SUPREME COURT OF QUEENSLAND

CITATION:	*Weigall v Toman* [2006] QSC 349
PARTIES:	**LUCY ELISABETH WEIGALL** (applicant) v **DORIS MARY TOMAN** (respondent)
FILE NO:	BS 7784/06
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	23 November 2006
DELIVERED AT:	Supreme Court, Brisbane
HEARING DATE:	28 September 2006
JUDGE:	Wilson J
ORDER:	**1. Application for the orders sought in paragraphs 1 and 2 of the originating application dismissed.** **2. Application for an interlocutory injunction dismissed.** **3. Costs of and incidental to the application heard 28 September 2006 to be paid by the applicant, assessed on the standard basis.**
CATCHWORDS:	REAL PROPERTY – EASEMENTS – EASEMENTS GENERALLY – OTHER MATTERS – where the applicant purchased land over which the respondent holds an easement – where the easement grants the respondent exclusive use of a garage that stood on a section of the easement – whether the easement is valid *Attorney-General of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599, considered *Batchelor v Marlow* [2001] 1 EGLR 119, considered *Clos Farming Estates Pty Ltd v Easton* [2001] NSWSC 525, cited *Copeland v Greenhalf* [1952] Ch 488, considered *Grigsby v Melville* [1972] 1 WLR 1355, considered *Harada v Registrar of Titles* [1981] VR 743, considered *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278, considered *Mercantile General Life Reassurance Co v Permanent Trustee* (1988) 4 BPR 9534, considered *Miller v Emcer Products Ltd* [1956] Ch 304, considered

Moncrieff v Jamieson [2004] SCLR 135, considered
Reilly v Booth (1890) 44 Ch D 12, considered
Re Ellenborough Park [1956] Ch 131, considered
SS & M Ceramics Pty Ltd v Kin [1996] 2 Qd R 540, cited
Ward v Kirkland [1967] Ch 195, considered
Wright v Macadam [1949] 2 KB 744, considered

COUNSEL: D Bates for the applicant
RM Treston for the respondent

SOLICITORS: McCullough Robertson Lawyers for the applicant
Harrisons for the respondent

[1] **WILSON J**: The applicant is the owner of a property at Redcliffe over part of which there is an easement in favour of the respondent. By an originating application the applicant seeks the following orders –

> "1. a declaration that Easement No 60766681 ('Easement') is invalid;
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> 2. the Registrar of Titles replaces the Easement on the Register of Titles with an amended Easement, which excises the invalid parts of the Easement;
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> 3. further or alternatively, the Respondent by herself, her employees, servants, or agents, or any of them, or otherwise howsoever, be restrained from driving or parking any vehicle over or upon the Easement;
>
> 4. the Respondent pay the Applicant's costs of the application."

[2] Both the applicant's property and the respondent's have frontage to Moreton Bay. There is a house on each property. The applicant's property, 26 Whytecliffe Parade, Woody Point, is more particularly described as lot 20 on RP 169304 ("no 26"). It is a battle-axe shaped block: a narrow strip of land (the handle of the axe) runs from Whytecliffe Parade to the main part of the block (the blade of the axe) which fronts Moreton Bay. The respondent's property, 28 Whytecliffe Parade, is more particularly described as lot 2 on RP 93469 ("no 28"). It lies to the north-west of the main part of the applicant's land, and does not have frontage to Whytecliffe Parade, as there is another block (lot 1 on RP 93469) between it and the street.

[3] The easement was created by an indenture made on 18 March 1960 between the parties' predecessors in title, and registered in the Titles Office on 6 April 1960. It is over the handle of the axe and continues along the edge of the blade until the shoreline is reached ("the servient tenement"). A survey plan showing the respective positions of the parties' properties and the servient tenement ("Easement A") is annexed to these reasons for judgment.

