

SUPREME COURT OF QUEENSLAND

CITATION: *Trevisin & Anor v Julatten Developments Pty Ltd* [2012] QSC 393

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: 7 December 2012

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGE: Chief Justice

ORDER: **Upon the defendant by its Counsel undertaking to allow the plaintiff continued access across lot 13 on plan HG72 County of Hodgkinson, Parish of Leadingham, following the path previously used, for a period of 30 days from the date of this order,
order that:**

- 1. the plaintiffs' claim be dismissed;**
- 2. upon the defendant's counter claim, that the plaintiffs be restrained, whether by themselves, their servants or their agents, from entering upon and passing across the defendant's land for the purpose of gaining access to the plaintiffs' land, from and including the date two months from the date of this order;**
- 3. the plaintiffs pay the defendant's costs of and incidental to the proceeding, such costs to be assessed on the standard basis up to and including 3 June 2010, and thereafter on the indemnity basis.**

COUNSEL: C J Ryall for the plaintiffs
D P Morzone SC for defendant

SOLICITORS: David Anthony Solicitors for the plaintiffs
Apels Solicitors & Notary for the defendant

- [1] I published my reasons for judgment on 9 November 2012, indicating that I would dismiss the plaintiffs' claim.
- [2] On 3 June 2010, the defendant offered to settle the proceeding on this basis: the plaintiffs discontinue, the defendant allows continuing access over the defendant's land for 21 days (during road construction), and the plaintiffs pay the defendant's costs in the amount of \$5,000. The plaintiffs did not accept that offer. The offer had remained open for 14 days, which despite the plaintiffs' submission was, I consider, a reasonable period.
- [3] On 31 March 2011, the defendant made a further offer: the defendant would allow the plaintiffs continued access until 30 June 2011 (3 months), the plaintiffs were to discontinue, and each party would bear that party's own costs. The plaintiffs did not accept that offer either.
- [4] On 14 October 2010, the plaintiffs had offered to settle on the basis each party "walk away and bear their own costs", with the plaintiffs to be allowed 12 weeks continuing access while they built an alternate road.
- [5] Having succeeded in having the plaintiffs' application dismissed, there is no reason why the plaintiffs should not now be ordered to pay the defendant's costs, and the plaintiffs acknowledge that.
- [6] The defendant will have secured a result materially more favourable to it than the position presented in either of those offers from the defendant.
- [7] Rule 361 of the *Uniform Civil Procedure Rules* is not in terms applicable to this situation (where the plaintiff has not succeeded at all), but where the plaintiffs have been wholly unsuccessful, prior offers bear on the discretion now to be exercised (*Sultana Investments Pty Ltd v Cellcom Pty Ltd (No 2)* [2008] QCA 398).
- [8] I consider the plaintiffs unreasonably rejected the defendant's offer. I do not consider their case, whether on the title issue or an easement, was of a strength warranting taking the matter to a full court hearing. As already noted, also, the defendants' director had exercised considerable patience over a long period. There was a failed mediation. Having insisted on a full court hearing, and completely failing, the plaintiffs should in all these circumstances indemnify the defendant.
- [9] In the following order, my designation of the 30 day period takes into account that the plaintiffs have known since 9 November of their need to commission the alternate access, and also what I have said of the defendant's patience to date: the defendant is now entitled to a speedy resolution.
- [10] I make the following formal orders to conclude the matter:

Upon the defendant by its Counsel undertaking to allow the plaintiff continued access across lot 13 on plan HG72 County of Hodgkinson, Parish of Leadingham, following the path previously used, for a period of 30 days from the date of this order,

order that:

1. the plaintiffs' claim be dismissed;

2. upon the defendant's counter claim, that the plaintiffs be restrained, whether by themselves, their servants or their agents, from entering upon and passing across the defendant's land for the purpose of gaining access to the plaintiffs' land, from and including the date two months from the date of this order;
3. the plaintiffs pay the defendant's costs of and incidental to the proceeding, such costs to be assessed on the standard basis up to and including 3 June 2010, and thereafter on the indemnity basis.