

NEW SOUTH WALES SUPREME COURT

CITATION: Eccleston v O'Keefe [2007] NSWSC 159

JURISDICTION: Equity Division

FILE NUMBER(S): 4922 of 2006

HEARING DATE(S): 19, 20 and 23 February 2007

JUDGMENT DATE: 6 March 2007

PARTIES:

Peter Bryan Eccleston (First Plaintiff)
Lucy Finette Taylor Eccleston (Second Plaintiff)
David Daniel O'Keefe (First Defendant)
Kathryn Michelle O'Keefe (Second Defendant)

JUDGMENT OF: Windeyer J

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:

Mr D Williams (Plaintiffs)
Ms K Burke (Defendants)

SOLICITORS:

Golsby Whiteley (Plaintiffs)
McIntosh McPhillamy & Co (Defendants)

CATCHWORDS:

EASEMENTS– Easement for electricity and water – CONSTRUCTION – Easement to draw water from neighbouring dam – Whether easement permits the maintenance and operation of a pump on the servient tenement – Whether easement may restrict servient tenement from using water in specified conditions – ENFORCEABILITY– Whether Water Management Act 2000 renders easement for water unenforceable – Whether Water Management Act 2000 precludes servient tenement from supplying water to dominant tenement

LEGISLATION CITED:

Conveyancing Act 1919 s88
Water Act 1912, s10
Water Management Act 2000 s52, s53, s54, s392

Gale on Easements 17th Ed p22 and 30 ff

CASES CITED:

Beeston v Wheate [1856] 5 E&B 986

Fitzgerald v Masters (1956) 95 CLR 420;

Miller v Emcer Products Ltd [1956] Ch 304

Perpetual Trustee Company Limited v Westfield Management Limited [2006] NSWCA 337

Re Ellenborough Park [1956] Ch 131

Watson v Phipps (1985) 60 ALJR 1

DECISION:

Four separate questions. Held in favour of the defendants that the Water Management Act 2000 precludes enforcement or operation of the easement. Held in favour of the plaintiffs that an easement for drawing water was created.

JUDGMENT:

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**IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION**

WINDEYER J

TUESDAY 6 MARCH 2007

4922/06 PETER BRYAN ECCLESTON & ANOR V DAVID DANIEL O'KEEFE & ANOR

JUDGMENT

1 These proceedings relate to the rights of the plaintiffs pursuant to certain easements attached to their land entitling them to take water from a dam on the land of the defendants. In the hope that some sense of goodwill and neighbourly behaviour might eventually shine through with the parties proceeding to a carefully conducted mediation I will say no more about the facts relevant to these proceedings than is necessary for the separate questions before me. In times of drought whatever water is available is of importance and value.

Separate issues for determination

2 Because some of the issues require urgent determination and because I was told that if the questions were answered in a particular way that would bring the proceedings to an end I made an order for a separate determination of four questions. That may have been a mistake, as the answers will not determine the proceedings. They may, however, provide a basis for

reasonable discussion and possible resolution of what is after all a dispute between neighbours of adjoining land in a country district.

Facts relevant to the separate issues

3 The plaintiffs own a property of about 63 hectares at Byng, near Orange, known as “Longford”. It is the land in Folio Identifier 5/1013666 so that it is Lot 5 in DP 1013666. The defendants own a property called “Tremearne”. It is the land in Folio Identifier 4/1013666 and thus is Lot 4 in the same Deposited Plan. The property now known as “Longford” was originally part of “Tremearne”. The plaintiffs purchased Lot 5 in 2000 from Mr and Mrs Taylor, the parents of Mrs Eccelston, who owned “Tremearne” and subdivided it. At the time, water for use on what became Lot 5, particularly for the cottage and gardens, was pumped from a large dam on what is now Lot 4, and there was a pump shed and pump located at the dam edge with electricity connected to the pump. There were negotiations for an easement in favour of Lot 5. The plan of sub-division had not been registered at the time the plaintiffs contracted to buy Lot 5 from Mr and Mrs Taylor. It was registered on 2 June 2000. Upon registration of the plan of sub-division various easements were created pursuant to s88B of the Conveyancing Act 1919 including what was described as an easement for water and electricity supply, eight metres wide in favour of Lot 5 burdening Lot 4. The easement was in the following terms: - (where the words “in any quantities” are underlined this is my underlining so that paragraph 6 will be clear)

