SUPREME COURT OF QUEENSLAND

CITATION:	*Elroa Nominees Pty Ltd v Registrar of Titles & Ors* [2002] QSC 176
PARTIES:	**ELROA NOMINEES PTY LTD** ACN 006 553 180 (applicant) **v** **REGISTRAR OF TITLES** (first respondent) AND **STATE OF QUEENSLAND** (second respondent) AND **COUNCIL OF THE SHIRE OF NOOSA** (third respondent) AND **NATIONAL AUSTRALIA BANK LIMITED** (fourth respondent)
FILE NO:	4195 of 2002
DIVISION:	Trial
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	19 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	31 May 2002
JUDGE:	Chesterman J
ORDER:	**1. That the application is dismissed** **2. That the applicant pay the respondents' costs of the application to be assessed on the indemnity basis**
CATCHWORDS:	TORRENS SYSTEM – CORRECTION OF REGISTER – whether boundaries of applicant's land incorrectly recorded – whether transfers of land to and from the State were valid COSTS – INDEMNITY COSTS – where application had no chance of success *Harbours Act* 1955, s 91 *Land Act* 1962, s 6 *Land Title Act* 1994, ss 188, 188B *Real Property Act* 1861, Form no. 2, Schedule C

Colgate-Palmolive Company v Cussons Pty Ltd (1993) 46 FCR 225, cited
Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd [1988] 81 ALR 397, cited

COUNSEL: Mr D. M. Beames for the applicant
Mr R. J. Douglas SC with Mr P. G. Bickford for the first and second respondents
Mr C. J. Carrigan for the third respondent
Mr B. Porter for the fourth respondent

SOLICITORS: Chris Reeve & Co Solicitors for the applicant
Crown Solicitor for the first and second respondents
Wakefield Sykes, Solicitor, Council of the Shire of Noosa for the third respondent
Thynne & Macartney for the fourth respondent

[1] **CHESTERMAN J:** The applicant is the registered proprietor of land described as Lot 9 on Crown plan MCH 3882 ("lot 9") in the County of March, Parish of Tewantin subject to an easement and a mortgage which may, for present purposes, be ignored. The land is a suburban block the southern boundary of which fronts onto Hilton Terrace which is an extension of Gympie Terrace which is the major thoroughfare through Noosaville. On the northern boundary of the applicant's land is a park, Chaplin Park, the northern boundary of which is the right bank of the Noosa River. Almost every aspect of fact and law concerned in the application is controverted by the parties but it may be confidentially believed that Chaplin Park is the result of reclamation works undertaken by the Noosa Shire Council, the third respondent some decades ago. Prior to the reclamation works the northern boundary of lot 9 (though it was not then owned by the applicant) was the riverbank. The same is true of the neighbouring lots of land along Hilton Terrace. The result of the reclamation was to fill tidal flats adjacent to the north of lot 9 and adjoining lots and to move the riverbank many metres to the north.

[2] The applicant, in effect, seeks orders pursuant to the *Land Title Act* 1994 to "correct" the description of lot 9 so as to substitute the present riverbank for the fixed survey line as the northern boundary. The result would be to increase the area of the applicant's land very substantially and correspondingly diminish the area of Chaplin Park.

[3] The applicant's neighbour, Cayman Quays Pty Ltd made a similar application which was heard and dismissed by Fryberg J on 31 January 2002. Both the applicant and Cayman Quays Pty Ltd were represented by the same solicitor, Mr Beams. The argument advanced on behalf of the applicant was also presented on behalf of Cayman Quays Pty Ltd and Fryberg J recorded in his reasons for judgment that he "understood Mr Beams not to pursue this argument although he did not in terms abandon it".

[4] In order to understand the argument it is necessary to say something about the history of the ownership of the land.

