

SUPREME COURT OF QUEENSLAND  
CIVIL JURISDICTION  
ATKINSON J

No 11963 of 2009

ENERGEX LIMITED

Applicant

and

BOHUSLAV SABLATURA

Respondent

BRISBANE

..DATE 04/11/2009

ORDER

HER HONOUR: On 26 October 2009 the applicant, Energex Limited ACN 078 849 055, applied to this Court for orders that the respondent, until trial or further order:

(a) permit the applicant, its employees, agents, workmen, linesmen, contractors and others authorised by it, with or without vehicles, plant and equipment of any description to enter upon and remain, pass and repass, on and over Easement B in lot 985 on SP 136604 being registered Easement in Gross Number 707908910 burdening the land described as Lot 985 on CP S312890, County of Stanley, Parish of Redcliffe ("the Easement") for the purposes of exercising its rights under the easement; and

(b) be restrained, whether by himself or by his servants or agents or otherwise, from interfering with or obstructing the exercise of the rights of the applicant under the easement.

The application has become necessary because of the refusal of the respondent to allow the applicant to attend to works on the registered easement which the applicant has over the respondent's land and a Court order is necessary to enforce the applicant's rights. The applicant proposes to undertake work, upgrading the existing electricity network between the South Pine Substation at Brendale and the Hays Inlet Substation at Rothwell. It involves, amongst other things, the duplication of Energex's existing power line between those two substations.

The evidence from Mr Forno, a Senior Network Risk and

Contingency Planning Engineer employed by the applicant, shows that the works proposed, which are in the public interest, are both urgent and necessary, particularly given the proximity of summer demand. His evidence graphically shows that unless the work proposed is carried out on the registered easement to upgrade the electricity connection, then there are both safety concerns, and an expectation that Energex will be compelled to conduct an emergency load shed during periods of peak requirements.

Electricity in this day and age is no longer a luxury but a necessity. Not only does the comfort and security of the community and the needs of business rely upon it, but indeed the lives of some citizens depend on the electricity supply being maintained. This is therefore a very serious matter in need of urgent resolution.

A problem immediately faced by the applicant is not with its substantive right to gain the order which it seeks, which it plainly has, but rather with its having an effective respondent to the application.

The respondent, Mr Sablatura, has been the subject of an appointment made by the Guardianship and Administration Tribunal on 29 April 2009. The Public Trustee of Queensland has been appointed to be the administrator for Mr Sablatura for managing all financial matters except day-to-day finances and CentreLink payments.

Financial matters are defined in schedule 2 part 1 of the

*Guardianship and Administration Act 2000* ("the Act"), which provides that a financial matter for an adult is a matter relating to the adult's financial or property matters. The matters which it includes are listed. They include, in subparagraph (p), "a legal matter relating to the adult's financial or property matters." This is in contradistinction to personal matters, which are covered by part 2 of schedule 2 of that Act. Personal matters include, under subparagraph (i), a legal matter not relating to the adult's financial or property matters.

The application before the court is a legal matter relating to Mr Sablatura's property because it concerns a registered easement over real property registered in his name and the rights of the applicant, as against the respondent, pursuant to the registered easement over that property. The Public Trustee has been appointed by the Tribunal to be administrator for managing all financial matters, which includes legal matters relating to the adult's financial or property matters. That appointment can only be made by the Tribunal once it has been proved, against the presumption of capacity, that the person, who has an administrator appointed, lacks capacity for the matter.

Section 239 of the Act provides that it does not affect the rules of Court, of the Supreme Court, District Court or Magistrates Court about a litigation guardian for a person under a legal incapacity. The appointment of a litigation guardian in this State is done by the Court under rule 95 of

the *Uniform Civil Procedure Rules* 1999.

Rule(95)2 provides: "If the interests of a party who is a person under a legal incapacity require it, the court may appoint or remove a litigation guardian, or substitute another person as litigation guardian". If a person is under a legal incapacity, then under rule 93, a person may start or defend a proceeding, only by the person's litigation guardian, and sub-rule (2) of rule 93 provides that, "anything in a proceeding ... required or permitted by these rules to be done by a party may, if the party is a person under a legal incapacity, be done only by the party's litigation guardian".