3. Identity of Easement firstly Easement for Water
referred to:- & Electricity Supply 8 wide

Schedule of Lots etc affected

<u>Lots Burdened</u>	<u>Lots or Authority Burdened</u>
Lot 4	Lot 5

3. Terms of Easement or restrictions thirdly referred to in abovementioned plan:-

Full and free right for the body in whose favour this easement is created and every person authorised by it; from time to time and at all times to supply water in any quantities across and through the land herein indicated as the servient tenement together with the right to use for the purpose of the easement, any line of pipes already laid within the servient tenement for the purpose of supplying water or any pipe or pipes in replacement or in substitution therefore and where no such line of pipes exists, to lay, place and maintain a line of pipes of sufficient internal diameter beneath or upon the surface of the servient tenement and together with the right for the body in whose favour this easement is created and every person authorised by it with any tools, implements or machinery necessary for the purpose to enter upon the servient tenement and to remain there for any reasonable time for the purposes of laying, inspecting, cleansing, repairing, maintaining or renewing such pipeline or any part thereof and for any of the

aforesaid purposes to open the soil of the servient tenement to such extent as may be necessary provided that the body in whose favour this easement is created and the persons authorised by it will take all reasonable precautions to ensure as little disturbance as possible to the surface of the servient tenement and will restore that surface as nearly as practicable to its original condition, and

An easement for the transmission of electricity with full and free right leave liberty and licence for Advance Energy and its successors to erect construct place repair renew maintain use and remove electricity transmission mains wires cables towers poles and ancillary works on the surface, undersurface, or subsoil of the said easement for the transmission of electricity and for purposes incidental thereto through and/or in and/or over and/or along the said easement and to cause or permit electricity to flow or be transmitted through and along the said transmission mains wires and cables and substation equipment and to cut or trim or lop trees branches and other growths or foliage and to remove any other obstructions or any kind whatsoever which now or at any time hereafter may overhand encroach or be in or on the said easement and which may or may be likely to interfere with any right leave liberty or licence granted hereunder and for any of the purposes aforesaid for Advance Energy and every person authorised by it to enter into and upon the said easement of any part thereof at all reasonable times and to remain there for any reasonable time with surveyors workmen vehicles things or persons and to bring and place and leave thereon or remove therefrom all necessary material machinery implements and things provided that Advance Energy and the persons authorised by it will take all reasonable precautions to ensure as little disturbance as possible to the surface of the said easement and will restore that surface as nearly as practicable to its original condition AND the Registered Proprietor for the time being of the land hereby burdened shall not erect or permit to be erected any building or other erection or any kind or description on over or under the said easement or alter the surface level thereof or carry out any form of construction affecting the surface, undersurface or subsoil thereof without Advance Energy's permission, and the Registered Proprietor of the servient Tenement will at all times cease irrigation from the dam when the capacity thereof has been lowered to a level of four megalitres.

4 This somewhat extraordinary and obviously ill-thought out gobbledegook seems to have been cobbled together at least so far as the water is concerned by taking words from the extended meaning of the short form “easement to drain water” as it appears in Schedule VIII Pt III of the Conveyancing Act using the inappropriate word “supply” instead of the more normal word “draw” and omitting from the wording “from the dam at the end of the easement” or other appropriate wording. In spite of this, as one must give meaning to the

words if possible, I consider the words give a right to take water from the dam. The evidence establishes that the easement extends into the dam.

5 The wording of the easement for electricity is even more inappropriate. It might well have been and probably was drawn from a precedent supplied by Advance Energy. What Advance Energy had to do with the matter I cannot comprehend. However as Lot 5 has the benefit of the easement and Lot 4 the burden probably all wording is unnecessary after the words “an easement for the transmission of electricity”. The pump shed and pump are within the easement. The final words at the end of what seems to be the electricity easement:

... and the Registered Proprietor of the servient Tenement will at all times cease irrigation from the dam when the capacity thereof has been lowered to a level of four megalitres.

if they are to have effect at all relate to dam rights inappropriately tacked on to the end of the electricity provision.

6 When Dr O’Keefe inspected Lot 4 prior to purchase in 2002, Mr Taylor told him that the pump belonged to Mr Eccleston and that “it’s in the easement, an easement to pump water”. There were some further negotiations as a result of which it was agreed that Mr and Mrs Taylor would procure the easement terms to be varied by deleting the words in the water provision “in any quantities” and substituting for those words the words “for stock and domestic supply only (not to include irrigation other than in respect of the household garden and trees along the driveway)”. A variation of easement was executed accordingly and registered number 8821845. Somewhat surprisingly no attempt was made at this time to tidy up the general wording of the document.

