SUPREME COURT OF QUEENSLAND

CITATION:	*Grittner & Grittner v Hadley* [2008] QSC 268
PARTIES:	**RODNEY JOHN GRITTNER** and **JOAN EILEEN GRITTNER** (Applicant) **v** **DENISE JOY HADLEY** (Respondent)
FILE NO/S:	SC 39/2008
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Mackay
DELIVERED ON:	5 November 2008
DELIVERED AT:	Townsville
HEARING DATE:	21 October 2008
JUDGES:	Cullinane J
ORDER:	**Applications dismissed with costs to be assessed**
CATCHWORDS:	REAL PROPERTY – EASEMENTS – PARTICULAR EASEMENTS AND RIGHTS – TORRENS SYSTEM – REGISTRATION OF EASEMENT – DECLARATIONS - where applicants and respondent own adjoining land –where both parties purchased land from developer – where easement was not registered over the land at such time – where plan which was registered in 1982 shows an easement of way - where applicants seek declaration that an easement of way exists - whether an easement of way exists as a result of the registration of the plan REAL PROPERTY – EASEMENTS – PARTICULAR EASEMENTS AND RIGHTS – RIGHTS OF WAY – CREATION – where applicants and respondent own adjoining land – where applicants seek statutory right of user over part of respondent's land – where both parties purchased land from developer – where easement was not registered over the land at such time – where applicants seek to make

commercial use out of land – where vehicular access in absence of statutory right of way difficult and dangerous – whether statutory right of user is reasonably necessary

REAL PROPERTY – ESTOPPEL - PROPRIETARY ESTOPPEL – REPRESENTATION - where applicants and respondent own adjoining land - where the applicants purchased the land on the representation by their real estate agent that an easement of way was in existence – whether an easement of way has been created by estoppel

Acts Interpretation Act 1954, s14B, s20(2)(a)
Integrated Planning Act 1997, s 6.1.24
Land Title Act 1994, s 82, s 105, s 184 (2)(a), s 201
Property Law Act 1974, s 53(1), s 53 (4), s 180
Real Property Act 1861, s 3, s 34, s 43, s 109, s 119A

Breskvar v Wall (1971) 126 CLR 376 cited
Hanny v Lewis (1998) NSW SC 285 cited
Hutchinson v Lemon (1983) Qd R 356 considered
Lang Parade Pty Ltd v Peluso & Ors (2005) QSC 112 cited
Lynch v White (1987) Q Conv R 54-257 cited
Nelson v Calahorro Properties Pty Ltd (1985) Q Conv R 54-202 cited
Re Hodgkin OS 2985 of 1999 SC Brisbane (unreported) cited
Re Parimax (SA) Pty Ltd. (1956) 56 SR (NSW) 130 cited
Re Seaforth Land Sales Pty Ltd (No 2) (1977) Qd R 317 cited
Rock v Todeschino (1983) Qd R 356 considered
Tipler v Fraser (1976) Qd R 272 cited
Tregoyd Gardens Pty Ltd v Jarvis (1997) 8 BPR 97688 cited

COUNSEL: G F Crow for the applicants
The respondent appeared on her own behalf

SOLICITORS: Macrossan & Amiet Solicitors for the applicants
The respondent appeared on her own behalf

[1] In this matter proceedings were instituted by the applicants against the respondent by application dated 15 April 2008. In the application, the applicants sought a declaration that an easement of way exists over an area of the respondent's land described as Lot 1 on RP737932 Parish of Tawvale, County of Herbert benefiting the applicants' land described as Lot 2 on RP737932, Parish of Tawvale, County of Herbert.

[2] The area of the easement was described by reference to an area marked as easement "A" on the same plan. The application also sought an order that the respondent execute an instrument in registrable form to enable the easement to be registered.

[3] Alternatively an order that a statutory easement be granted pursuant to s 180 of the *Property Law Act* 1974 as amended was sought.

[4] At the time the matter came before the Court at its sittings in Mackay in May 2008, the applicants, through their counsel, indicated that they would not be pursuing declaratory relief and would be pursuing only the claim for a statutory easement under s 180.

[5] In mid-September 2008, the applicants, through their solicitors, informed the respondent that they intended to again pursue the claim for a declaration that an easement existed.

[6] The respondent at all times has been unrepresented. She appeared unrepresented upon the hearing of the application.