[5] That history is set out in considerable detail in the report by Mr Enever exhibited to Mr Beams' affidavit. In 1906 portion 151 was subdivided into two sections one of which had a further 15 subdivisions and the second of which had 12 subdivisions. The northern boundaries of all of these allotments was the high water mark of the riverbank. Subdivision 9 of section 1 was one of the new allotments. It has become lot 9. The plan of subdivision was numbered 32784 and apparently became registered in the Titles Office pursuant to the *Real Property Act* 1861.

[6] The certificate of title to lot 9 (then subdivision 9 etc) was issued on 13 August 1926. According to the certificate Mr and Mrs Whitmee were then "seized as joint tenants of an estate in fee simple in all that piece of land in the County of March, Parish of Tewantin containing 1 rood 6 perches being subdivision 9 of section 1 of subdivision 1 of portion 151 on plan catalogue M8-176 deposited in the Office of the Registrar of Titles, Brisbane which . . . land was part of the portion marked 151 delineated in the Public Map of the said parish deposited in the Office of the Surveyor General". The plan drawn on the certificate shows the northern boundary as the Noosa River.

[7] On 21 August 1969 the land was transferred to Mr and Mrs Hassett. On 26 February 1974 they transferred the land to their private company, Hassett Holdings Pty Ltd.

[8] Meantime in 1970 Warren Lawrence, a surveyor, prepared three survey plans numbered respectively MCH 3881, 3882 and 3883. Lot 9 is, as I have mentioned, included in plan MCH 3882. The plans redefine the allotments between Hilton Terrace and the Noosa River by making the northern boundary of the allotments a straight survey line in place of the natural boundary of the riverbank.

[9] The survey was presumably carried out to give effect to the third respondent's reclamation works which resulted in the riverbank being established a considerable distance to the north. An Order in Council made 30 March 1967 authorised the third respondent to reclaim land lying below the high water mark including the area abutting into the north of the land. The Order in Council contained a condition that the irregular boundaries of the freehold land abutting the reclamation area should be straightened by a give and take line so that the final area of the allotments was no less than they had been prior to the reclamation and re-survey.

[10] It is perhaps worth recording some remarks made by the Land Court which gave permission to the third respondent pursuant to s 91 of the *Harbours Act* 1955 to reclaim the land. The member said:

> "I was informed by Mr McKenna that in the locality of his allotment the area was covered by about five to six feet of water at the height of an average seven foot tide. As the tide recedes the area becomes a quagmire. The allotments abutting the proposed reclamation have, therefore, no deep water or attractive river frontage. It would be impracticable to anchor a small dingy in the area. The only use apparently made of the tidal land proposed to be reclaimed by any of the owners of adjoining land, is crab catching by Mr Wallace.
>
> The general appearance of the subject area is in sharp contrast to the foreshores of the river adjoining on the east which have recently been reclaimed by the Noosa Shire Council and appear to be in the

> process of being grassed and turned into an attractive picnic and tourist area. . . . Over the years a sandbank has formed in the river approximately along the line of the attached plan marking the river boundary of the proposed reclamation area. This sandbank for all practical purposes forms a true bank of the river. Beyond it lies deep water and small boats may be anchored out from it."

[11] In order to give effect to the Order in Council which required the northern boundaries of the allotments bordering the reclamation to be redrawn by the give and take line the then owners of the allotments surrendered them to the Crown which, by subsequent deed of grant, granted new allotments to the previous owners, with the re-drawn northern boundary.

[12] On 27 September 1976 Hassett Holdings Pty Ltd:

> "Being the registered proprietor of an estate in fee simple . . . in all that piece of land situated in the County of March, Parish of Tewantin containing 1 rood 6 perches . . . being subdivision 9 of section 1 of subdivision 1 of portion 151 on plan M8-176 . . . under and in pursuance of the provisions of s 9 of the *Land Act* . . . do hereby surrender and transfer to Her Sovereign Majesty Queen Elizabeth the Second all its estate or interest in the said piece of land . . ."

[13] An endorsement on the certificate of title records that on 8 July 1977 Her Majesty was seized of an estate in fee simple of the land.