7 It is not necessary for the purpose of this part of the action to go into the sorry story of subsequent events. It is sufficient to say that the defendants formed the view, perhaps on legal advice, that the plaintiffs had no entitlement to have the pump shed and pump on Lot 4 and demanded its removal, and when the plaintiffs did not comply took down the shed, disconnected the pump, bent the pipe and placed the components of the shed and the pump back over the dividing fence between Lot 4 and Lot 5 onto Lot 5 land. That action and others brought about the commencement of these proceedings. The pump in question is a Davey Shallow Well Pressure Pump most suitable for operation close to the water source.

8 I turn now to the separate issues and deal with them in turn.

Question 1: Whether the written and/or alleged implied terms of the Easement Registered No 8821845L (“the Easement”) entitle the Plaintiffs to draw water from the dam (“the Dam”) situated at the end of the strip shown in diagram 2 of the Plan of Subdivision on the Defendants’ land to the Plaintiffs’ land.

9 It is now accepted that the answer to the question is in the affirmative but subject to any restrictions on the right imposed by the Water Management Act 2000 and the Water Act 1912. I think that is clearly correct. The easement must be construed so as to give it purpose. In coming to this conclusion I do it on the basis of the document and not on the basis of any

implied rights. The evidence of Mr Surveyor Searl was that “I drew the easement so that one end of the easement projected into the dam on the proposed Lot 4 and the other end terminated at the boundary of the proposed Lot 5.”

Question 2: If so,

- (i) **Whether s392 of the Water Management Act 2000 (“the Act”) renders the Easement unenforceable and;**
- (j) **Whether s53(3) of the Act precludes the defendants from supplying water to the plaintiffs from the Dam.**

10 The following are the relevant sections of the Water Management Act:

392 State’s water rights

- (1) For the purposes of this Act, the rights to the control, use and flow of:
 - (a) all water in rivers, lakes and aquifers, and
 - (b) all water conserved by any works that are under the control or management of the Minister, and
 - (c) all water occurring naturally on or below the surface of the ground,are the *State’s water rights*.
- (2) The State’s water rights are vested in the Crown, except to the extent to which they are divested from the Crown by or under this or any other Act.
- (3) The State’s water rights prevail over any authority conferred by or under any other Act or law, except to the extent to which this or any other Act expressly so provides.

...

52 Domestic and stock rights

- (1) Subject to subsection (2), an owner or occupier of a landholding is entitled, without the need for an access licence, water supply work approval or water use approval:
 - (a) to take water from any river, estuary or lake to which the land has frontage or from any aquifer underlying the land, and
 - (b) to construct and use a water supply work for that purpose, and
 - (c) to use the water so taken for domestic consumption and stock watering, but not for any other purpose.

...

- (3) In this section:
domestic consumption, in relation to land, means consumption for normal household purposes in domestic premises situated on the land.

stock watering, in relation to land, means the watering of stock animals being raised on the land, but does not include the use of water in connection with the raising of stock animals on an intensive commercial basis that are housed or kept in feedlots or buildings for all (or a substantial part) of the period during which the stock animals are being raised.

53 Harvestable rights

- (1) An owner or occupier of a landholding within a harvestable rights area is entitled, without the need for any access licence, water supply work approval or water use approval:

- (a) to construct and use a dam for the purpose of capturing and storing rainwater run-off, and
- (b) to use water that has been captured and stored by a dam so constructed,

in accordance with the harvestable rights order by which the area is constituted.

...

- (3) This section does not allow a landholder:

- (a) to supply any other land with water that has been captured and stored under this section, or
- (b) to construct or use a dam that obstructs the flow of a river, unless the river is declared by the relevant harvestable rights order to be a minor stream for the purposes of this Division.

54 Harvestable rights orders

- (1) The Minister may, by order published in the Gazette, constitute any land as a harvestable rights area and may, by the same or a subsequent order so published, name the area and fix its boundaries.