[7] When asked whether she wished to obtain legal advice in relation to the abandonment and then revival of the claim for declaratory relief having in a written outline suggested that she had acted to her detriment as a consequence of the notification of the abandonment, she made it clear that she did not wish to delay matters any further and wished the matter to proceed. She was informed that if she wished to raise any claim by way of estoppel or otherwise arising out of these events, it would be necessary for her to take some positive action. Again, she indicated that she wished to have the matter proceed and be dealt with.

[8] The relevant land is situated in the town of Proserpine and has frontage to Waite Street. In September 1981 the then owner (Hoss Pty Ltd) of the land which is now owned by the applicants and the respondent applied to the Proserpine Shire Council to subdivide the land into two parcels.

[9] There is evidence showing the approval of the local authority to such subdivision to be effected by a plan described as PP88. This occurred in October 1981.

[10] The file of the local authority was forwarded to the Court which had directed that the local authority be notified of the application and asked whether it wished to present any views to the Court.

[11] An affidavit of the Chief Executive Officer of the Council was forwarded to the court and read on the hearing by the applicants.

[12] The material shows that the then proprietor Hoss Pty Ltd was notified by letter of 7 October 1981 of the Council's approval which was subject to conditions relating to contributions for sewerage and water supply works.

[13] Council's records show that the Council in recommending the subdivision had been informed that a four metre easement was provided on one of the lots which easement was to permit access to the rear of proposed buildings for parking purposes and that the easement and parking requirements would be constructed at the time of building on Lot 2 the dominant tenement.

[14] Subsequently and in circumstances which are not readily apparent, the local authority appears to have again considered an application to subdivide the land but this time by reference to a different plan, namely a plan of survey number 37932,

which is the plan which ultimately was lodged for registration and registered. The material before the Court shows the relevant committee recommended to the general meeting of the Council that such a plan be approved "subject to easement documents for easement 'A' in favour of Lot 2 being registered contemporaneously with the plan of survey".

[15] There was a reference made in the motion in the following terms:

> "*This plan follows from proposal plan number PP88 approved by Council at its meeting of 5 October 1981.*"

[16] A copy of RP737932 appears in the record in a number of places.

[17] As will be seen from the plan, two parcels were brought into existence. The land of which the applicants are the registered proprietors is described as Lot 2 and the land of which the respondent is currently the registered proprietor is described as Lot 1.

[18] As will be seen the plan as registered shows the subdivision and shows an easement over Lot 1.

[19] The plan was registered at the Titles Office on 9 December 1982.

[20] Lot 2 was purchased by the applicants in August 1990 from the subdivider. In the same month, the respondent and her then husband, Peter Charles Vigor purchased Lot 1 from the subdivider.

[21] On 25 November 1997, Lot 1 was transferred to the respondent solely.

[22] Searches of the register of Lot 2 in the names of the applicants or Lot 1 in the names of the respondent and her former husband and subsequently in her name alone do not make any reference to an easement. They of course make reference to the plan which brought the parcels into existence.

[23] The respondent currently uses Lot 1 as a dance studio. As I understand matters she has done so for a number of years.

[24] There has been a history of friction between the respondent and the applicants over the use of the respondent's land, the subject of the alleged easement. The respondent on a number of occasions objected to the parking of vehicles on the land by the applicants.

[25] When the respondent and her former husband purchased the land from the former owner, there was no access point from the roadway onto her land and it was necessary for her to enter her block via a driveway on Lot 2. Of recent years the local authority has provided an access point from the roadway onto the respondent's land.

[26] The respondent and her then husband were informed when they purchased the land that there was an easement over the land. This state of affairs appears to have been accepted for many years until as a result of the ongoing conflict between the respondent and the applicants the applicant approached the local authority and was informed that the Council was not aware of any easement and that there was no

easement recorded. She was advised to contact the Department of Natural Resources. She did this and received similar information.

[27] The respondent deposes that as a result of receiving this information and because of what she describes as her concerns for the safety of the children who attend her dance classes and who pass over the area, the subject of the alleged easement, to gain access to the dance school's dressing rooms, she erected a four foot fence along the boundary between Lots 1 and 2.

[28] This, it can be said, instigated the current litigation.

