

CITATION: *Sellwood & Kelly* [2003] NTMC 055

PARTIES: Daphne Gweneth Sellwood

V

Mathew James Kelly

TITLE OF COURT: Local Court Transferred from Small Claims Court

JURISDICTION: Civil

FILE NO(s): 20312366

DELIVERED ON: 3 November 2003

DELIVERED AT: Darwin

HEARING DATE(s): 23 October 2003

DECISION OF: Jenny Blokland SM

CATCHWORDS:

RIGHT OF WAY – whether gates are a substantial interference -

Law of Property Act (NT) s 157; schedule 3;

Small claims Act, ss5, 23;

Finlayson v Campbell (1998) ANZ Conv R 388 Ext: (SC NSW), Young J ;

Gohl v Hender [1930] SASR 158;

Timpar Nominees Pty Ltd v Archer [2001] WASCA 430;

Stewart v Cooper (SC Tas); unreported, 20 January 1986, Neasy J;

Halsbury's Laws of Australia ; [355 – 12075].

REPRESENTATION:

Counsel:

Plaintiff: Mr Piper

Defendant: Self

Solicitors:

Plaintiff: Pipers

Defendant: Self

Judgment category classification: B
Judgment ID number: [2003] NTMC 055
Number of paragraphs: 20

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20312366

BETWEEN:

Daphne Gweneth Sellwood
Plaintiff

AND:

Matthew James Kelly
Defendant

REASONS FOR DECISION

(Delivered 3 November 2003)

Jenny Blokland SM:

Introduction

1. This claim commenced in the *Small Claims Court*. The claim seeks damages that readily fall within the jurisdiction of the *Small Claims Court*, however, as well as damages, the substance of the claim seeks declaratory relief. The court is asked to declare the plaintiff may continue to maintain certain gates and that the defendant must keep those same gates closed on his adjoining property. This proposed relief does not readily fall within the jurisdiction envisaged in the *Small Claims Act*, s 5. Further, if granted, this form of relief may require ongoing obligations not contemplated in the *Small Claims Act*. At the commencement of this hearing, on application on behalf of the plaintiff and without objection by the defendant I ordered this matter be dealt with *as if it had been commenced under the Local Court Act: (s 23 Small Claims Act)*.

Evidence Before the Court

2. The only *vive voce* evidence in this case came from the plaintiff, Ms Daphne Sellwood. Most of her evidence is not in dispute. She was down to earth, clear and appropriately accommodating of other points of view. I have no hesitation accepting her as a witness of truth. Ms Sellwood gave evidence she purchased Lot 11 (176A Bees Creek), (noted in the relevant LTO documents tendered in these proceedings in *Exhibit P1 and P2*); the defendant purchased one of the neighbouring lots, (Lot 15), and began living on that lot on or about early 2002; that Lot 11, (owned by the plaintiff) is subject to a number of encumbrances, of relevance here is a *right of way* in favour of Lot 15 running parallel with a boundary line of Lot 11 and a *right of way* enjoyed by a number of title holders in the vicinity, including Lot 15 that facilitates access to Bees Creek Road: (see copies of Certificates of Title; *Exhibit P2*). Ms Sellwood gave evidence that Lot 11 was fenced and gated when she purchased the property; that the property is some 25 acres, (over 10 hectares); that she currently has a house on the property, having first had a caravan and then built the house; that on the neighbouring Lot 15, there was rarely anybody present when she first moved in; and that the two gates were already constructed in their current positions when she purchased Lot 11.
3. The two gates relevant to these proceedings are marked as gate “A” and “B” on various documents and diagrams before the court, including the statement of claim. The oral and documentary evidence indicates gate A crosses the *right of way* connecting various lots to Bees Creek Road; that at point B a gate crosses the *right of way* that stretches the boundary of Lot 11 and enables access to and from Lot 15; that on the other side of Lot 15 is Crown land; that without gate B being shut, Lot 11 is open to and accessible from the Crown land; that at point B there are two gates perpendicular to each other, although there is enough room to turn; that the plaintiff’s access to Bee’s Creek Road is at gate “A”.

