

*Dowd v Various Proprietors* [2016] NTSC 24

PARTIES: DOWD, Steven James  
v  
Various Proprietors

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION

FILE NO: 48 of 2015 (21523988)

DELIVERED: 3 MAY 2016

HEARING DATES: 26 FEBRUARY 2016

JUDGMENT OF: HILEY J

**CATCHWORDS:**

REAL PROPERTY — EASEMENTS — Modification or extinguishment of easements — obsolete — impede the reasonable user of the land — no longer necessary or advantageous—misuse of easement.

*Law of Property Act 2000* (NT), s 177.

*Driscoll v Church Commissioners for England* [1957] QB 330; *Stanhill Pty Ltd v Jackson & Ors* [2005] VSC 169, referred to.

**REPRESENTATION:**

*Counsel:*

Applicant: M Crawley  
Defendants: (No appearance)

*Solicitors:*

Applicant: Bowden McCormack Lawyers

Judgment category classification: B  
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IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*Dowd v Various Proprietors* [2016] NTSC 24  
No. 48 of 2015 (21523988)

BETWEEN:

**STEVEN JAMES DOWD**  
Applicant

AND:

**VARIOUS PROPRIETORS**  
Forty Six Defendants

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 4 May 2016)

**Introduction**

- [1] On 26 February 2016 I made an order wholly extinguishing the right of way easement granted to the proprietors of Lots 1-24 and 26-46 LTO 73/013B over Lot 25 LTO 73/013B (the **Easement**), pursuant to s 177 of the *Law of Property Act 2000* (NT) (**LPA**). These are my reasons.
- [2] The Easement was created, along with easements inside part of the northern boundary of Lot 26 and the eastern boundary of Lot 14, some time prior to 1974. Together those easements enabled access between Kentish Road to the south and Livingstone Road to the north through

those three properties. The Easement was expressed to provide free and unrestricted right of way over Lot 25 to the proprietors of Lots 1-24 and 26- 48.

[3] It seems that all of the 48 lots were part of a subdivision of land between Livingstone Road, Kentish Road and Blyth Road (the **Roads**) and to the west of Blyth Road. Originally, all of the Roads were dirt roads and access to and from those lots was problematic in times of flooding. According to an entry dated 5 June 1974 on an Internal Minute Form of the Northern Territory Land Titles Office “this did provide a physical access between the northern and southern extremities of the subdivision, which otherwise was not available during wet conditions.”<sup>1</sup>

[4] The Roads have subsequently been raised, upgraded and sealed, and drainage infrastructure along the Roads has also been upgraded.<sup>2</sup> Consequently all properties previously affected in times of flooding can now be accessed at all times without using the right-of-way easement.

### **Interested parties**

[5] By Originating Motion filed on 26 May 2015 the Applicant sought an “order wholly extinguishing the right of way easement granted to the

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<sup>1</sup> Paragraph 3 on Internal Minute Form at Folio 27 File No. LTO 73/13.

<sup>2</sup> “Flooding and Accessibility Assessment – Livingstone Road, Blyth Road and Kentish Road, Livingstone, Northern Territory” dated 9 December 2014 by Dr Sharmil Marker, Principal Engineer of WRM Water and Environment Pty Ltd (the **Marker report**) at p 148.

proprietors of Lots 1-24 and 26-46 LTO 73/013B, pursuant to s 177 of the *Law of Property Act*".

- [6] The 46 Defendants are respectively the registered proprietors of Lots 1-24 and 26- 48 (the **other lots**) and Section 2524 of S96/249B (Litchfield Council). For convenience they are collectively referred to in this proceeding as "Various Proprietors 48/2015".
- [7] Most of the defendants were personally served with the Originating Motion. The others, namely the registered proprietors of Lots 7, 20, 24 and 40 were duly served following orders for substituted service made by the Master on 12 August 2015 and 22 October 2015.
- [8] Other persons with an interest registered on the titles of defendants in the proceedings (eg mortgagees) were duly served pursuant to an order made by the Master on 12 August 2015 that service upon them be effected by post.
- [9] By its letter of 16 November 2015 Litchfield Council expressed the following attitude to this application:

Should it be demonstrated that residents of affected properties can safely access their properties during 100-year average recurrence interval (ARI) events, Council does not see a technical issue with the extinguishment of the easement. These points continue to be valid, and remain the position of Litchfield Council regarding the easement.

