SUPREME COURT OF QUEENSLAND

CITATION:	*Giorgio Trevisin and Anna Maria Trevisin v Julatten Developments Pty Ltd as Trustee under Instrument 710018985* [2012] QSC 341
PARTIES:	**GIORGIO TREVISIN AND ANNA MARIA TREVISIN** (plaintiffs**)** v **JULATTEN DEVELOPMENTS PTY LTD (ACN 099 967 165) AS TRUSTEE UNDER INSTRUMENT 710018985** (defendant)
FILE NO:	138 of 2010
DIVISION:	Trial
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	9 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	1-2 November 2012
JUDGE:	Chief Justice
ORDER:	**Adjourned to a date to be fixed, costs reserved.**
CATCHWORDS:	Plaintiffs have for decades traversed the defendant's land for access to their own – they have used a path which follows a road marked on a registered survey plan – that road has never been gazetted – whether the plaintiffs have a lawful entitlement to use that road – indefeasibility: the defendant took without (adequate) notice of the proposed new road reservation – if no lawful entitlement in the plaintiffs, whether they should be granted a statutory right of user over that route – where the alleged lawful entitlement does not clearly emerge from the register – where practicable affordable access is available to the plaintiffs' land, which is not landlocked, other than by passing through the defendant's land *Land Act* 1962 *Land Title Act* 1994 *Real Property Act* 1861 *Property Law Act* 1974.
COUNSEL:	C J Ryall for the plaintiffs D P Morzone for defendant
SOLICITORS:	David Anthony Solicitors for the plaintiffs

Apels Solicitors & Notary for the defendant

[1] The plaintiffs own lot 14, which is rural land near Dimbulah adjoining the defendant's lot 13. Through its director Mr McKean, the defendant actively farms lot 13, although the plaintiffs do not farm their land. (The properties were originally used for tobacco growing.)

[2] Dating from a time when a relative of the plaintiffs owned lot 13, the plaintiffs have for a long time, indeed decades, used rural tracks across lot 13 for the purpose of gaining vehicular access to their own land, for themselves and their invitees. Looking at the aerial photograph C33 which is in Exhibit 1, the plaintiffs have used the road from Wolfram Road which traverses lot 13 from east to west, then down a road within their own land lot 14 to their homestead.

[3] Over the years since his company's purchase of lot 13 in 2006, Mr McKean has been alerting the plaintiffs to the fact that he wishes that access over his lot 13 to cease. He has given the plaintiffs more than adequate notice of his serious intent in that regard. They resorted to this proceeding in a context where he has in recent times, out of understandable frustration, been obstructing their passage over his property. Notwithstanding that, if the plaintiffs have had no legal right to use that path across his property, then Mr McKean has actually shown considerable patience and tolerance in his efforts to bring a stop to that usage.

[4] The plaintiffs contend that they are lawfully entitled to use that route through lot 13, because it constitutes a public road. Their entitlement is said to arise from the manner of registration of lot 13 in the freehold land register.

[5] There are two registered plans depicting lot 13, HG72 and HG603. The former, dating from as long ago as 1932, shows the position for which the defendant contends: a public road reserve traversing lot 13 in a dogleg pattern as depicted in green on C33, intersecting with the eastern boundary of lot 14 in swampy land to the north-west of the point at which the plaintiffs presently enter lot 14 from the defendant's property. That is in fact a gazetted road.

[6] The later plan, HG603, dated June 1977 and registered on 24 November 1982, shows both that 1932 road, and in addition, another road along the route hitherto used by the plaintiffs. That other "road" has never been gazetted.

[7] Complicating and what may be termed untidy features are that the earlier plan HG72 contains these additions, obviously made at subsequent times: the words "See HG 603" written onto lots 13 and 14, and dotted lines over the path of the road now used by the plaintiffs.

[8] Mr Ryall, appearing for the plaintiffs, relied on s 179 of the *Land Title Act* 1994. It provides that: "Particulars of a registered instrument recorded in the freehold land register are conclusive evidence of ... the contents of the instrument", and he referred to s 43 of the *Real Property Act* 1861 which provided that upon registration, an instrument was to take effect according to its tenor. See also *Rock v Todeschino* (1983) 1 Qd R 356. Mr Ryall submitted that since the plans are part of the register, the reference to HG603 establishes the existence of a new road along the path which has hitherto been used by the plaintiffs, hence the plaintiffs' lawful

entitlement. Mr Ryall would submit my epithet "untidy" unduly diminishes the significance of the entry.

[9] Mr Morzone, who appeared for the defendant, relied on this history. Perpetual lease selection number 2323 was granted over lot 13 in 1939. That was eventually transferred to one Semenzato. Lot 14 was created by deed of grant in 1939, and the proprietor one Michieletto sought permanent closure of the road reserve now in question (the "gazetted road" which the defendant acknowledges still exists). As the evidence of Ms Slade shows, executive authority for that road closure was not forthcoming because applicable conditions were not fulfilled. Opening and closing of roads depends on gazettal: s 362, 363 *Land Act* 1962 as then applicable. There has been no gazettal of the opening of the prospective road shown on HG603.

[10] When the defendant purchased lot 13 in 2006, the title search read: "For exclusions refer to plan CP HG72". That is the plan which contains the cryptic, "See HG603", and the apparently pencilled in and (possibly) dotted lines covering the path hitherto followed by the plaintiffs.