[4] There have been changes in the physical condition of the servient tenement over the years, but the easement must be construed having regard to the physical facts and circumstances existing at the date of the grant.[1] At that time, the servient tenement

[1] *SS & M Ceramics Pty Ltd v Kin* [1996] 2 Qd R 540.

was a steep, scrubby pathway followed by a staircase sloping down from the street to the beach. At the street end, where the servient tenement broadens out, there were two garages, one larger than the other. The larger one was adjacent to lot 1 on RP 93469 and the smaller one adjacent to lot 4 on RP 93469.

[5] The grantor gave the grantee (and her tenants, servants, agents, workmen, tradesmen and visitors) a right of pedestrian passage for all purposes –

> "SUBJECT NEVERTHELESS to the right of the registered proprietor for the time being of the dominant tenement to have the exclusive use of the larger of the two garages erected on the easement and subject to the right of the registered proprietor for the time being of the servient tenement to have the exclusive use of the other garage erected on the easement."

The grantor covenanted that the grantee should have full free and uninterrupted right and liberty to go pass and repass along the servient tenement subject to a similar right vested in the registered proprietor of another property and –

> "SUBJECT HOWEVER to the reservation in favour of the grantor and her successors in title and the grantee and her successors in title in respect of the two garage buildings erected on the easement …"

The grantee covenanted –

> "1. That the grantee will at her sole expense keep repair and maintain the larger garage in as good repair as at present."

The grantor further covenanted –

> "AND THE GRANTOR HEREBY FURTHER COVENANTS with the grantee that the grantee shall have the right to repair and/or rebuild at her own expense the larger garage and in so repairing and/or re-building to extend the length of garage by no more than 3' feet but not to increase the width of the garage."

[6] The respondent and her then partner acquired no 28 (with the benefit of the easement) in 1983. The two garages were still on the servient tenement, and they used the larger one to park their vehicles. They also acquired an easement over part of lot 1 on RP 93469 ("Easement B") which entitled them to the use of another garage. The owners from time to time of no 26 used the smaller garage. In 1999 the respondent and her partner separated and no 28 was transferred to her.

[7] Mr and Mrs Walters acquired no 26 in December 2003 and undertook a substantial redevelopment of the property, including the demolition of the garages and the construction of a new house and a sealed and retained driveway along the servient tenement. They reached an agreement with the respondent in these terms-

> "To whom it may concern
>
> This is an agreement between the owners of 26 and 28 Whytecliffe Parade, Woody Point.

This replaces the previous covenant of the easement of 26. ~~and~~

I Doris Toman give Jenny & Darryl Walters of 26 Whytecliffe Parade the right to demolish the garage on the easement that I have had the use of, in exchange for a car parking space to be built and an [adjoining] joint driveway to this car parking space.

In association with that the ground is to be retained with rock walls where necessary.

Jenny & Darryl Walters give driveway rights to Doris Toman's new car parking space.

Jenny Walters
D Walters"

There was a further document signed by the Walters and the respondent on 2 December 2004 in these terms –

"2nd December 2004

RE: NEW COVENENT [sic]

This is an agreement between Doris Toman and Jenny and Darryl Walters.

I Doris Toman give permission for the Demolition of my garage on the easement at 26 Whytecliffe Pde, Woody Point. This being to facilitate the construction of a driveway onto both properties.

We Jenny and Darryl Walters will build at our cost a driveway into 28 Whytecliffe Pde, Woody Point, and will afford Doris Toman, family, friends, Trades and services the full use of the driveway on 26 Whytecliffe Pde, Woody Point.

A new covenant will be lodged covering all rights of both parties in the use of the driveway and the land that it covers.

(signed)		(signed)	
Doris Toman		Jenny Walters	
(signed)		(signed)	
Witness	2/12/04	Witness:	2/12/04"

Further the Walters paid the respondent $10,000 as a part contribution towards the cost of a new garage.

[8] As soon as the driveway was completed, the respondent began using it for vehicular access to no 28. The Walters sold no 26 to the applicant in December 2005, without ever having granted the respondent the new easement which had been intended when they constructed the driveway. The respondent continued to use the driveway

for vehicular access to her property and to park at the street end on the site of the old larger garage. There have been acrimonious exchanges between the respondent and the applicant's mother who has been in occupation of no 26. I cannot resolve factual disputes relating to the various exchanges on this application.