As for issues outside of flooding and inundation as described above, Litchfield Council does not express an opinion either for or against the extinguishment of the easement.

[10] Otherwise, only three of the defendants, namely the proprietors of Lots 12, 24 and 39, expressed a view or lodged a notice of appearance. Prior to the proceedings, the proprietors of Lots 12 and 39 agreed to abide by the decision of the Court.<sup>3</sup> As of 26 February 2016, only the proprietor of Lot 24 had a notice of appearance on foot, but he did not appear when the matter was called on.

### **The evidence**

[11] The Applicant has been the proprietor of the property at Lot 25 since 2006. He stated that the Roads are now sealed and no longer subject to flooding. He annexed a copy of the Marker Report to his affidavit.

[12] Since he became proprietor of Lot 25 he has seen many people, some of whom he knows not to be proprietors of the other lots, drive through the Easement at high speeds in various forms of four-wheel-drive or all-terrain vehicles. He annexed photographs showing various vehicles using the Easement on various dates between November 2013 and April 2015.

[13] Since about April 2015 he has also seen people, some of whom he knows not to be proprietors of the other lots, use the Easement to access land near the eastern border of his property (adjacent to Lot 26) which is not subject to any easement and does not lead to any road. He

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<sup>3</sup> See orders made by the Master on 5 November 2015, and affidavit of Tammy Lai-Yan Wong dated 14 January 2016.

annexed photographs dated 20 April 2015 showing tracks and erosion caused by vehicles traversing that part of his property.

[14] He also annexed photographs, some taken in January 2011, and others in May 2015,<sup>4</sup> showing erosion and damage to the original right of way to the extent that it could not be used as intended, with the consequence that other vehicles had to drive closer to his fence-line thus creating new tracks and additional damage. He expressed concern that similar damage will be caused to the eastern part of the property if people continue to access it from the Easement. Since 2011 he has hired machines and used other tools to remedy the damage both to the eastern part of his property and to the right-of-way easement itself. Despite those efforts, both areas remain damaged.

[15] He has also found large amounts of rubbish and industrial waste, such as concrete, steel rods and pipes, left on or near the right-of-way easement on his property, and provided photographs taken in May 2015 depicting some of that rubbish and waste.<sup>5</sup> He estimates that it would cost about \$1000 to remove the industrial waste.

[16] He also said that in March 2014 his 16-year-old daughter told him that she saw a vehicle stationary outside the house on the property for about 30 minutes, while he was at work. He expressed fear for the safety of

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<sup>4</sup> Affidavit of Steven James Dowd dated 25 May 2015 Annexures "G" and "H".

<sup>5</sup> Affidavit of Steven James Dowd dated 25 May 2015 Annexure "I".

his daughter and himself if unknown persons and vehicles are able to traverse the right-of-way easement.

[17] He has made more than a dozen complaints to police since 2010 about people unlawfully accessing his property.

[18] The Marker Report included detailed consideration of historical flooding and the drainage network and any current flood hazard in the relevant area. The author of the report met representatives of the Litchfield Council to discuss Council's requirements for the extinguishment of the easements. The report concluded that the flood hazard at the relevant road crossings is likely to be low for all flood events up to and including a 100 year ARI flood event. In the conclusions, at p 20:

All 45 affected properties now have all weather access from Kentish, Blyth and Livingstone roads without using the Right of Way. All these roads are now sealed and in good condition. These roads would be rarely affected during the wet season and any potential flooding of these roads during major flood events would be minimal. Further, any potential flooding during a major flood event would be to a shallow depth and any driving restrictions and / or disruptions would only be for a short duration (less than an hour). These reasons would negate any need for the public to use the Right of Way.

