

SUPREME COURT OF QUEENSLAND

CITATION: *Body Corporate for Torwood Hill Residential Retreat CTS 24557 v Fittell* [2020] QSC 32

PARTIES: **BODY CORPORATE FOR TORWOOD HILL
RESIDENTIAL RETREAT CTS 24557**
(applicant)
v
LYNETTE ANNE FITTELL
(respondent)

FILE NO: BS No 6249 of 2017

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 6 March 2020

DELIVERED AT: Brisbane

HEARING DATE: 2 October 2019

JUDGE: Davis J

ORDER: **The applicant pay the respondent:**

- 1. all fees and charges paid or payable by her to experts retained on her behalf in the application; and**
- 2. sixty per cent of her other costs of the application assessed on the standard basis.**

CATCHWORDS: REAL PROPERTY – EASEMENTS – EASEMENTS GENERALLY – CREATION – BY EXPRESS AGREEMENT OR UNDER STATUTE – STATUTORY EASEMENTS – where applicant applies for orders allowing its contractors access to the respondent’s land to rectify a retaining wall sitting on the common boundary between the two properties – where orders made allowing access – where costs submissions sought – where both parties seek their costs – where applicant must show special circumstances to secure such an order – where respondent had legitimate interests to defend – where the respondent contributed to the protraction of the proceedings – whether the respondent should bear some of the costs burden

Body Corporate and Community Management Act 1997, s 94
Property Law Act 1974, s 180
Body Corporate and Community Management (Standard Module) Regulation 1997, r 159

Uniform Civil Procedure Rules 1999, r 681

2040 Logan Road Pty Ltd v Body Corporate for Paddington Mews [2016] QSC 40, cited

Ex parte Edward Street Properties Pty Ltd [1977] Qd R 86, cited

Lambert Property Group Pty Ltd v Body Corporate for Castlebar Cove [2015] QSC 179, cited

Lang Parade Pty Ltd v Peluso & Ors [2006] 1 Qd R 42, cited

Re De Pasquale Bros Pty Ltd v NJF Holdings Pty Ltd [2000] QSC 4, followed

COUNSEL: MT de Waard for the applicant
MT Steele with D Whitehouse for the respondent

SOLICITORS: OMB Solicitors for the applicant
McCullough Robertson for the respondent

[1] The applicant who is the body corporate of a unit block and who I will call “the Body Corporate”, made application against the respondent (Ms Fittell) for orders allowing its contractors access to her land to rectify a retaining wall sitting on the common boundary between the two properties.

[2] On 2 October 2019, I made the following orders at the urging of both parties in these terms:

“1. Pursuant to section 180 of the Property Law Act 1974 the Respondent shall permit access to the applicant, its contractors, engineers, servants and agents, for a period of up to six (6) weeks, to attend upon Lot 8 on RP19673 Title Reference 15532063 known as 101 Annie Street, Auchenflower in the State of Queensland (‘Lot 8’) to enable rectification work (being that work described in the affidavit of Barry Jones, and the report of Denis Riley dated 23 July 2019) to be carried out to the entire length of the retaining wall structure approximately on the boundary between Lot 8 and the Applicant’s land at SP188059 known as 105 Annie Street, such access being limited to:

- (a) the length of the retaining wall;
- (b) the area delineated by the blue hatching on the plan which is exhibit 5 in the application; and
- (c) any other areas reasonably necessary to carry out rectification work to the retaining wall and/or to protect the 101 Annie Street property upon 24 hours written notice being provided to the respondent seeking her consent, such consent not to be unreasonably refused by the respondent.

2. Order 1 is made subject to the following conditions:

(a) The statutory right of use be subject to the following conditions:

(i) Indemnity

The Applicant shall indemnify and keep indemnified the Respondent against any costs, expenses, claims, demands or actions arising out of the rectification work but not limited to any act or omission occurring during the period of the carrying out of the rectification work.

(ii) Insurance

The Applicant must effect and keep in place public liability insurance in the sum of not less than \$10,000,000 in respect of the Applicant's property including the retaining wall.