[29] According to the male applicant prior to purchasing Lot 2 he was informed by the real estate agent that the owners were only prepared to sell Lot 1 (which the respondent and her former husband were interested in purchasing for the purposes of operating a dancing school from the existing building) if they were also able to sell at the same time, Lot 2. He says that the agent told him that there was an easement over Lot 1 for the benefit of Lot 2 and the agent provided him with a copy of the plan. He says that having received this information he agreed to purchase Lot 2 and arranged for his solicitor to attend to the transfer.

[30] It seems that the applicants conduct a car dealership and a rural supplies business on land which is either adjacent to Lot 2 or nearby.

[31] The applicants have, since acquiring Lot 2, used it from time to time to park vehicles. The applicants have a proposal to develop Lot 2 by erecting a warehouse to park and store vehicles and automobile parts for the purposes of their car dealership and workshop. I will return to this proposal a little later.

[32] The first and primary issue which arises is whether there exists an easement over Lot 1 on RP737932 for the benefit for Lot 2 as a result of the registration of the plan.

[33] The applicants placed particular reliance upon the judgment of McPherson J in *Rock v Todeschino* (1983) Qd R 356. Reliance was also placed upon the judgment of Connolly J in *Hutchinson v Lemon* (1983) Qd R 356.

[34] In *Rock v Todeschino* an owner subdivided land into two parcels. The plan of subdivision which was registered showed an easement over one of the parcels for the benefit of the other. No instrument specifically creating the easement was executed or registered.

[35] Subsequently purchasers of the parcel shown as the servient tenement on the registered plan erected a fence preventing access over it by the then owners of the parcel shown as the dominant tenement on the registered plan.

[36] A memorial was entered on the relevant folium of the register constituted by the Certificate of Title of the parcel to be subdivided which was to the effect that the land was subdivided into two lots by the plan described "and a survey is made of EAS A in Lot 1--"

[37] Subsequent Certificates of Title which were issued made no reference to an easement although the land was described by reference to the registered plan.

[38] His Honour concluded that the plan, being an instrument within s 3 of the *Real Property Act* 1861 as amended was registered pursuant to s 34 of the *Act* and upon such registration it passed the interest intended to be granted or conveyed pursuant to s 43.

[39] His Honour concluded that the easement was, as a result, registered for the purposes of the Act and came into existence upon registration of the plan.

[40] A number of arguments were advanced before the court against this conclusion. One was that since the dominant and servient owners were the same, no easement could have been created at common law. His Honour rejected this argument applying the principle in *Breskvar v Wall* (1971) 126 CLR 376, to the effect that since the Torrens system provides for a system of title by registration it is registration alone which is determinative of any issue of title once this occurs. What is decisive is the fact of registration.

[41] His Honour also rejected a claim based upon indefeasibility of title provided for by s 44 of the *Act*. The argument was that no reference to the easement having been made in the Certificate of Title which subsequently issued, the title of the registered proprietor was not subject to any such easement. His Honour's conclusion was that the easement in that case was an omitted easement for the purposes of s 44 and thus fell within an exception to indefeasibility. This conclusion was based upon the failure by the Registrar of Titles to enter the easement which had earlier been created by the registration of the plan.

[42] The judgment of Connolly J in *Hutchinson v Lemon* (supra) is to a similar effect.

[43] The applicants argued that their right to the easement which arose under the *Real Property Act* is protected by s 201 of the *Land Title Act* 1994 which repealed the *Real Property Act.* It is also contended that the easement continues to be an omitted easement for the purposes of s 105 of the *Land Title Act* 1994.

[44] It seems to me that the present case is indistinguishable from these two cases and that any other consideration aside, the applicants would have been entitled to succeed on this basis.

[45] However, in 1985 s 119A of the *Real Property Act* 1861 was enacted.

[46] This provided:

> *"**8. New s 119A**. The Principal Act is amended by inserting after section 119 the following section:-*
>
> ***119A. Effect of plan showing easement.** (1) An easement does not arise from the registration, lodgement or deposit, whether before or after the commencement of this section, of any plan.*
>
> *(2) A plan may be registered designating the site of an easement intended to be created by an instrument to be registered thereafter, but—*
>
> *(a) in any such plan the designation of that site shall incorporate the word "proposed";*

