises are unlikely to be used as a residence and, indeed, she is to be compensated in an amount which is comparatively higher because of an assumption that her premises will continue to be used for commercial purposes.

[31] Nor do I see it as necessary or appropriate to exclude delivery trucks and vans. The respondent's interest is sufficiently protected by limiting the range of vehicles so that no trucks greater than two tonnes should be permitted.

[32] It will be ordered then that the owner for the time being of Lot 2 on RP 101547 in the County of Stanley, Parish of Enoggera, Title Reference 13593134, together with such persons as permitted by that owner, will have a statutory right of user in respect of the land described as Lot 3 on RP 81648 in the County of Stanley, Parish of Enoggera, Title Reference 12916077, by way of a right of way over such part of

that land which is marked as "Easement A" on a plan numbered 11461-4 prepared by J B Goodwin, Midson & Partners, and dated 18 November 2003.

[33] It will be further ordered that the right of way will provide a right to pass, whether by vehicles or upon foot, and at all times by day and by night for all purposes connected with the use and enjoyment of the car park presently upon the dominant land.

[34] It will be further ordered that the statutory right of user will be subject to the following conditions:

(a) No truck of greater than two tonnes will be allowed to use the easement;
(b) The owner of the dominant tenement will at its cost maintain the easement area substantially in its present condition.

[35] The applicant had proposed the grant of an easement upon certain terms and conditions some of which I have not seen fit to incorporate as conditions of this order. An example is the proposed covenant by the grantee to effect public liability insurance in the joint names of the grantee and grantor and their respective mortgagees (if any). I think it is preferable to leave the parties to effect their own insurance. More generally, if it becomes necessary to impose some further condition, the court has power to modify the terms of the right of user: s 180(4)(d).

[36] It will be further ordered that the applicant pay to the respondent the sum of $80,000 by way of compensation or consideration and that the applicant remove, at its expense, the gate constructed pursuant to the order of 18 November 2003.

[37] I will hear the parties as to costs and any further orders.