[11] Those indications would provide an uncertain and slim base from which to conclude that the updated HG72 was recording the creation of a new road reserve along the path for which the plaintiffs now contend. For what purpose is one invited to "see" HG603? If HG603 was to be regarded as superseding HG72, then one could reasonably ask why the register did not say so directly, and why, in referring to "exclusions", the reference to HG72 only was maintained, without substituting or adding reference to HG603.

[12] In any event, there has been no gazettal of the opening of a road along the path depicted in HG603.

[13] Looking back on those and the other circumstances covered by the affidavit and oral evidence of Ms Slade, which I accepted, one sees that the local authority and the former owner of lot 14 came to an agreement to open and close roads subject to certain conditions which were not fulfilled. In the result, no opening or closing was gazetted, as would be required by the *Land Act* then applying. Consequently, the road reserve on HG72 was not closed, and the proposed new road on HG603 was not opened. Consistently, HG603 was ignored in the conversion of the perpetual lease to freehold, the issue of the deed of grant, and the transfer of lot 14 to the defendant.

[14] Having taken without notice of the road depicted in HG603, the defendant relies on the principle of indefeasibility of title (*Land Title Act* 1994, s 184, s 185). The title to lot 13 shows, under the heading "Easements encumbrances and interests", "Rights and interests reserved to the Crown by deed of grant number 21411202 (lot 13 on CP HG72)". As has been seen, the only road clearly appearing on HG72 is the dogleg road which the defendant agrees is excluded from its lot 13, and the significance of the reference to the later plan does not emerge from the realm of uncertainty or at most prospectivity.

[15] There is another consideration. The registered deed of grant of lot 14 records: "Area 62.5239 Ha. excluding 1.6238 hectares for a surveyed road". While not precisely the same as the area covered by the road in HG72, that area of 1.6238

hectares is substantially more than the area covered by the proposed new road depicted on HG603.

[16] While by s 179 of the *Land Title Act* the content of HG603, as a registered instrument, is what it says, rights fall to be determined by reference to the freehold land register as a whole, and in relation to lot 13, its content supports the conclusion that the road depicted in an unbroken way on HG72 is the only operative road.

[17] I conclude that the plaintiffs have no lawful right to use the road they have been using. I therefore turn to their alternate claim, for relief under s 180 of the *Property Law Act* 1974, which primarily raises the issue whether it is reasonably necessary for the effective use of their land that they have access over lot 13, which is their preferred option.

[18] The plaintiffs draw on history: the previous owners of the two lots inferentially considered it preferable to allow access to lot 14 over the "new" road, one which has allowed reliable access in all weathers. There may have been some indulgence because of family relationships. There is no doubt that that access is very convenient for the plaintiffs, but the circumstance that it cuts approximately through the middle of the defendant's lot 13 must not be overlooked, and neither should Mr McKean's reasonable wish to maximize the farming potential of his land.

[19] I accepted evidence from the civil contractor Mr Musumeci and the civil engineer Mr Flanagan that the proposed road shown approximately in Exhibit 2, accessing the homestead on lot 14 via a sandy ridge to so-called No Name Road would provide appropriate, affordable, all-weather access. I accepted the evidence of Mr Musumeci that it would not be necessary to fill the well-formed existing crossing in lot 14 near the barn, notwithstanding that some refurbishment would be required. I also accepted his evidence that there was no need to upgrade No Name Road. On Mr Musumeci's evidence, the cost of establishing the road within lot 14 would be a little over $8,000 which in the overall context is not a substantial sum.

[20] As to No Name Road, accepting the evidence of Mrs Petersen and Mr McKean, I find that following the cleaning out of the dam on Mrs Petersen's property, access along No Name Road, in periods of heavy rainfall, has not since 2009 occasioned more than a few hours' delay even for ordinary (non four-wheel drive) vehicles, certainly not more than a day, and that that is a level of burden one may reasonably expect to bear in these country conditions.

[21] Generally speaking, I accepted all of the evidence given in the case, save that I had some reservation about the evidence of Mr Trevisin, although that may be explained by language difficulties. I did feel, however, that Mr Trevisin somewhat overstated any difficulty in establishing an all-weather road through his land.

[22] Some of the evidence – as to the carrying of a shotgun, and placing nails on carriageways, for example – was irrelevant to the disposition of the case, as Counsel conceded. In relation to what matters, concerning the relationship between the parties, I was content to proceed, where there was conflict, on the account of Mr McKean, whom I considered to be a plain-spoken, open, candid witness. But a limited number of largely irrelevant issues aside, there was not a great deal of divergence between his evidence and that of the plaintiffs.

[23] In relation to cost, there was much common ground between Mr Musumeci and Mr Gregg. It goes without saying that the cost of the road construction appropriate here should relate to the construction of private rural farmland access comparable with what already exists on the properties, rather than the cost of a higher level public road such as would be expected of developers.

[24] I respectfully commend the engineering and construction witnesses for their patent objectivity.

[25] I conclude therefore that the plaintiffs' claim should be dismissed. There is no need for a grant of relief as sought in the counterclaim, which also should be dismissed.

[26] The defendant should however consider offering an undertaking to permit the plaintiffs to use the roadway across lot 13, as hitherto, for the ensuing period of one month. That would be reasonable, notwithstanding the ample notice already given, in order to allow the plaintiffs to make the necessary alternative arrangements. If that undertaking is not forthcoming, I would be inclined to make orders to facilitate that continued, strictly short term access. After that period, the plaintiffs will be forbidden access to their land across the defendants'.

[27] I adjourn the matter to a date to be fixed and reserve costs. I invite written submissions as to the form of orders, and as to costs. I ask that those submissions be furnished to me in Brisbane within the next week or so.