> *(b) any written reference to the intended easement in any memorial in the Register Book or in any deed of grant or certificate of title in respect of the land recording particulars of registration of the plan shall be preceded by the word "proposed".*
>
> *(3) A designation or reference in accordance with subsection (2) shall not be regarded as indicating a present intention to create an easement.*
>
> *(4) Save as provided in subsection (5), the provisions of subsection (1) apply in respect of all plans whether lodged or registered before or after the commencement of the* Real Property Act Amendment Act *1985.*
>
> *(5) The provisions of subsection 91) do not affect any easement whereof the judgment of a court of competent jurisdiction has, before the commencement of the* Real Property Act Amendment Act *1985, been pronounced, declaring or giving effect to the existence of an easement designated upon a registered plan and the rights and obligations of any registered proprietor of land under an easement so pronounced, declared or given effect to shall be the rights and obligations of the registered proprietor for the time being of that land save where those rights and obligations are lawfully extinguished by agreement between all persons holding an interest in the easement."*

[47] This amendment was a consequence of the two judgments referred to above.

[48] This is made clear by the speech of the then attorney general on the second reading of the relevant bill.

> *"Another purpose of the Bill is to overcome the effects of two Supreme Court decisions which determined the registration in the Titles Office of a plan of subdivision, which has designated thereon an area denoted 'easement', had the effect of creating a valid easement over that area. These decisions have had a dramatic effect on Titles Office practice in that it had always been assumed that a valid easement could be created only by the registration of an easement document in the Titles Office.*
>
> *Such a document clearly identifies the respective rights and obligations of the parties thereto and its existence is readily identified by a routine search of Titles Office records.*
>
> *The Bill restores the legal position to that which was previously accepted by providing that a plan on which the site of an easement is designated is not an instrument creating an easement. The plan will be required to denote that the easement is a proposed 'easement'. This applies to all plans, irrespective of when they were lodged or registered, but the Bill provides that easements resulting from the judgements of the court are not affected."*

[49] The second reading speech is material to which the court is entitled to have regard in construing the effect of s 119A. See s 14B of the *Acts Interpretation Act* 1954 as amended.

[50] Counsel for the applicants contended that the effect of s 119A was a somewhat limited one being intended to address a situation such as that which existed in *Rock v Todeschino* where as the owner of the servient and dominant tenements at the time of the subdivision were identical no easement could have arisen at common law but for reasons already canvassed in these reasons the easement upon registration of the plan came into existence. That is, it was contended that the effect of s 119A was that registration of the plan showing an easement could not alone give rise to such an easement. It was also necessary to demonstrate the creation of an easement by grant or reservation.

[51] This of course is not what the second reading speech suggested was the intended effect of the amendment. It is noteworthy that in the *Land Title Act* 1994 this matter is now the subject of a positive provision expressed in unequivocal terms. Section 82(1) provides:

> *"An easement over a lot may only be created by registering an instrument of easement."*

[52] It is axiomatic that in construing legislation the intention of the legislature is to be found in the language used in the statute assisted, where appropriate, by regard to extrinsic material such as relevant parliamentary debates.

[53] A recourse to the latter can never justify a construction which offends the language of the statute itself.

[54] Here it seems to me that a consideration of the language of the statute together with the assistance of the second reading speech provides, justifies the conclusion that the statute was intended to prevent an easement arising by registration in the circumstances which exist here.

[55] In my view the effect of the legislation is intended to deny the benefit of registration to a purported easement appearing only in a registered plan. The benefit of registration under the *Real Property Act* embodying as it does the principles of title by registration is the creation of an interest in land. Section 119A acts as a barrier to the creation of such an interest in such a way.

[56] The impact of the legislation may be far reaching. It would have the effect, it would seem, of extinguishing easements which in accordance with the principles set out in the two cases referred to, would have come into existence prior to the enactment of s 119A which is expressly stated to be retrospective in its effect. It is only those cases in which the court has pronounced in favour of the existence of an easement that property rights are protected. The applicants are not in this position.

[57] The second reading speech was not mentioned in addresses. Subsequently the parties' attention was directed to it and further submissions invited. The applicants contended that upon the repeal of the *Real Property Act* s 119A ceased to have any relevance. This overlooks the effect of section 20(2)(a) of the *Acts Interpretation Act* which provides:

> *"(2) the repeal or amendment of an act does not –*

(a) revive anything not in force or existing at the time the repeal or amendment takes effect."

[58] The argument already referred to in para [51] herein was again advanced. The interest relied upon would be an unregistered interest from which the respondent is protected by initially s 109 of the *Real Property Act* and now s 184(2)(a) of the *Land Title Act*. The principal claim advanced by the applicants, must in my view fail.