It is apparent that the Tribunal has made an order appointing the Public Trustee as the administrator for financial affairs which includes, as I've said, the relevant legal matters. The appointment of the litigation guardian is, however, under the rules, quite properly to be made by the Court.

The Court is satisfied that notwithstanding the presumption of capacity in the Act, whilst the order remains in force by the Tribunal, and given the evidence before the Court, that the respondent is a person who is under a legal incapacity for the proceeding. The court is satisfied that it is the respondent's interests to have a litigation guardian appointed to assert or protect his rights. The Court proposed, therefore, to appoint the Public Trustee. However, the Court was informed by the representative of the Public Trustee that that appointment would be refused, pursuant to a power to refuse

appointment under which it says it has under s 27(3) of the *Public Trustee Act 1978*.

The applicant in this case made an offer in open Court to indemnify the Public Trustee for any costs incurred by it in acting as litigation guardian. The Public Trustee nevertheless asserted that it would not accept appointment by the Court, however over the luncheon adjournment, further instructions were sought and the Public Trustee has quite properly consented to its appointment as litigation guardian. It is, of course, a matter of some concern to the Court that, where the defendant is or becomes under a legal disability, an applicant or plaintiff may not be able to vindicate its rights if there is no-one who is able to act as litigation guardian, apart from the Public Trustee; the Court is of the view that the Public Trustee is the appropriate person to be appointed; the Public Trustee nevertheless has the statutory power to refuse appointment; and exercises that power to refuse appointment.

In those circumstances, either the statute needs amendment or the Court would have to look to other public officials to undertake this important public duty. It would be hard to imagine that another public official would be appropriate, where the Public Trustee was the administrator for such matters, but as a final resort, the Court would presumably have to look to the Attorney General in the Court's exercise of its *parens patriae* jurisdiction over infants and those who lack legal capacity. However, that has not been necessary in this case because after argument, and after the luncheon

adjournment, the Public Trustee agreed to act as litigation guardian.

This is a topic which is in need of law reform to clarify when the Public Trustee must act as litigation guardian particularly where there is no-one else willing and able to act. Such law reform should consider if conditions may be attached to the Public Trustee's appointment particularly as to costs. The need for such law reform has been recognised, albeit in a different statutory context, in Western Australia by Pullin J in *Farrell v Allregal Enterprises Pty Ltd* [2009] WASC 65.

I am entirely satisfied by the extensive submissions on behalf of the applicant and by the evidence before me that Energex's rights under the easement are incontrovertible and it has become necessary for the applicant to seek injunctive relief because of the absolute refusal of the respondent to allow access to his property, to which the applicant is undoubtedly entitled.

The applicant is, of course, in such a case, acting not only in its own interests, but in the public interest. I note that the proposed electricity lines span 130 properties and this property is the only one which has required such an application.

I therefore make the order by consent, that the Public Trustee of Queensland be appointed litigation guardian of the

respondent. I order that the applicant pay the costs of the Public Trustee of Queensland, of and incidental to his acting as litigation guardian of the respondent in these proceedings. I order that the respondent forthwith, upon service of a copy of this order, permit the applicant, its employees, agents, workmen, linesmen, contractors and others authorised by it, with or without vehicles, plant and equipment of any description, to enter upon and remain, pass and repass, on and over Easement B on Lot 985 on SP 136604, being registered easement in Gross Number 707908910, burdening the land described as lot 985 on CP S312890, County of Stanley, Parish of Redcliffe (the easement) for the purpose of exercising its rights under the easement; and be restrained, whether by himself or by his servants, or agents or otherwise, from interfering with or obstructing the exercise of the rights of the applicant under the easement.

I note that the order is endorsed:

"If you, Bohuslav Sablatura, do not obey this order within the time specified, you will be liable to Court proceedings to compel you to obey it and punishment for contempt."

I therefore make the order as per draft, which I will initial and place with the file. I direct that the order be served on Mr Sablatura, as well as on the Public Trustee.

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