City Developments Pty Ltd (ACN 009 638 733) & Anor v The Registrar–General of the Northern Territory & Ors [2001] NTCA 7

PARTIES:	CITY DEVELOPMENTS PTY LTD (ACN 009 638 733) First Appellant AND: THE PROPRIETORS UNITS PLAN 97/026 Second Appellant AND: THE REGISTRAR–GENERAL OF THE NORTHERN TERRITORY First Respondent AND: EDWARD ARTHUR FIELD Second Respondent AND: TREVOR LINDSAY SULLIVAN Third Respondent AND: ANDRE AND RINALDO SCARTON Fourth Respondents AND ROBERT JOHN NASH Fifth Respondent
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY

JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	NO. AP15 of 2000
DELIVERED:	29 August 2001
HEARING DATES:	30 April & 1 May 2001
JUDGMENT OF:	MARTIN CJ, ANGEL AND BAILEY JJ

REPRESENTATION:

Counsel:

Appellants:	J B Waters QC
Respondents:	P Barr

Solicitors:

Appellants:	De Silva Hebron
First Respondent:	NT Attorney-General's Department
Second Respondent:	T S Lee & Associates
Third Respondent:	Priestleys
Fourth Respondents:	Hunt & Hunt
Fifth Respondent:	Vincent Close

Judgment category classification:	C
Judgment ID Number:	Ang200107
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

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No. AP15 of 2000

BETWEEN:

CITY DEVELOPMENTS PTY LTD (ACN 009 638 733)
First Appellant

AND:

THE PROPRIETORS UNITS PLAN 97/26
Second Appellant

AND:

THE REGISTRAR–GENERAL OF THE NORTHERN TERRITORY
First Respondent

AND:

EDWARD ARTHUR FIELD
Second Respondent

AND:

TREVOR LINDSAY SULLIVAN
Third Respondent

AND:

ANDRE AND RINALDO SCARTON
Fourth Respondents

AND:

ROBERT JOHN NASH
Fifth Respondent

CORAM: MARTIN CJ, ANGEL & BAILEY JJ

REASONS FOR JUDGMENT

(Delivered 29 August 2001)

MARTIN CJ:

[1] I have had the benefit of the draft judgment of Justice Angel in this matter and agree that the appeal be dismissed for the reasons given by his Honour.

ANGEL J:

[2] This appeal from a decision of Thomas J, (2000) 135 NTR 1, concerns the legal efficacy of certain registered easements at Lake Bennett Resort. The appellants are the owners of the servient tenements and the respondents are the owners of the dominant tenements.

[3] On 2 June 2000 Thomas J held that the easements are good in law. The appellants challenge that conclusion in this appeal.

[4] The dispute concerns the Lake Bennett Resort. The lake and foreshore strip surrounding it were once part of Section 69 Hundred of Howard. That section was sub–divided into three separate areas comprising, inter alia, Sections 92, 93 and 118. On 10 June 1983 Section 118 was sub–divided into Sections 152 to 155 inclusive. Section 152 comprised the area of the lake and the surrounding foreshore land.

[5] On 18 December 1996 a grant of easement was registered over Section 152 in favour of Section 92. Section 92, comprising the land described in Certificate of Title Register Book Volume 432 Folio 158, is registered in the name of the respondents Scarton. On 22 April 1993 a grant of easement was

registered over Section 152 in favour of Section 93 which was also owned by the respondents Scarton.

[6] The conditions of the grant of easement in favour of Section 92 are as follows:

> "1. The owner of the land receiving the benefit of the easement (hereinafter called "the Grantee") and all bona fide non paying guests of the Grantee from time to time authorised by him shall have the right to enter upon and use the land burdened by the easement (hereinafter called "the Grantor's land") for private recreational purposes PROVIDED THAT the lake situated on the Grantor's land (hereinafter called "the lake") shall be used only for such recreational purposes as are permitted by the terms of the Waterworks Licence No. 363 issued under the control of the Water Act reserving nevertheless to the Grantor its employees agents and all persons from time to time authorised by it in common with the Grantee and all bona fide non paying guests of the Grantee from time to time authorised by him and all other persons having the like right free and uninterrupted passage across and use of the Grantor's land.
>
> 2. The Grantee shall have the right to leave a catamaran and canoes on the said lake for use by the Grantee and such bona fide non paying guests of the Grantee as may be authorised by him.
>
> 3. The Grantee for himself and his successors in title covenants with the Grantor and its successors in title that the Grantee and his successors in title will not do or suffer anything to be done upon the Grantor's land whereby the lake and its retaining wall may be damaged or polluted or the use of the lake either by the Grantor its employees agents and all persons from time to time authorised by it or by any other person with a like right to use the lake may be prejudicially interfered with.
>
> 4. Should the Grantee at any time subdivide Section 92 Chinner Road, Lake Bennett then the easement shall be extinguished on all save one of the subdivided lots. The Grantee may nominate the lot to which the easement shall continue to attach."