4. The plaintiff's evidence is that without the gates being shut (not locked), she cannot secure her property; that she has her own dogs on her property that need to be kept in; that stray dogs are able to access the property more readily without the gates being shut; that she has always intended to bring her horses onto the property but has been unable to because in the current circumstances the defendant refuses to shut the gates and consequently she cannot guarantee their safety; that residents in the area have been warned generally about security issues including guarding against vandalising, robbery and arsonists.
5. Ms Sellwood gave evidence that when she first moved onto the property there was no issue with gate B as it was always shut as no-one was living on Lot 15 at that time; that she, as well as other residents regularly used gate A to access Bees Creek Road and that they all shut the gate after accessing Bees Creek Road, although a number of residents have alternative access routes to Bees Creek Road; that with the arrival of the defendant, (Mr Kelly) in early 2002, Ms Sellwood asked him to respect the *right of way* and to keep the gates closed.
6. Ms Sellwood gave evidence that the defendant refuses to shut the gates; that this is detrimental for her in that she cannot reasonably secure her property; that as a result of police warnings about security she did on one occasion lock the gates in mid 2002 and gave the defendant keys but has not done so since. Ms Sellwood gave evidence of many altercations with Mr Kelly where he has left the gates open or conducted himself in a way that evinces his intention not to shut the gates after using them. A substantial part of the evidence also relates to vehicles that enter the defendant's premises leaving the gate or gates open after their visits. Further, Ms Sellwood gave evidence of an incident that she in part photographed (*Exhibit P3*) of the defendant driving into and damaging a shut gate. Further, there is evidence of conduct bordering on nuisance or harassment and threats of further adverse conduct made by the defendant that is apparently intended to indicate the assertion

of his belief that the plaintiff has no right to maintain the gates and that he does not have to shut them.

7. Ms Sellwood gave evidence of the defendant stating to her, (as he did to the court), that he had *free and unrestricted access* on the *right of way*; that he would never shut the gates. The circumstantial evidence tends to indicate that it was the defendant who placed a star picket at the base of the gate A: (*photos Exhibit P5*) to keep it open and stop it from being closed. In cross examination the plaintiff told the court that of the eight other properties enjoying the benefits of the *right of way*, only the defendant refuses to shut the gates. All other property owners leave the gates the way they were when used. The plaintiff has, in the interim, constructed a temporary fence structure to attempt to secure her premises as a result of not being able to maintain the gates. The various costs associated with this structure and the cost to fix the gate damaged by the defendant form the basis of a moderate claim for damages.
8. The defendant did not give evidence and substantially relies on his interpretation of the content of the rights that accrue from a *right of way*; his submission to the court indicates that in his view, having to alight from his vehicle, open the gates and shut them behind him interferes with the *right of way*. I asked him if he would feel the same if he could control the gate by use of a remote control without having to get out of the vehicle. He replied that that would only help him and not other people who had to access his land and as I interpreted his submission, he believes there is also a potential discrimination issue with gates for people with disabilities. It seems it is the fact that he must get out of his car to open and shut the gates that informs his belief that his rights are being interfered with.

Analysis of the Relevant Legal Principles

9. The title expresses the right of way as follows: *Lot 15 has free and unrestricted right of way over that part of Lot 11 designated right of way.* As to what may be the content of a *free and unrestricted right of way*, s 157 *Law of Property Act (NT)* states:

“Subject to s 161, a person who is entitled to the use or benefit of a registered easement or easement in gross of a right of way is to be taken to have the rights specified in Part A of Schedule 3.”

Schedule 3, headed *Rights under a Right of Way* states:

“The person entitled to the use or benefit of an easement or easement in gross of a right of way, may, for all purposes, enter on and pass along or over the servient land with or without a vehicle.”

10. The statute itself confers fairly limited rights and is silent on the issue to be resolved here. Here the defendant’s view is that his right is being interfered with by the maintenance of the gates by the plaintiff. It is accepted that Lot 11, (the plaintiff’s property) is the *servient tenement* and Lot 15, (the defendant’s property) is the *dominant tenement*. Generally a dominant owner can only complain where there is a *substantial interference* with an easement. Whether there has been a *substantial interference* is a question of fact: *Finlayson v Campbell* (1998) ANZ Conv R 388 Ext: (SC NSW); Young J.

“The defendant in this instance has not sought a remedy from the court alleging *substantial interference* rather the evidence indicates he has resorted to a degree of *self help* to advance his perceived right to enforce a *free unrestricted right of way*”.

11. *Halsbury’s Laws of Australia*, [355-12075] states in relation to *Obstruction of rights of way* (footnotes omitted):

“An easement may be granted subject to an obstruction. Where there is an obstruction at the time of the grant and the easement is not to be subject to this obstruction, the grantee must remove it. Where there is an obstruction to a right of way it will only be actionable if it

is substantial. For example, the grantor may be entitled to erect a gate across the right of way although the obstruction caused by the gate may be such as to constitute an actionable interference with the right of way. Any such gate must be left unlocked. In considering whether the obstruction is substantial, the court is entitled to consider all relevant circumstances including the rights of other persons to use the right of way.”