The Applicant shall prior to commencing works provide copies of:

- (A) the Applicant's certificate of currency of insurance;
- (B) certificate of currency of insurance for geotechnical engineers' professional indemnity insurance, work cover or equivalent;
- (C) certificate of currency of insurance for the contractor engaged to carry out the rectification works professional indemnity insurance, work cover or equivalent;
- (D) any other contractors, engineers or persons required to attend on Lot 8 to perform the rectification work of those parties relevant certificate of currency for public liability and work cover insurance.

(iii) Encroachment

Survey Plan

- (A) Forthwith after completion of the rectification works, the Applicant must engage a Registered Surveyor to produce a survey plan of the encroachment area. The survey plan must include all areas of encroachment of the wall and all associated spoon drain drainage infrastructure required to give effect to the rectification of the retaining wall.

- (B) The Respondent will transfer to the Applicant the area of encroachment identified on the survey plan and the Applicant will pay an amount as determined by independent Registered Valuers. The Applicant shall pay the Respondent's transaction costs of the transfer, including stamp duty.
- (C) The method and basis of valuation is:
 - (I) each party will appoint an appropriately qualified and registered valuer. The reasonable costs of such valuations shall be paid by the Applicant, and the Applicant must indemnify the Respondent for those costs;
 - (II) the valuers shall value the property on a 'before and after' basis taking into account the value of the area of land to be transferred, based on the highest and best use of the Respondent's land;
 - (III) in the event of any difference in the valuations then the parties agree to adopt the mid-point between the two valuations as the agreed value.

(iv) Supervision

- (A) The Body Corporate must engage a managing RPEQ geotechnical engineer, being an independent contractor, to design, supervise and certify the works in accordance with all relevant Australian Standards.
- (B) The managing engineer must be on site at all times necessary to fulfil his professional obligations and provide the necessary design and certification referred to in these orders.
- (C) Certification must include both Form 15 (Design) and Form 16 (Construction).
- (D) Forms 15 and 16 must reference design drawings and specifications and daily construction records and tests including for all anchors.
- (E) All failures must be recorded and notification provided to the Respondent.

- (F) The managing geotechnical engineer or the contractor may employ an inspector or other suitably qualified person who is experienced for attendance and recording on site who is to be present at all times during the Rectification Works for which the RPEQ geotechnical engineer is not otherwise present.

(v) Surety

Before commencing the Rectification Works the Applicant must pay the amount of \$250,000 into the Applicant's solicitor's trust account to be held on trust for the benefit of the Applicant to carry out the proposed works, including the geotechnical engineer and restoration works of the respondent's property.

(vi) Compensation

- (a) The Applicant is to pay the Respondent \$200 per night for the six week period commencing upon the eve of the commencement of the rectification, to be paid in advance of the commencement of the Proposed Works.
- (b) The Applicant is to reimburse the Respondent for reasonable moving costs associated with vacating her land for the period of the Proposed Works.
- (c) The Applicant is to pay the Respondent the amount of \$1,000.00 compensation for imposing the statutory right of user.

(b) General conditions of access

- (i) The rectification of the retaining wall referred to in paragraph 1 of these Orders, shall be performed in a proper and tradesman like manner.
- (ii) All stormwater is to be managed on 105 Annie Street and directed to a lawful point of discharge, and must incorporate a sub slab drainage system to ensure stormwater is not collected behind the wall or directed to the Respondent's property as designed by NJA Consulting stormwater management plan.
- (iii) Adequate drainage to direct water from weepholes in the retaining wall to a lawful point of discharge.

(c) Water Usage

All water used in the Rectification Works shall be supplied from the Applicant's lot.

(d) Washout Area- Concrete Pump

The Applicant agrees the concrete pump will not be washed out on any part of the Respondent's lot.

3. Costs

- (a) The applicant is to file and serve an outline of submissions on costs and any further affidavits in support of that submission by 16 October 2019.
- (b) The respondent is to file and serve an outline of submissions on costs and any further affidavits in support of that submission by 30 October 2019.
- (c) The applicant to file and serve an outline of submissions in reply but limited to submissions on matters of law and the correction of any factual assertions raised in the respondent's submissions."