[59] The applicants advanced a number of additional bases upon which it is claimed an entitlement to an easement exists. Each of these, it seems to me, is faced with the obstacle of the respondent's position as registered proprietor of Torrens title land and the consequences of that. Her title is indefeasible subject to certain exceptions which are not relevant here.

[60] As already mentioned s 109 of the *Real Property Act* 1861 as amended and now s 184(2)(a) of the *Land Title Act* expressly protect the respondent from unregistered interests notwithstanding notice.

[61] One of the claims advanced is based upon s 53(1) of the *Property Law Act* which provides for covenants running with the land.

[62] As will be seen s 53(4) expressly provides that the section is subject to the *Land Title Act.* Some provision is now made in the *Land Title Act* for the recognition of restrictive covenants.

[63] Apart from the obstacle already referred to I think it is at least doubtful whether any covenant for the purposes of s 53 of the *Property Law Act* can be identified in the present case. Such a covenant in this case would have to be implied there being obviously no express covenant. It is true that upon registration of the plan it is taken to impose upon the person signing it the same obligations as if it had been sealed and delivered. (See s 35). Here the suggested covenantor and covenantee would be identical. No registered easement can arise from registration of the plan because of s 119A.

[64] A further claim was based upon the provisions of s 6.1.24 of the *Integrated Planning Act* 1997 as amended. Section 6.1.24 provides as follows:

*"**6.1.24 Certain conditions attach to land***
(1) If a local government has set conditions in relation to a continuing approval, the conditions attach to the land on and from the commencement of this section and are binding on successors in title.
(2) Also, if an application to amend a former planning scheme was, or the conditions attached to an amendment were, approved under the repealed Act or under section 6.1.26 and conditions in relation to either amendment were attached to the land under the repealed Act or section 6.1.26—
(a) if the approval was given before the commencement of this section—the conditions remain attached to the land on and from the commencement of this section and are binding on successors in title; and

> *(b) if the approval was given under section 6.1.26—the conditions remain attached to the land on and from the day the approval was given and are binding on successors in title.*
>
> *(3) Subsections (1) and (2) apply, despite—*
>
> *(a) a later amendment of the transitional planning scheme; and*
>
> *(b) the later introduction or amendment of an IPA planning scheme."*

[65] This argument is based upon what appears to be an approval in May 1982 of plan of survey 37932 and what is said to be a condition that the subdivision be approved "subject to easement documents for Easement A in favour of Lot 2 being registered extemporaneously to the plan of survey".

[66] I have already referred to the fact that an approval to subdivide the land had already been granted. It is not clear in what circumstances the council came to again consider the question of the subdivision of the land.

[67] There is evidence before the court that at the time of the subdivision the means by which an easement would be registered where the owner of the proposed servient and dominant tenements were the same was by the registration of the plan rather than by the registration of a separate instrument of easement.

[68] This is of course what occurred here. It would at that time have been effective in creating an easement by registration in accordance with the two judgments set out above. However the position has subsequently been changed by legislation having retrospective effect.

[69] Finally reliance was placed upon an alleged proprietary estoppel. The argument is based upon certain propositions contained in Gale on Easements (17th edition). The elements of the alleged estoppel are that the applicants purchased the land relying on a representation by the real estate agent that an easement had come into existence. The respondent and her husband were informed at the time that they purchased Lot 1 of the existence of an easement. This was conveyed to them by a real estate agent. In the argument advanced it was said to be irrelevant how the respondent came to be aware of the claimed easement. Reliance also was placed upon the use by the applicants without objection by the respondent over many years of the alleged easement.

[70] In my view no estoppel could come into existence without the respondent or somebody acting on her behalf making the representation alleged to have been relied upon by the applicants or becoming in some way responsible for the making or maintenance of such a representation.

[71] There are as I have said, fundamental objections to an interest of the kind alleged being claimed in relation to Torrens title land upon any of these bases.

[72] As an alternative to the claim for a declaration that an easement exists, the applicant sought an order under s 180 of the *Property Law Act.* This section provides as follows:

*"**180 Imposition of statutory rights of user in respect of land***

(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.