[9] Counsel for the applicant submitted that the easement is invalid to the extent that it purports to give the grantee exclusive use of part of the servient tenement, and that the Court ought to order that it be amended by the deletion of those parts quoted above. Further, he sought an injunction restraining the respondent from breaching the easement by driving or parking any vehicle over or on it [sic] (ie over or on the servient tenement).

[10] There are four characteristics of an easement:

(i) there must be a dominant and a servient tenement;

(ii) there must be the required connection between the one and the other: an easement must "accommodate" and serve the dominant tenement and be reasonably necessary for the better enjoyment of that tenement;

(iii) the dominant and servient owners must be different persons; and

(iv) the right over land said to amount to the easement must be capable of forming the subject matter of a grant.[2]

[11] In *Re Ellenborough Park*[3] Evershed MR said of the fourth characteristic –

> "The exact significance of this fourth and last condition is, at first sight perhaps, not entirely clear. As between the original parties to the 'grant' it is not in doubt that rights of this kind would be capable of taking effect by way of contract or licence. But for the purposes of the present case, as the arguments made clear, the cognate questions involved under this condition are: whether the rights purported to be given are expressed in terms of too wide and vague a character; whether, if and so far as effective, such rights would amount to rights of joint occupation or would substantially deprive the park owners of proprietorship or legal possession; whether, if and so far as effective, such rights constitute mere rights of recreation, possessing no quality of utility or benefit; and on such grounds cannot qualify as easements."

Evershed MR's second "cognate question" comes down to whether the easement would amount to exclusive use of the servient tenement.[4]

[12] In *Reilly v Booth*[5] Lopes LJ said –

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2 EH Burn, *Cheshire and Burn's Modern Law of Real Property* (16th ed, 2000) 596-574; Jonathan Gaunt and Paul Morgan, *Gale on Easements* (17th ed, 2002) [1-05]-[1-63]; *In re Ellenborough Park* [1956] Ch 131, 163-164 (Evershed MR).

3 [1956] Ch 131, 164.

4 Adrian Bradbrook and Marcia Neave, *Easements and Restrictive Covenants in Australia* (2nd ed, 2000) [1.36].

5 (1890) 44 Ch D 12, 26.

> "The exclusive or unrestricted use of a piece of land, I take it, beyond all question passes the property or ownership in that land, and there is no easement known to law which gives exclusive and unrestricted use of a piece of land. It is not an easement in such a case, it is property that passes."

[13] However, "the application of this characteristic to the facts of various disputes has sometimes proved awkward for the courts",[6] and authorities in this area require careful analysis. The validity of an easement purporting to confer on the owner of the dominant tenement a right of an exclusive character to use the servient tenement is a matter of degree. If it robs the servient owner of "the reasonable use of his land",[7] it is invalid. A survey of decided cases reveals a number of factors which have been relevant to the determination of this issue, including –

(i) proportionality between the servient tenement as a whole and that part of it over which the exclusive right is given;

(ii) the extent of the exclusivity claimed;

(iii) whether the easement arose by prescription or by express grant; and

(iv) practicalities.

Proportionality

[14] Cases dealing with easements for storage purposes (including parking motor vehicles) illustrate the relevance of proportionality – in the sense of the relative importance or significance of that part of the servient tenement over which an exclusive right is given to the servient tenement as a whole.[8] It was recognised in *Attorney-General of Southern Nigeria v John Holt & Co (Liverpool) Ltd*[9] that there can be a valid easement for the storage of goods, in that case storage on a wharf. However an exclusive right of user over the whole of the confined space representing the servient tenement cannot be a valid easement.