### **Consideration**

[19] Section 177 of the LPA provides as follows:

#### **Modification or extinguishment of easements and covenants**

- (1) Where land is subject to the burden of an easement or a covenant, the Court may, on application by a person who has an interest in the land, make an order modifying or wholly or partially extinguishing the easement or covenant.
- (2) The Court may not make an order under subsection (1) unless it is satisfied that:
  - (a) because there has been a change in the user of the land having the benefit of the easement or covenant, in the character of the area in the vicinity of the land or in any other circumstance that the Court considers material, the easement or covenant is obsolete;
  - (b) the continued existence of the easement or covenant would impede the reasonable user of the land or that the easement or covenant, in impeding that user, is:
    - (i) no longer necessary or advantageous to the person or persons entitled to the benefit of the easement or covenant; or
    - (ii) contrary to the public interest,and each person who suffers loss or disadvantage from the modification or extinguishment of the easement or covenant can be adequately compensated in money for his or her loss or disadvantage;
  - (c) each adult who is entitled to the use or benefit of the easement or the covenant and who has capacity to do so:
    - (i) has agreed to the modification or extinguishment of the easement or covenant; or
    - (ii) by his or her acts or omissions may reasonably be considered to have abandoned the easement or to have waived the benefit of the covenant in whole or in part; or
  - (d) the proposed modification or extinguishment will not substantially injure the persons entitled to the use or benefit of the easement or covenant.
- (3) In determining whether to make the order, the Court must take into account the operation of the *Planning Act* and in

particular the provisions of the planning scheme, within the meaning of the Act, apply to the land.

- (4) The power of the Court to make an order modifying an easement or covenant includes power to amend the instrument creating the easement or covenant to include new terms as to the use, ownership or maintenance of the servient land.
- (5) In making an order under subsection (1), the Court may also make an order directing the applicant to pay a person entitled to the use or benefit of the easement or covenant the amount that appears to the Court to be just to awarded consideration for either:
  - (a) any loss or disadvantage suffered as a consequence of the modification or extinguishment; or
  - (b) any reduction in any compensation received for the land affected by the easement or covenant when it was created that is attributable to its imposition.

[20] I find that the Easement is no longer required to ensure access to the dominant tenements during times of flooding. I also find that the right-of-way has been, and is misused in several respects, including for the purposes of speeding and trespass to the Applicant's property, causing damage to the property and rendering the right-of-way unusable, and as an access for illegal dumping. It has also been used as access resulting in breach of privacy for the lawful occupants of Lot 25.

[21] Although the criteria stipulated in s 177(2) are alternatives I consider that most if not all of them are applicable.

[22] In particular I am satisfied that there has been a relevant change in the character of the area in the vicinity of the land having the benefit of the Easement, namely the sealing and flood proofing of the Roads, and that the easement is obsolete.<sup>6</sup> In the context of provisions analogous to those in s 177(2)(a) the word “obsolete” has been construed as meaning “outmoded” or “out of date”<sup>7</sup> and as applying to situations where the relevant land, although still used but for selfish or unreasonable reasons, is no longer used for its intended purpose.<sup>8</sup> Although the land that is the subject of the Easement has been used by a number of people, the evidence suggests that most if not all of those users have not been people legally entitled to use it, and that the use has been for purposes other than the purpose of the Easement, namely for access when access has not otherwise been available by using one or other of the Roads.

[23] I consider that the damage previously caused to some of the land subject of the Easement may well continue to occur if the Easement remains. I am satisfied that the continued existence of the Easement has impeded and is likely to impede the reasonable user of the land by the Applicant.<sup>9</sup> I construe the word “impede” as meaning “retard”, “obstruct” or “hinder”; not “prevent”.<sup>10</sup>

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<sup>6</sup> See s 177(2)(a) LPA.

<sup>7</sup> *Stanhill Pty Ltd v Jackson & Ors* [2005] VSC 169 (*Stanhill*) at [31].

<sup>8</sup> *Driscoll v Church Commissioners for England* [1957] QB 330 at 341-2.

<sup>9</sup> See s 177(2)(b).

<sup>10</sup> See for example *Stanhill* at [34].

[24] Further, I am satisfied that the Easement is no longer necessary or advantageous to the persons entitled to its benefit.<sup>11</sup> The extinguishment of the Easement “will not substantially injure the persons entitled to [its] use or benefit”.<sup>12</sup>

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<sup>11</sup> See s 177(2)(b)(i).

<sup>12</sup> See s 177(2)(d).