(2) A statutory right of user imposed under subsection (1) may take the form of an easement, licence or otherwise, and may be declared to be exercisable--

(a) by such persons, their servants and agents, in such number, and in such manner and subject to such conditions; and
(b) on 1 or more occasions; or
(c) until a date certain; or
(d) in perpetuity or for some fixed period;

as may be specified in the 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.

(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; and
(b) may include such other terms and conditions as may be just; and
(c) shall, unless the court otherwise orders, be registered as provided in this section; and
(d) may on the application of the owner of the servient tenement or of the dominant tenement be modified or extinguished by order of the court where it is satisfied that--
(i) the statutory right of user, or some aspect of it, is no longer reasonably necessary in the interests of effective use of the dominant land; or

(ii) some material change in the circumstances has taken place since the order imposing the statutory right of user was made; and
(e) shall when registered as provided in this section be binding on all persons, whether of full age or capacity or not, then entitled or afterwards becoming entitled to the servient land or the dominant land, whether or not such persons are parties to proceedings or have been served with notice or not.

(5) The court may--

(a) direct a survey to be made of any land and a plan of survey to be prepared; and
(b) order any person to execute any instrument or instruments in registrable or other form necessary for giving effect to an order made under this section; and
(c) order any person to produce to any person specified in the order any title deed or other instrument or document relating to any land; and
(d) give directions for the conduct of proceedings; and
(e) make orders in respect of the costs of any of the preceding matters and of proceedings generally.

(6) In any proceedings under this section the court shall not, except in special circumstances, make an order for costs against the servient owner.

(7) In this section--

owner includes any person interested whether presently, contingently or otherwise in land.

statutory right of user includes any right of, or in the nature of, a right of way over, or of access to, or of entry upon land, and any right to carry and place any utility upon, over, across, through, under or into land.

utility includes any electricity, gas, power, telephone, water, drainage, sewerage and other service pipes or lines, together with all facilities and structures reasonably incidental to the utility."

[73] As already mentioned the applicants propose to develop the land. Details of the proposed development are to be found in a report of Neil de Bruyn, a town planner.

[74] The proposal is to establish on the applicant's land, a shed type building having a nominal zero side set back on each side boundary and having a six metre front set back from Waite Street and an approximate nine metre set back from the rear boundary. The proposed use involves using this shed for the purposes of parking and storage of vehicles and automotive parts.

[75] Certain approvals are required including a material change of use development permit.

[76] In the report Mr de Bruyn canvasses the advantage of such a development compared to a development which would take place wholly within the applicants' lands and allow a driveway to the western side of the proposed building. The latter

would result in a limited turning radius of what is described as a design vehicle, the dimensions of which are set out in the report. The vehicle would be unable to enter or exit the proposed warehouse building by way of a single manoeuvre. Each vehicle would have to undertake multiple manoeuvres.

[77] It is largely upon the basis that this would be avoided that it is contended that the provision of the proposed access easement on Lot 1 is reasonably necessary in the interests of the effective use of this site.

[78] The proposed development which would require an easement over the respondent's land conflicts in a substantial way with the fire resistance level specifications of the *Building Code of Australia*. This subject is dealt with in a report of building surveyor, Mr Dempster. In his report, he suggests that a complaint alternate solution for the purposes of the *Building Code of Australia* was capable of being developed by a fire engineer. No attempt to demonstrate this alternate solution was made in the course of evidence.

[79] As I have said the respondent conducts a dance school at the premises and this involves many children coming to the site and the evidence suggests that they access at least some parts of the building by passing over the area of the proposed easement. Many parents have signed affidavits raising concerns and objecting to the grant of an easement. The deponents swear to what they regard as the much improved situation from a safety perspective with the erection of the fence already referred to by the respondent.

[80] Turning then to the considerations which arise under s 180 it is necessary that the applicants establish that it is reasonably necessary in the interests of effective use in any reasonable manner of the dominant land that such land should have a statutory right of use in respect of the servient land.

[81] I take the relevant considerations to be those referred to by Wilson J in *Re Hodgkin* OS 2985 of 1999 SC Brisbane (unreported) and Douglas J in *Lang Parade Pty Ltd v Peluso & Ors* (2005) QSC 112.