[15] In *Grigsby v Melville*[10] a vendor owned two adjoining properties, a cottage and a shop, both occupied by a butcher. The butcher used a cellar under the cottage for storing brine. The butcher's business ceased, and the vendor sold the cottage reserving "such rights and easement … as may be enjoyed in connection with" the shop. One of the questions before Brightman J was whether the subsequent owner of the shop had an easement of storage within the cellar. His Lordship held that she did not because the particular user of the cellar (accommodating a brine bin) had ceased when the butcher's business closed and the subsequent owner of the shop wanted to use the cellar for another purpose (general storage). His Lordship discussed two earlier cases concerning exclusive rights of user over servient

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6 Bradbrook & Neave, above n 4, [1.7].

7 *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278, 1288. Bradbrook & Neave (above n 4, [1.9]) formulate the test in this way: if the easement, on the facts, "involves a significant restriction on the possessory rights of the servient owner" it will be invalid.

8 For a useful review of English authorities, see *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278.

9 [1915] AC 599.

10 [1972] 1 WLR 1355 (Brightman J); aff'd on other grounds [1974] 1 WLR 80.

tenements, *Wright v Macadam*[11] and *Copeland v Greenhalf*,[12] observing that "a problem of this sort may be one of degree".[13]

[16] In *Wright v Macadam* the landlord of a flat permitted his tenant to use a coal shed on his property to store such coal as might be required for the domestic purposes of the flat. The permission was unlimited in time, although it is not clear from the report whether the tenant had exclusive use of the coal shed or of any defined part of it. Jenkins LJ held that the permission was a right or easement recognised by law.[14]

[17] By contrast, in *Copeland v Greenhalf* the defendant, a wheelwright, and his father before him had parked and repaired vehicles on a strip of the defendant's land for about 50 years. His claim of an easement by prescription was rejected by Upjohn J, because the right claimed was so extensive as to amount to a claim of joint user or exclusive possession. His Lordship said –

> "I think that the right claimed goes wholly outside any normal idea of an easement, that is, the right of the owner or the occupier of a dominant tenement over a servient tenement. This claim… really amounts to a claim to a joint user of the land by the defendant. Practically, the defendant is claiming the whole beneficial user of the strip of land on the south-east side of the track there; he can leave as many or as few lorries there as he likes for as long as he likes; he may enter on it by himself, his servants and agents to do repair work thereon. In my judgment, that is not a claim which can be established as an easement. It is virtually a claim to possession of the servient tenement, if necessary to the exclusion of the owner; or, at any rate, to a joint user, and no authority has been cited to me which would justify the conclusion that a right of this wide and undefined nature can be the proper subject-matter of an easement. It seems to me that to succeed, this claim must amount to a successful claim of possession by reason of long adverse possession. I say nothing, of course, as to the creation of such rights by deeds or by covenant; I am dealing solely with the question of a right arising by prescription."[15]

[18] In *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd*[16] the defendant transferred part of its land to the plaintiff together with easements and other rights over the retained land, including a right to park cars on any available space in any part of the retained land set aside as a carpark. Judge Paul Baker QC noted that there is clear authority that in some circumstances the right to park cars can amount to an easement, and identified the ultimate test as one of degree – whether the right granted in relation to the area over which it is to be exercisable is such that it would leave the servient owner without any reasonable use of its land, whether for parking or anything else.[17] In his review of the authorities, he considered (inter alia) *Wright*

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11. [1949] 2 KB 744.
12. [1952] Ch 488.
13. [1972] 1 WLR 1355, 1364.
14. [1949] 2 KB 744, 752.
15. [1952] Ch 488, 498.
16. [1992] 1 WLR 1278.
17. [1992] 1 WLR 1278, 1288.

v Macadam and *Copeland v Greenhalf*, and recognised proportionality as a factor when he said –

> "A small coal shed in a large property is one thing. The exclusive use of a large part of the alleged servient tenement is another."[18]

Extent of the exclusivity

[19] In *Harada v Registrar of Titles*[19] the State Electricity Commission claimed an easement to suspend powerlines over the plaintiff's land, including the right to clear the land of obstructions (such as vegetation and buildings) and the right to prevent the owner from interfering with the land (for example, by erecting buildings). King J held that those rights went far beyond what was appropriate for an easement: they were so broad that the servient owner would have very few rights over her own property and could do little more with it than move over it and park cars on it. There was no valid easement.