- (2) The order by which a harvestable rights area is constituted must specify the following:

- (a) the proportion of the average rainwater run-off that may be captured by landholders in the area (being no less than 10% of that average),

- (b) the procedures to be followed for calculating the average rainwater run-off for a landholding in the area.
- (3) The order may allow an existing dam to be used both for rainwater run-off that has been captured and other water that has been lawfully taken from a water source.
- (4) The order may also deal with the following matters:
 - (a) the types and locations of dams that may be used by a landholder to capture and store rainwater run-off,
 - (b) the means by which the maximum capacity of a dam that may be used by a landholder to capture and store rainwater run-off is to be calculated,
 - (c) the arrangements that may be made by landholders of adjoining land for the shared use of a single dam for the capture of rainwater run-off,
 - (d) such other matters as are necessary or convenient to give effect to the order.
- (5) For the purpose of calculating any matter under an order under this section, a reference in the order to an area of land is, in the case of land that is valued under the *Valuation of Land Act 1916*, a reference to the area of a portion or parcel of land that is separately valued under that Act.
- (6) An order under this section may deal with any matter by reference to a map held in the head office of the Department.
- (7) Any map that is so referred to is to be available for public inspection, free of charge, during normal office hours at the head office of the Department and at the regional office for the area to which the relevant order relates.

11 It is admitted that the subject land is in a harvestable rights area and subject to a harvestable rights order.

12 Section 10 of the Water Act 1912 so far as it is applicable is as follows:

10 Application for licences

- (1) Any occupier of land whereon any work to which this Part extends (not being a joint water supply scheme) is constructed or used, or is proposed to be constructed or used, for the purpose of:

- (a) water conservation, irrigation, water supply, or drainage, or
- (b) (Repealed)
- (c) changing the course of a river,

may apply to the Ministerial Corporation in the form prescribed for a licence to construct and use the said work, and to take and use for the purposes specified in the application the water, if any, conserved or obtained thereby, and to dispose of such water for the use of occupiers of land for any purpose.

- (1A) An application for a licence may be made under subsection (1) by a person who proposes to construct or use any such work as is referred to in that subsection subject to the person obtaining the right to occupy the site of the work, and for all purposes of or relating to such application such person shall be deemed to be an occupier:

Provided that a licence shall not be issued upon any application made under the authority of this subsection unless and until the applicant has obtained the right to occupy the site of the work

13 On the basis of this legislation and the relevant definitions in the two Acts it is accepted that the answer to the question is:

Yes, unless the plaintiffs hold a licence required under of the Water Act 1912 or any other Act.

Question 3: Whether the written and/or alleged implied terms of the said Easement entitle the Plaintiffs to operate and maintain a pump shed and pump and electrical connections thereto on the Defendants' land for the purpose of pumping the water from the said Dam situate on the Defendants' land to the Plaintiffs' land by reason of the alleged ancillary rights reasonably necessary for the exercise and/or enjoyment of the Easement.

14 There was a considerable body of evidence going to the necessity to have the pump and associated shed adjacent to the dam or whether the pump house and pump could be placed on the dominant tenement and work effectively. What that evidence established was that if the pump were located on the dominant tenement, the model of the pump used to the present time would not be effective to draw water, and a deep well pump would be effective but not as convenient.

15 I should deal with the evidence of a Mr Alan Palmer, solicitor, which was given on the voir dire on the basis that if I considered it admissible it would be taken into evidence in the proceedings. Generally speaking that evidence was of the type which might be given in a professional negligence case. Insofar as it went to the question of the proper construction of the wording of the easement, in my view, it was inadmissible and is rejected. The proper construction of the easement must be determined by its words but having regard to the matrix

of facts which would include the physical facts relating to the lands in question. I therefore reject that evidence.

16 I conclude that this question is easily determined by the fact that the easement is described as one for water and electricity. The easement for electricity extends to the same place or, in traditional terms, terminus as the water easement. There would be no purpose whatever in having an easement for electricity extending to the edge of the dam unless it were for the purpose of making power available to a pump to be sited at that edge. It is apparent therefore that the proper construction of the easement is to allow the operation and maintenance of the pump and pump shed and electrical connections on the servient tenement. In those circumstances it is really unnecessary to have regard to the objective ascertainable circumstances existing at the time of the grant, but circumstances such as the existence of the pump and shed at grant only go to support the construction I have reached. As to admissibility of such evidence see *Perpetual Trustee Company Limited v Westfield Management Limited* [2006] NSWCA 337 and particularly paragraphs 26-28.

17 The precipitant action of the defendants of removing the pump and shed was an unauthorised interference with the rights accorded to the plaintiffs under the easement.