[7] The conditions of the grant of easement in favour of Section 93 are as follows:

> "1. The owner of the land receiving the benefit of the easement (hereinafter called 'the purchaser') and all persons from time to time authorised by him shall have the right to enter upon and use the land burdened by the easement (hereinafter called 'the Vendor's land') for recreational purposes PROVIDED THAT the lake situated on the Vendor's land (hereinafter called 'the lake' shall be used only for such recreational purposes as are permitted by the terms of the Waterworks Licence No. 363 issued under the control of the Waters Act reserving nevertheless to the Vendor its employees agents and all persons from time to time authorised by it in common with the Purchaser and all persons from time to time authorised by him and all other persons having the like right free and uninterrupted passage across the use of the Vendor's land.
>
> 2. The Purchaser shall have the right to leave a boat on the said lake for use by the Purchaser and such persons as may be authorised by him.
>
> 3. The Purchaser for himself and his successors in title covenants with the Vendor and its successors in title that the Purchaser and his successors in title will not do or suffer anything to be done upon the Vendor's land whereby the lake and its retaining wall may be damaged or polluted or the use of the lake either by the Vendor its employees agents and all persons from time to time authorised by it or by any other person with a like right to use the lake may be prejudicially interfered with."

[8] In or about January 1997, Section 152 was further sub–divided into Sections 244 and 245. Section 244 comprises portion of the foreshore land abutting the lake to the north and Section 245 comprises the lake and remainder of the foreshore land south of the lake.

[9] Prior to the further sub–division of Section 152 into Sections 244 and 245, Section 152 was burdened with easements in favour of Section 106 Hundred

of Howard owned by the second respondent Field, Section 162 Hundred of Howard owned by the third respondent Sullivan and Section 94 owned by the fifth respondent Nash.

[10] The conditions of the grant of easement burdening Section 152 for the benefit of Section 106 (owned by the second respondent), Section 102 (owned by the third respondent) and Section 94 (owned by the fifth respondent) is the same as for the grant of easement in respect of Section 93 (owned by the fourth respondent).

[11] It was common ground between the parties before Thomas J and on appeal, following *Re Ellenborough Park* [1956] 1 Ch 131 at 163, that there were four essential legal elements of a private easement, viz:

1. There must be a dominant and a servient tenement.
2. An easement must accommodate the dominant tenement.
3. Dominant and servient owners must be different persons, and
4. A right over land can not amount to an easement unless it is capable of forming the subject matter of a grant.

[12] For present purposes it is unnecessary to consider Section 81 of the Real Property Act NT, or whether, contrary to the opinion of Dr Kerr, easements in gross, that is, easements not appurtenant to any other land can exist at common law or can be registered; see generally Douglas Whalan "The Torrens System in Australia" (1982) pp 108–109; Bradbrook & Neave

"Easements and Restrictive Covenants in Australia" (1981) paras 110 and 111.

[13] The arguments before Thomas J and the arguments on appeal focused upon whether the grants of easement accommodated the dominant tenements and whether the dominant land owners' right to use the servient tenement for "private recreational purposes" was capable in law of being the subject matter of a grant.

[14] Her Honour, following *Dukart v District of Surrey* (1978) 86 DLR (3d) 609 per Estey J at 661, held that the grants of easement accommodated the dominant tenements and that they did benefit the dominant tenements not just the owners personally. Her Honour further held that the right to use the servient tenement for private recreational purposes was not too wide and vague in character to constitute an enforceable right. She also held that the right to use the servient tenement for private recreational purposes did not amount to a right of joint occupation with the owner of the servient tenement and that it did not substantially deprive the owners of the servient tenement of their proprietorship or legal possession or enjoyment of the land. Her Honour held that the grants of easement were good in law and dismissed the appellants' claims that the easements granted for the benefit of the second, third, fourth and fifth respondents were null and void. Her Honour agreed with the submission for the respondents that there was no reason in law why the easement could not be granted for recreational

purposes. She noted that thirteen sections of land in all received the benefit of a grant of easement over the lake and foreshore sections. She agreed with the respondents' submissions that the workable exercise of the respective rights of the thirteen owners of the dominant tenements required each to accommodate his or her recreational activities to those of the others. Her Honour inferred that the intentions of the grantor were to create a large recreational area available to the owners of the sections of land surrounding Lake Bennett, the recreational area to comprise the lake itself and the surrounding foreshore. Her Honour noted that the grant of easement for recreational purposes over the whole of former Section 152, now Sections 244 and 245, was inconsistent with the development of the servient land otherwise than in accordance with its use for recreational purposes. Her Honour noted that the dominant tenements in the present case were physically separated from the servient tenements by other land but that in the present case the use of the servient land for recreational purposes nevertheless enhanced the enjoyment of the dominant tenements: *Todrick v Western National Omnibus Company Limited* [1934] 1 Ch 561.