12. Mr Piper referred me to *Gohl v Hender [1930] SASR 158* a case where the plaintiff erected a gate instead of the previous slip-panels resulting in the defendant having to pass that new gate as well as her own. The defendant’s property enjoyed a right of way over the plaintiff’s property expressed as *full and free right and liberty to pass and repass*. After some nine months of using the gate, complications set in with stock movement and the defendant claimed the right to use the private road unhindered by the plaintiff’s gate. In particular, they refused to close the gate after them, with the result that cattle depastured on the plaintiff’s land escaped. In an action similar to the one before the Court today, Justice Napier held that there was a duty on the owner of the dominant tenement and others using and enjoying the right of way to shut the gate after opening and passing through it if leaving it open occasions damage to the owner of the servient tenement.
13. Justice Napier held that words such as *full free right and liberty* needed to be subject to what he called the *legal doctrine of relativity*, that is, to be understood and applied in the sense of appropriate to the subject-matter and, *appropriate to a servitude which calls for an adjustment of the competing rights of the owners of the servient and dominant lands, these words cannot imply an exclusive right*. In reference to the particular facts His Honour said the plaintiff’s were entitled to maintain their gate to fence their cattle in for the reasonable use and enjoyment of their property, provided there is no substantial interference with the defendant’s right to pass and repass. Further, he said (at 163) that persons who use a private road should open and close the gate. He considered this to be a natural and necessary incident of the use of the plaintiff’s land.

14. *Gohl v Hender (supra)* was cited with approval by the Full Court of Western Australia in *Timpar Nominees Pty Ltd v Archer [2001] WASCA 430* as standing for the proposition that [para 95]: *In the end, the question becomes one of fact to be determined upon the circumstances of the case in regard to the competing rights and interests of the parties....*
15. *Gohl v Hender (supra)* was also applied in *Stewart v Cooper (SCTAS), 20 January 1986, Justice Neasey – BC8600044*. *Stewart v Cooper* also discusses the Full Court decision in *Gohl v Hender* made prior to Justice Napier’s findings emphasising there must be damage consequent to leaving a gate open consistent with the ordinary law of nuisance before any action can succeed. Justice Neasey made similar declaratory orders to those made by Justice Napier on the basis that it was an *obvious proposition* that one of the primary needs of those who use rural land for stock grazing purposes is to prevent stock straying into or away from such land.
16. In the proceedings before me the defendant sought to distinguish these cases on the basis that they all involved movement of stock. He maintained this was not a feature of this case.

Application of the principles to these facts

17. In the balancing exercise that must ensue, I take into account that the defendant must open (and potentially shut) two gates to access his property and then a further gate of his own. There was evidence that the plaintiff had attempted to speak with the defendant about moving a gate back to make it easier for the defendant but he was not interested in compromising. The fact is that two gates are erected on land over which he enjoys a *right of way*. He must alight from his vehicle on each occasion to open and shut the gates. The gates were constructed in the current positions prior to the plaintiff and the defendant purchasing their respective lots of land. The enjoyment of the *right of way* is not absolute – the law will protect only substantial interferences with the *right of way*. Whether maintenance of gates over the

right of way constitutes *substantial interference* is a question of fact. Clearly, *locking gates* is a substantial interference with the rights of the dominant tenement. In my view the maintenance of gates is not a substantial interference in this case when balanced against the servient tenement's rights. In this case the plaintiff cannot properly secure her property without closing the gates. I imagine, (although this was touched on only briefly in the evidence), that a substantial part of the property would have to be re-fenced to provide anywhere near the security that is reasonable; the preponderance of evidence points to a substantial loss of enjoyment of the plaintiff's property through being unable to bring her horses onto the land; being unable to keep other dogs out of her property and her own dogs in; various acts of nuisance being caused on her property including on 8 May 2003 with motor-bikes and evidence of threats of more acts of nuisance by the defendant. I also take into account the fact that eight other adjacent property owners have no problem with opening and shutting the relevant gate at "A", indeed, in my view most people would agree on a private road (with or without a formal grant of *right of way*) that it is customary in Australia to leave a gate the way that you find it after passing through it. This is especially so on rural properties and is evident in the cases cited in this judgement. I note the loss caused by the defendant damaging the gate as described by the plaintiff. I note also the loss incurred by the plaintiff in having to provide extra security measures on account of lack of security because the gates are being left open regularly. In my view the gates are a natural incident of enjoyment of the title. The plaintiff's claim should succeed.

Relief

18. There will be judgement for the plaintiff.
19. I assess damages for the loss incurred to be \$1092 comprising \$183 for the repairs to the gate and \$909 for the new fence.

20. In relation to the equitable relief, I will make orders as follows:

- (a) The plaintiff is entitled to maintain unlocked gates at points “A” and “B” as detailed in the statement of claim.
- (b) The defendant or any agent of his is under a duty to close the same gates after opening them and using them.
- (c) The defendant or any agent of his is restrained from and an injunction is granted restraining him from unreasonable use of the right of way by leaving the gate open in breach of his duty under paragraph (b).

Dated this 3rd day of November 2003.

Jenny Blokland
STIPENDIARY MAGISTRATE