[20] *Miller v Emcer Products Ltd*[20] and *Ward v Kirkland*[21] afford examples of rights not amounting to "ouster" of the servient owner's right. In *Miller* a tenant was held to have an easement to use two toilets on different floors from the demised premises, Romer LJ noting –

> "[i]t is true that during the times when the dominant owner exercised the right, the owner of the servient tenement would be excluded, but this in greater or less degree is a common feature of many easements"[22]

And in *Ward* the plaintiff, who had a cottage on the boundary of his land with that of the defendant, was held to have an easement to enter the defendant's land in order to conduct routine maintenance on the cottage, including cleaning windows and gutters: the right would be exercised infrequently and did not substantially interfere with the servient owner's rights.

[21] A recent Scottish case, *Moncrieff v Jamieson*,[23] is a good illustration of the need to give careful consideration to the particular right in question in its factual context. While the Scottish system of land law is quite different from our own, the Scottish concept of 'servitudes' is closely analogous to that of easements.[24] In that case pursuers (plaintiffs) with a right of way across the servient land claimed servitudes of parking and storage. Sheriff McKenzie upheld the non-exclusive right to park as a necessary incident of the right of way, but found the storage claim invalid because it would "use[] up the natural rights of the servient tenement."

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18 [1992] 1 WLR 1278, 1286.
19 [1981] VR 743.
20 [1956] Ch 304.
21 [1967] Ch 195.
22 [1956] Ch 304, 316.
23 [2004] SCLR 135.
24 *Dyce v Hay* (1852) 1 Macq 305 (HL); *Moncrieff v Jamieson* [2004] SCLR 135. See also C D'Olivier Farran, *The Principles of Scots and English Land Law: A Historical Comparison* (1958) 109-111; CF Kolbert and NAM Mackay, *History of Scots and English Land Law* (1977) 133-136.

Easement by prescription or by express grant

[22] In *Mercantile General Life Reassurance Co v Permanent Trustee*[25] Powell J considered an easement to pass and repass with additional rights including the right to load and unload in the ordinary course of business and the right to enclose and lock up a certain part of the servient tenement referred to as "the light area". The dominant owner commenced building on its land, which required use of the servient tenement including the light area for loading and unloading building materials, positioning cranes and scaffolding and storage of some building materials. His Honour found that the easement in dispute was valid, but that the activities in question were beyond what was permitted by it. Significantly for present purposes His Honour reviewed the authorities about exclusivity: he cautioned that they must be carefully analysed because they are all context-dependent,[26] and suggested that –

> "For the most part, those cases in which the existence of an easement involving the exclusive use of part of the servient tenement (as, for example, *Copeland v Greenhalf* …; *Grigsby v Melville* …) or the use, in common with the servient owner, of the whole, or substantially the whole, of the servient tenement (see, for example, *Copeland v Greenhalf* …) has been denied, appear, to be cases involving a claim to a prescriptive easement (*Copeland v Greenhalf* …), or an implied easement (*Grigsby v Melville* …), in which cases, so Upjohn J (as he then was) seemed to suggest in *Copeland v Greenhalf* …, the relevant claim, in reality, amounts to a claim to the title to the land by reason of long adverse possession - it should, however, be noted that this view has not been universally accepted (see, for example, Bradbrook & Neave op cit p.5);"

[23] The relevance of this factor has been criticised. Butt,[27] for example, has argued that all easements, however they arise, must comply with the same basic requirements, one of which is that the right claimed must not require possession of the servient tenement. I respectfully agree with Mr Nicholas Warren QC in *Batchelor v Marlow*[28] that there is no valid distinction between an easement claimed by prescription and one expressly granted, although evidentially it may be easier to establish a derogation of the rights of the servient owner in the case of an express grant than in the case of an easement by prescription.

Practicalities

[24] Courts have taken into account other considerations arising from particular circumstances – for example, the need for access to a property,[29] the safety of and risk to the community,[30] maintenance requirements[31] and other amenities of life.[32] As Bryson J said in *Clos Farming Estates Pty Ltd v Easton* –

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25 (1988) 4 BPR 9534.