[15] The appellants submitted that her Honour's conclusion that the rights conferred in the respective grants were easements was wrong in law.

[16] Counsel for the appellants submitted that the right to enter and use the appellants' land for "private recreational purposes" was in terms too wide and vague in character to constitute an enforceable right. He submitted that

the right granted was merely a *jus spatiandi* and thus unenforceable. He further submitted the right to enter and use the appellant's land for "private recreational purposes" effectively gave the owners of the dominant tenements a right of joint occupation of the servient tenements or at least a right that substantially deprived the owners of their proprietorship or possession or enjoyment of their land and as such it did not to constitute an easement. Reference was made to the judgment of Upjohn J in *Copeland v Greenhalf* [1952] 1 All ER 809. Unlike the present case that was not a case of express grant.

[17] It was also submitted on behalf of the appellants that the grants of easement were intended to give the dominant tenement owners access to and enjoyment of the lake rather than the servient tenements in so far as they comprised the foreshore land. There was a clear distinction, it was said, between *Ellenborough Park* (supra) where there was a clear intention on the part of the owners of the park to maintain an area as a park or garden area for the benefit of surrounding title holders, and *Riley v Penttilla* [1974] VR 547, where there was a similar intention, and the present case, where there was no clear intention evidenced in the grants of easement that the status or character or use of the original Section 152, the then lake itself, was not to be altered and that there was no intention that the foreshore area was to be preserved for recreational use by the dominant tenement owners. It was submitted in support of this that recreational use of the foreshore land – in contrast to the lake itself – was not reasonably necessary for the better

enjoyment of the dominant tenements. Reference was made to the judgment of Lord Evershed in *Ellenborough Park* (supra) at p 170 where the following passage from Dr Cheshire's "Modern Real Property" 7th ed at p 457 was quoted with approval:

> "One of the fundamental principles concerning easements is that they must be not only appurtenant to a dominant tenement, but also connected with the normal enjoyment of the dominant tenement. ….. We may expand the statement of the principle thus: a right enjoyed by one over the land of another does not possess the status of an easement unless it accommodates and serves the dominant tenement, and is reasonably necessary for the better enjoyment of that tenement, for if it has no necessary connexion therewith, although it confers an advantage upon the owner and renders his ownership of the land more valuable, it is not an easement at all, but a mere contractual right personal to and only enforceable between the two contracting parties."

[18] In my judgment the decision of Thomas J is correct and the appeal should be dismissed. As is noted in 22 Halsbury's Laws of Australia, para 355–12005, some attempts to create easements have foundered because the rights have been regarded as too indeterminate and incapable of forming the subject matter of a grant, although it is to be noted that Lord Sumner in *Pwllbach Colliery Company Ltd v Woodman* [1915] AC 634 at 648–649 was of the view that an indeterminate right could be created by a grant. Of course the category of easements is not closed: *Ward v Kirkland* [1967] Ch 194 at 222–223; *Attorney–General of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599 at 617; *Commonwealth v Registrar of Titles (Victoria)* (1918) 24 CLR 348 at 353 citing Lord St Leonards in *Dyce v Hay* (1852) 1 Macq at 312, but the present easements form no new category. It is now, I

think, reasonably well settled, that a *jus spatiandi* (a right to wander at will over the whole of the alleged servient land) can be the subject of an easement: see *Re Ellensborough Park* [1956] 1 Ch 131; *Riley v Penttilla* [1974] VR 547; *Dukart v District of Surrey* (1978) 86 DLR (3d) 609; *Arndale (Kilkenny) Pty Ltd v Gaetjens* (1970) 44 ALJR 434, 22 Halsbury's Laws of Australia, para 355-12050. It is now, I think, also clearly established that a right of recreation may be the subject of a valid easement: 22 Halsbury's Laws of Australia, para 355–12115.

[19] Whether the right of recreation is connected with the use or enjoyment of the dominant tenements was a question of fact resolved in favour of the respondents. The use of the foreshore for recreational purposes was, I think, clearly incidental to the use of the lake, and I agree with Thomas J's conclusion that the required connection between the easements and the dominant tenements was made out on the evidence.

[20] I would dismiss the appeal.

BAILEY J:

[21] I have had the benefit of reading the judgment of Angel J in draft. I agree that the appeal should be dismissed for the reasons given by his Honour.