[82] In the former case her Honour said at 8 and 9:

> "*The question of what is 'reasonably necessary in the interests of effective use of land in any reasonable manner' cannot be determined without regard to the implications or consequences on the other land likely to be affected: see* Nelson v Calahorro Properties Pty Ltd (1985) Q Conv R 54-202 at 57, 341-42 *per McPherson J with whom Andrews ACJ and Demack J agreed. The evidence in relation to reasonable necessities to be examined with particular care to ensure that the proprietary rights of Mr and Mrs Fusche are not necessarily diminished;* see Lynch v White (1987) Q Conv R 54-257 at 57, 769-70 *per de Jersey J with whom Connolly and Carter JJ agreed. While absolute necessity need not be established, it is necessary to show more than mere preference or convenience: see* Tipler v Fraser (1976) Qd R 272; Re Seaforth Land Sales Pty Ltd (No 2) (1977) Qd R 317 at 322; *see also* Tregoyd Gardens Pty Ltd v Jarvis (1997) 8 BPR 97688 *in relation to the New South Wales Legislation."*

[83] In the latter case his Honour set out the relevant principles at para 23:

> *"(a) One should not interfere readily with the proprietary rights of an owner of land.*
>
> *(b) The requirement of 'reasonably necessary' does not mean absolute necessity.*
>
> (c) *What is 'reasonably necessary' is determined objectively.*
>
> (d) *'Necessary' means something more than the desirability or preferability over alternative means; it is the question of degree*
>
> (e) *The greater the burden of the imposition that is sought the stronger the case needed to justify finding a reasonable necessity*
>
> (f) *For right of user to be reasonably necessary for a development, the development with the right of user must be (at least) substantially preferable to development without the right of user.*
>
> (g) *Regard must be had to the implications or consequences on the other land of imposing a right of user."*

[84] I do not lose sight of the fact in approaching this question that the applicants had from the time of acquisition of the land and over a long period thereafter, the belief on reasonable grounds that an easement existed and that access to the rear of their land for parking purposes could be gained if necessary.

[85] However what is now proposed is a different use of their land to that which they have made until this time and it is by reference to the proposed use that the application for the statutory right of use has to be considered.

[86] The evidence identifies an advantage to the applicants if an easement is granted and the avoidance of a disadvantage. However it also raises serious issues as to compliance with fire safety requirements and leaves these unanswered.

[87] The applicants seek to make the most effective commercial use of their land by erecting a building which will occupy the whole of the site at least laterally giving rise to the need to have access over the respondent's land.

[88] The remarks of Young J in *Hanny v Lewis* (1998) NSW SC 285 when speaking of the New South Wales counterpart to s 180 have a particular relevance in this case:

> *"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."*

[89] Here a development could be undertaken which would have the premises erected and access provided wholly upon the applicants' lands. The fact that vehicles may require more than one movement in effecting a turn or any other similar difficulty is not sufficient to justify the imposition of a right of user in my view. It does not meet the test of what is reasonably necessary.

[90] The applicants have not satisfied me that it is reasonably necessary to grant a statutory right of use over the respondent's land.

[91] Similarly when one comes to the consideration for which s 180(3)(a) provides, whilst it may be accepted that the use proposed is generally consistent with the public interest, the specific proposal which gives rise to the alleged need for an easement does for reasons that I have already touched upon give rise to concerns which are not adequately addressed in the evidence in my view. I am not prepared to make a positive finding in the applicants' favour in terms of s 180(3)(a) on the evidence as it stands.

[92] Finally, I do not think that the refusal of the respondent to accept the imposition of an easement over the servient land is in terms of s 180(3)(c)(i) unreasonable. I have already referred to the concerns of the parents and of the respondent arising from the use of the land for the movement of vehicles over an area where children are likely to be encountered on a regular basis.

[93] Whilst, it might be accepted that compensation for the respondent's loss as proprietor by the grant of an easement can be assessed and that payment of such a sum would, viewing the matter objectively, be an acceptable mode of compensating her, subjective considerations in my view should be regarded as relevant when considering whether the refusal is unreasonable for the purposes of s 180(3)(c)(i). See *Re Parimax (SA) Pty Ltd* (1956) 56 SR (NSW) 130 at 133.

[94] Whilst the respondent was prepared to engage in negotiations relating to the payment of compensation I accept she is genuine in her concerns about the safety issues which led her to, on her account, cease these negotiations. I do not think in the circumstances of this case in the light of the concerns raised and the basis for them, that her refusal to grant an easement should be regarded as unreasonable.

[95] The result will be that the applications are dismissed with costs to be assessed.