26 (1988) 4 BPR 9534, 9537.

27 Peter Butt, 'Prescriptive rights to park cars' (2001) 75 *Australian Law Journal* 658, 659.

28 [2001] 1 EGLR 119, 124. Although the decision in this case was reversed on appeal (*Batchelor v Marlow* (2001) 82 P & CR 459), this observation in the decision at first instance was not criticised.

29 *Moncrieff v Jamieson* [2004] SCLR 135.

30 *Prospect County Council v Cross* (1990) 21 NSWLR 601.

31 *Ward v Kirkland* [1967] 1 Ch 195.

32 *Miller v Emcer Products Ltd* [1956] 1 Ch 304.

> "[t]he validity of easements for storing goods or parking vehicles depends on the nature and circumstances of the servient tenement, the operation in detail of the purported easements and their effect on the servient tenement."[33]

Application

[25] In the present case the respondent's predecessor in title was expressly and unambiguously granted an exclusive right to use a garage which occupied only a small part of the servient tenement. That right was counterpoised against an exclusive right in the applicant's predecessor in title to use the smaller garage (which was also on the servient tenement). At the time of the grant, it was physically impossible for motor vehicles to proceed along the servient tenement beyond the garages because of the steep, scrubby nature of the pathway along it, and the easement with its reciprocal exclusive rights afforded the grantor and the grantee places to park their vehicles and pedestrian access to their respective dwellings. I conclude, therefore, that the grantee's exclusive right to use the larger garage did not rob the grantor of the reasonable use of the servient tenement as a whole.

[26] I decline to make a declaration that the easement is invalid in whole or in part.

Injunction

[27] The applicant seeks to restrain the respondent from driving along the servient tenement or parking a vehicle upon it.

[28] The respondent has no right to drive her vehicle along the servient tenement: the easement affords a right of pedestrian passage only. She may still have the right to park her vehicle on that part of the servient tenement where the larger garage once stood and the right to rebuild the larger garage at her own expense. Of course, physical facts and circumstances have changed since the easement was granted. But the agreement reached between the respondent and Mr and Mrs Walters is not binding on the applicant. In practice the situation is most unsatisfactory to both parties, and the respondent has foreshadowed an application to modify the easement.[34]

[29] This matter came before the Court on an originating application which was heard in the Applications List, and, given the limited opportunity for exploration of factual issues, it is appropriate to treat the application for an injunction as an application for an interlocutory injunction. I am satisfied that the respondent has no right to drive along the servient tenement, and that there is a serious question to be tried whether she nevertheless has the right to park on the site of the old larger garage. For her to park there may impede the passage of the applicant's vehicle along the servient tenement. Physically, the respondent could now park her vehicle on her own land if she were allowed to access it along the servient tenement. In these circumstances the balance of convenience does not favour granting a restraint of the type sought by the applicant, and I am unpersuaded that damages would not be an adequate remedy for any loss suffered by the applicant in consequence of the Court's declining to grant an injunction on an interlocutory basis.

[30] I urge the parties to enter into some constructive negotiations with a view to resolving their dispute without further recourse to litigation. Pending the

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33 [2001] NSWSC 525, [39].

34 *Property Law Act* 1974 (Qld) s 181.

foreshadowed application to modify the easement, the best practical outcome would seem to be for the respondent not to impede the applicant's use of the servient tenement as a driveway by parking on the site of the old larger garage, and for the applicant to allow the respondent to drive her vehicle along the servient tenement (parking it off the servient tenement and on her own land). I would readily mould orders to that effect if there were a cross-application for modification of the easement before me – but there is not, and I am obliged simply to dismiss the applicant's application for an interlocutory injunction.

Orders

[31] I dismiss the application for the orders sought in paragraphs 1 and 2 of the originating application. I dismiss the application for an interlocutory injunction. I will hear the parties on directions for the further conduct of the proceeding and on costs.

Annexure