[3] Submissions as to costs were exchanged pursuant to Order 3. This is the determination of the costs issue.

General background

[4] Both the Body Corporate's unit block and Ms Fittell's house sit on the northern side of Annie Street, Auchenflower. Ms Fittell's house sits to the east of the unit block. Her property's western boundary is common with the unit block's eastern boundary.

[5] The natural slope of the land on the northern side of Annie Street is upwards from the street to the rear. Earthworks were performed decades ago on the Body Corporate's land. The unit block was constructed so that the ground level of the unit block is all on one level. This has been achieved by the construction of a retaining wall across the front of the property (the southern boundary) and across the eastern boundary which is common with Ms Fittell's land. At the footpath (the southern boundary of the property), the wall is about four metres high. The height of the wall diminishes towards the northern boundary as the natural height of the land rises. The retaining wall encroaches on Ms Fittell's land, but that is not the major problem.

[6] As early as 2006, cracking was appearing in the retaining wall. At that point, large jacaranda trees stood on Ms Fittell's property near the base of the retaining wall. An engineer's report identified the jacaranda trees as one of three possible causes of the cracking and they were removed.

[7] Negotiations for access to Ms Fittell's property to enable rectification commenced in earnest in 2014.

[8] The Body Corporate filed its originating application on 20 June 2017 and the application came before me on 2 October 2019.

The course of the hearing before me

- [9] Before the hearing commenced, I had the opportunity to read some of the material that had been filed. When the matter was called on, I told the parties that it appeared obvious that the wall had to be fixed. It would follow, I observed, that the Body Corporate had to be allowed access to fix the wall. It followed further, I thought, that the only real issue was as to the terms upon which access to Ms Fittell's property should be allowed. The parties agreed.
- [10] I was then told that the major issues were as follows:
- (a) what geotechnical engineering supervision of the repairs was necessary;
 - (b) whether, and to what amount, the costs of the repairs ought to be secured by the Body Corporate before repairs commenced;
 - (c) how any encroachment of the wall onto Ms Fittell's property should be dealt with; and
 - (d) what insurance for the works ought to be carried by the Body Corporate.
- [11] Short argument ensued. It became evident that the necessity for geotechnical engineering supervision was not so much an issue. What was more in issue was whether, and to what extent, the potential costs of the geotechnical engineering supervision ought to be secured in some way by the Body Corporate. It also became apparent that there were differences between the parties beyond the issues identified in paragraph [10] above.
- [12] In due course, Ms Fittell produced a draft of the conditions upon which she would allow access. The Body Corporate produced a draft of conditions which it would not oppose being placed on its right to enter Ms Fittell's land.
- [13] The major differences between the two drafts were:
- (a) the Body Corporate sought to limit its obligation to indemnify Ms Fittell against liability to only loss which occurred during the rectification of the wall;
 - (b) Ms Fittell proposed \$20 million insurance and the Body Corporate \$10 million;
 - (c) Ms Fittell sought security for the work in the sum of \$250,000 and the Body Corporate conceded \$200,000;
 - (d) Ms Fittell sought her "reasonable moving costs" to vacate the premises during the rectification work. The Body Corporate sought to limit that cost to \$1,000.
- [14] There was further argument. The parties then agreed on the orders finally made. They are the orders which appear in paragraph [2] above.
- [15] On the issues that were in dispute:
- (a) the Body Corporate conceded that the indemnity for liability ought not be limited to loss incurred during the course of the rectification work;¹

¹ Condition 2(a)(i).