Question 4: Whether the words “*the Registered Proprietor of the servient Tenement will at all times cease irrigation from the Dam when the capacity thereof has been lowered to a level of four megalitres*” form the subject matter of a grant of an easement, is appurtenant to the dominant tenement and amounts to a use of the land and runs with the land.

18 I have commented on the positioning of these words. I should add that their meaning is, in my view, perfectly clear. The purpose of the words was to ensure that the owner of the dominant tenement had a reasonably secure source of water. It may be that the words somewhat rephrased would be more appropriate for a restrictive covenant appurtenant to the easement - (Conveyancing Act 1919 s88AC) - but that is not the question for decision, which is whether they can form part of the subject matter of a grant.

19 The first thing to mention is that it is obvious that both the parties to the original grant, and to the variation, considered that the words had a meaning. The second matter to mention is that the same must apply to the defendants who negotiated amendments to the easement under the terms of their contract for the purchase of Lot 4. It is accepted by the parties that irrigation does not extend to use of water for stock watering or domestic use. The words on their face are not purely contractual as they refer to obligations of the registered proprietor or imposed restrictions on the use of the dam water by the registered proprietor of Lot 4. However, Ms Burke argued that they required positive action by the servient owner. I think this is incorrect. In ordinary expression ceasing to do something is not a positive act. On the other hand capacity referred to was obviously not intended to mean a lowering of the dam wall but intended to refer to the volume of water in the dam at a particular time. I consider that the words are intended to, and on proper construction do, relate to the extent of the grant by limiting the right in the servient tenement to joint use for all purposes when the dam level drops to a certain figure, thereby having the effect of prolonging the benefit of the easement by ensuring that the resource is not exhausted by excessive usage if the water volume falls. I consider it clear that the restriction is the same as would be brought about by the following words:

And so that, when the volume of water in the dam is four megalitres or less the registered proprietor of the servient tenement shall not take any water from the dam from which water is taken pursuant to this easement for the purpose of irrigation.

It does not seem to me that rectification of the easement is required for this purpose, as this is the obvious intention of the words used as a simple matter of construction. Fitzgerald v Masters (1956) 95 CLR 420; Watson v Phipps (1985) 60 ALJR 1. Thus it is not necessary to enter into discussion of rectification in the case of a bona fide purchase for value. I should add that the wording does not entitle the servient owner to keep the level at four megalitres by the simple means of pumping to another dam.

20 The more difficult question is whether or not a right such as this, which is a negative right, can be acquired by grant. There was little discussion of this except in a general way and difficult questions of law are involved. However, the restriction does not give the dominant tenement exclusive right to the dam water at any level but rather it limits rights in the servient tenement, as does any easement. There is no transfer of ownership or transfer of a right to possession. Where there is a right of way both dominant and servient owners can pass along it. Here both owners have a right to take water for stock and domestic purposes, but the servient owner has possession, the dominant owner does not; Re Ellenborough Park [1956] Ch 131; and both are limited to that purpose as to the dominant tenement at all times and as to the servient tenement when the volume falls to four megalitres. If there is a property right with water then exclusive possession is not given to the dominant tenement. There is no sharing of ownership, just exercise of a right and certainly no ouster; Miller v Emcer Products Ltd [1956] Ch 304 at 316; See Gale on Easements 17th Ed p22 and 30 ff. A more extensive right to water, that is one where there is less competition, so that the usefulness of the right may be prolonged, is not such as interferes with the possession of the servient owner's land. In some respects the circumstances are the opposite to cases such as Beeston v Wheate [1856] 5 E&B 986 where a right to divert all water was subject to a right in the servient owner to cut back into the channel when he needed water himself, but I can see no logical reason why a negative right, given to increase the value of a positive right, should not be upheld as a grant.

21 The answer to question 4 is therefore “Yes”.

Orders

22 It will be necessary in accordance with the Rules to direct that the answers to the questions on the separate issue be recorded and to give directions for the further conduct of the action. It would probably be desirable that there be some short interval to give the parties an opportunity to consider this judgment and one would hope take steps towards mediation of outstanding issues, which if not mediated successfully will involve further conflict between neighbours and considerable expense.

23 So far as costs are concerned the plaintiffs have been successful on three issues out of four, the third probably taking the most time. It is, however, not appropriate to make orders for costs on the separate issues at this stage but to leave these for determination at the conclusion of the proceedings, having regard of course to the success achieved.

LAST UPDATED: 7 March 2007