- (b) Ms Fittell conceded that \$10 million insurance was sufficient;²
- (c) the Body Corporate conceded that security in the sum of \$250,000 ought to be provided;³
- (d) the Body Corporate conceded that Ms Fittell's moving costs ought not be limited to \$1,000.⁴

Legal principles

[16] Section 180 of the *Property Law Act* 1974 provides:

“180 Imposition of statutory rights of user in respect of land

- (1) Where it is reasonably necessary in the interests of effective use in any reasonable manner of any land (*the dominant land*) that such land, or the owner for the time being of such land, should in respect of any other land (*the servient land*) have a statutory right of user in respect of that other land, the court may, on the application of the owner of the dominant land but subject to this section, impose upon the servient land, or upon the owner for the time being of such land, an obligation of user or an obligation to permit such user in accordance with that order.
- (2) A statutory right of user imposed under subsection (1) may take the form of an easement, licence or otherwise, and may be declared to be exercisable—
 - (a) by such persons, their servants and agents, in such number, and in such manner and subject to such conditions; and
 - (b) on 1 or more occasions; or
 - (c) until a date certain; or
 - (d) in perpetuity or for some fixed period;
 as may be specified in the order.
- (3) An order of the kind referred to in subsection (1) shall not be made unless the court is satisfied that—
 - (a) it is consistent with the public interest that the dominant land should be used in the manner proposed; and
 - (b) the owner of the servient land can be adequately recompensed in money for any loss or disadvantage which the owner may suffer from the imposition of the obligation; and

² Condition 2(a)(ii).

³ Condition 2(a)(v).

⁴ Condition 2(a)(vi)(b).

- (c) either—
 - (i) the owner of the servient land has refused to agree to accept the imposition of such obligation and the owner's refusal is in all the circumstances unreasonable; or
 - (ii) no person can be found who possesses the necessary capacity to agree to accept the imposition of such obligation.
- (4) An order under this section (including an order under this subsection)—
 - (a) shall, except in special circumstances, include provision for payment by the applicant to such person or persons as may be specified in the order of such amount by way of compensation or consideration as in the circumstances appears to the court to be just; and
 - (b) may include such other terms and conditions as may be just; and
 - (c) shall, unless the court otherwise orders, be registered as provided in this section; and
 - (d) may on the application of the owner of the servient tenement or of the dominant tenement be modified or extinguished by order of the court where it is satisfied that—
 - (i) the statutory right of user, or some aspect of it, is no longer reasonably necessary in the interests of effective use of the dominant land; or
 - (ii) some material change in the circumstances has taken place since the order imposing the statutory right of user was made; and
 - (e) shall when registered as provided in this section be binding on all persons, whether of full age or capacity or not, then entitled or afterwards becoming entitled to the servient land or the dominant land, whether or not such persons are parties to proceedings or have been served with notice or not.
- (5) The court may—
 - (a) direct a survey to be made of any land and a plan of survey to be prepared; and
 - (b) order any person to execute any instrument or instruments in registrable or other form necessary

for giving effect to an order made under this section; and

- (c) order any person to produce to any person specified in the order any title deed or other instrument or document relating to any land; and
 - (d) give directions for the conduct of proceedings; and
 - (e) make orders in respect of the costs of any of the preceding matters and of proceedings generally.
- (6) In any proceedings under this section the court shall not, except in special circumstances, make an order for costs against the servient owner.
- (7) In this section—

owner includes any person interested whether presently, contingently or otherwise in land.

statutory right of user includes any right of, or in the nature of, a right of way over, or of access to, or of entry upon land, and any right to carry and place any utility upon, over, across, through, under or into land.

utility includes any electricity, gas, power, telephone, water, drainage, sewerage and other service pipes or lines, together with all facilities and structures reasonably incidental to the utility.

- (8) This section does not bind the Crown.” (emphasis added)

[17] Section 180(6) ousts the “general rule” enshrined in r 681 of *Uniform Civil Procedure Rules* 1999 that costs follow the event. Mr de Waard for the Body Corporate correctly accepts that the fact that his client obtained relief of a kind sought in the application is not sufficient by itself to justify a costs order against Ms Fittell. The Body Corporate must show “special circumstances” to secure such an order.

[18] *Re De Pasquale Bros Pty Ltd v NJF Holdings Pty Ltd*⁵ is a case where Chesterman J (as his Honour then was) held that special circumstances existed and ordered costs against a respondent to an application under s 180. *De Pasquale* bears some factual resemblance to the current case in that the applicant there, like the Body Corporate here, brought the application not to enhance its land but to protect it. However, comparison of the facts in cases where “special circumstances” have been found or not found is unlikely to be of assistance.

[19] Of importance and assistance though, is his Honour’s analysis of s 180. His Honour observed that s 180 only vests jurisdiction in the court to make orders where the owner’s refusal to accept the obligations sought to be imposed upon the land “is in all the circumstances unreasonable”.⁶ His Honour reasoned that because s 180(6) requires “special circumstances” before a costs order is made against a respondent, it

⁵ [2000] QSC 4.

⁶ Section 180(3)(c).

must follow that unreasonable refusal is not sufficient itself to engage the jurisdiction to award costs against a respondent. However, his Honour observed “... the respondent’s conduct which amounts to an unreasonable refusal may be of such a character as to constitute a ‘special circumstance’”.⁷ I accept and follow his Honour’s reasoning.

- [20] Mr Steele for Ms Fittell submitted that the usual order is that a respondent to a s 180 application ought be favoured with a costs order. Section 180 though says nothing about the circumstances under which a respondent should recover costs against an applicant. Where, unlike this case, an order has been secured against a respondent other than by consent, a finding must be made that the respondent unreasonably refused the applicant’s request to burden the land with the obligation before the jurisdiction to make an order is triggered. There cannot be a presumption in favour of granting costs to a party who has acted unreasonably.
- [21] However, on any application under s 180 of the *Property Law Act*, an applicant seeks orders interfering with proprietary rights vested in the land owner.⁸ The respondent to an application under s 180 is entitled to argue for the imposition of conditions under s 180(4) and the reasonableness or otherwise of the stance which a respondent adopts on that issue must be relevant to the question of costs of the application.

The respective arguments here

- [22] Ms Fittell submitted that the real issue was not whether the Body Corporate ought to be granted access to her property in order to conduct repairs, but rather the conditions upon which that access should be given. She submitted that it was appropriate for her to seek the imposition of conditions which reasonably protected her position. She submitted that the Body Corporate made significant concessions on the day of the hearing which she says vindicates the reasonableness of her attitude to the application. She seeks her costs against the Body Corporate.
- [23] The Body Corporate seeks its costs against Ms Fittell. The Body Corporate submits that special circumstances arise because Ms Fittell has been uncooperative and obstructionist and her position has changed during the course of the litigation. The Body Corporate submitted that Ms Fittell took various positions throughout the litigation but resiled from those positions and sought to impose further, inconsistent conditions. The Body Corporate submitted that the respondent’s conduct incurred unnecessary costs for both parties. The Body Corporate also submitted that the application was made out of necessity to secure the wall for the benefit of both parties and pursuant to obligations which it had to maintain the common property by s 94 of the *Body Corporate and Community Management Act 1997*.⁹ The Body Corporate also submitted that the need for the repair of the retaining wall was caused by Ms Fittell’s jacaranda trees undermining its structural integrity.

⁷ At [9].

⁸ *Lang Parade Pty Ltd v Peluso & Ors* [2006] 1 Qd R 42 at [23], *Ex parte Edward Street Properties Pty Ltd* [1977] Qd R 86 at 91, *Lambert Property Group Pty Ltd v Body Corporate for Castlebar Cove* [2015] QSC 179 at [132] and *2040 Logan Road Pty Ltd v Body Corporate for Paddington Mews* [2016] QSC 40 at [39]-[42].

⁹ See also *Body Corporate and Community Management (Standard Module) Regulation 1997*, r 159.

- [24] The Body Corporate's position is that Ms Fittell should pay its costs or at least part of its costs and the Body Corporate strongly resists any order to pay Ms Fittell's costs or any part thereof.

Consideration and determination of the costs

- [25] I am not prepared to find that the problems with the retaining wall were caused wholly or even substantially by the jacaranda trees which stood on Ms Fittell's land.

- [26] An expert report was prepared by Scott Woolcock, an engineer of the Bonacci Group, on 21 March 2006,¹⁰ upon the instructions of Ms Fittell. He opined that there were three possible causes of the cracking in the wall, being:

- “1. Uneven subsidence of the retaining wall foundation.
2. Distress due to lateral pressures from the retained material.
3. Distress due to forces exerted by jacaranda and brush box tree roots.”

- [27] He went on to opine:

“The most likely causes of the initial cracking are subsidence of the foundation or differential movement caused by tree roots. Lateral pressures could then exacerbate any cracking.”

- [28] Mr Woolcock was critical of the method of construction of the unit block. The fill behind the retaining wall is likely builder's rubble. This, he observed, cannot be compacted and is therefore likely to be subject to significant subsidence.

- [29] Whether the cause of the cracking can or cannot be ultimately determined is unclear. At best for the Body Corporate the jacaranda trees are just one of three likely suspects.

- [30] The unit block is unquestionably built on fill. It is the Body Corporate's land which has been artificially altered, not Ms Fittell's. It is clearly the obligation of the Body Corporate then to keep the fill retained. In that sense, failure of the wall is the Body Corporate's problem exclusively, not Ms Fittell's. Section 94 of the *Body Corporate and Community Management Act 1997* confirms the Body Corporate's obligations.

- [31] It is true, as the Body Corporate submits, that the repair of the retaining wall benefits Ms Fittell. However, it benefits her only by protecting her from interference with the quiet enjoyment of her land caused by any failure of a retaining wall whose existence is necessary only because of the way in which the unit block was constructed.

- [32] Any rectification work is likely to significantly disrupt Ms Fittell's quiet enjoyment of her land. Both parties accepted that it was necessary for her to leave her home during the rectification work.

- [33] Ms Fittell clearly has a legitimate interest in:

- (a) what rectification work is done;
- (b) how the rectification work is done;

¹⁰ Exhibit 3, Expert Report Index, Annexure A to the Expert Report of Richard Hemphill.

- (c) what impact that rectification work will have upon her enjoyment of her property;
 - (d) the rectification work being done and completed efficiently and quickly so as to minimise disruption to her; and
 - (e) recouping any cost to which she might be exposed.
- [34] The conditions which were ultimately imposed by agreement all in my view are reasonable and necessary in order to satisfy the legitimate interests of Ms Fittell. The Body Corporate resisted, even at the hearing before me, securing Ms Fittell to the extent of \$250,000 and then ultimately capitulated.
- [35] In my view, giving proper security for the cost of the work was critical. As already observed, the parties accept that Ms Fittell cannot live in her home while the rectification work is performed. If the Body Corporate found itself unable to pay the contractors, then Ms Fittell could be faced with a partly completed construction site on her western boundary and her home, for all practical purposes, uninhabitable.
- [36] I accept though the Body Corporate's submissions that Ms Fittell's conduct in the application is open to valid criticism.
- [37] The Body Corporate has been trying to resolve the issue of the retaining wall for at least the last six years. Ms Fittell's position has not always been consistent. Her position does seem to have changed in relation to matters such as:
- (a) whether an easement ought to be granted;
 - (b) how the costs and compensation which she should receive ought to be calculated;
 - (c) the design of the rectification works;
 - (d) what rectification works were necessary (at one stage demolition of the unit block was suggested);
 - (e) what experts were necessary to design and supervise the works; and
 - (f) stormwater management.
- [38] I find that Ms Fittell has contributed to the protraction of, and therefore the costs of, the proceedings.
- [39] Faced with the significant problem of the pending structural failure of a four metre high retaining wall on her western boundary, Ms Fittell was justified in seeking expert opinion as to how the problem could and should be rectified. She should recover all moneys she has paid to experts who she retained.
- [40] In my view, the starting point is that Ms Fittell ought to recover her costs on the standard basis. That is because she had legitimate interests to defend. She spent money defending those interests. The expenditure of that money secured her the reasonable conditions that were finally agreed on the date of the hearing.

[41] However, her conduct of the defence of the proceedings has added not only to her own costs, but also the costs of the Body Corporate and an adjustment ought to be made.

[42] The respondent should recover sixty per cent of her costs.

Orders

[43] It is ordered the applicant pay the respondent:

1. all fees and charges paid or payable by her to experts retained on her behalf in the application; and
2. sixty per cent of her other costs of the application assessed on the standard basis.