[14] By Deed of Grant dated 21 September 1977:

> "Elizabeth the second . . . Queen of Australia . . . do hereby grant unto . . . Hassett Holdings Pty Ltd all that parcel of land in our said state containing by admeasurement 1,191 square metres . . . situated in the County of March, Parish of Tewantin (being) subdivision 9 of section 1 of subdivision 1 of portion 151 as delineated on plan of survey catalogue number MCH 3882 deposited in the Office of the Surveyor General and as shown edged read on diagram hereon . . ."

The applicant acquired the land by transfer in December 1997 from Mr and Mrs Sawyer and Ms Cooper who were co-owners. The evidence does not show whether they acquired the land from Hassett Holdings Pty Ltd or whether there were intermediate proprietors.

[15] On 8 October 1987, before the applicant acquired it, the description of lot 9 was changed to become lot 9 on plan MCH 3882.

[16] The applicant's case is not easily comprehended. The essence of the argument appears to be that because MCH 3882 is not a plan registered in the Titles Office the description of land by reference to it is erroneous or in some way invalid. The applicant's real point seems to be that the Deed of Grant to Hassett Holdings Pty Ltd in September 1977 could not validly describe the land being alienated by the reference to an unregistered plan. The description of the land is said to be incorrect and should be rectified by substituting for the reference to MCH 3882 a reference to the former registered, plan 32784 which, of course, designated the northern boundary of lot 9 as the riverbank.

[17] The applicant's submission is:

> "Had MCH 3882 been a registered plan, it would have been required to demonstrate that (lot 9) was re-subdivision 9 of subdivision 9 of section 1 of subdivision 1 of portion 151 on registered plan 32784 . . . This would have been achieved by describing the subject land as re-subdivision 9 of subdivision 9 of section 1 of subdivision 1 of portion 151 on registered plan MCH 3882. However it was not registered and plan of subdivision RP 32784 . . . is the registered plan creating subdivision 9 of section 1 of subdivision 1 of portion 155."

[18] I cannot accept the argument. Indeed I do not understand it. Section 6 of the *Land Act* 1962 provided that the Governor in Council may, in the name of Her Majesty, grant in fee simple any Crown land within Queensland. Section 12 of the Act provided that:

> "The land comprised in any Deed of Grant may be described by means of a map or plan, stating such particulars as are necessary to sufficiently describe the land, and delineated upon the Deed of Grant."

There is no requirement that such a map or plan be registered with the Registrar of Titles. It is enough that the land is sufficiently identified from a map or plan. I note that Form no. 2 in Schedule C to the *Real Property Act* 1861, Certificate of Title, provides for the description of land "delineated in the Public Map . . . deposited in the office of the Surveyor General . . ." There is evidence that surveyor Lawrence's three plans were enrolled in the then Department of Lands to allow for the issue of new Deeds of Grant. This would appear to be in accordance with s 12 and the practice recognised by the Form that land may be identified from a map held as a public record by an appropriate officer of the Crown.

[19] The applicant's submission continues that plan MCH 3882:

> "Had to be registered in the Titles Office before the legal title to the part of subdivision 9 (re-subdivision 9) described in (the plan) could be validly transferred to Her Majesty . . ."

This is incomprehensible. Hassett Holdings Pty Ltd surrendered and transferred to the Crown the parcel of land of which it was the registered proprietor. The memorandum of transfer describes the land in the exact terms appearing in the register book. It was obviously not necessary for the survey plan 3882 to become registered, or for the land to be differently described, before Hassett Holdings Pty Ltd could transfer and surrender it to the Crown. Nor does that plan create a new subdivision of lot 9 which should be designated re-subdivision 9 of subdivision 9. Such a description would have been quite misleading. All plan 3882 did was to redefine a prepared new northern boundary of the lots to be affected by the reclamation.

[20] The applicant had a further argument which was, if I understand it correctly, that the surrender of lot 9 by Hassett Holdings Pty Ltd was invalid either because it did not purport to surrender all of the land held by Hassett Holdings Pty Ltd or because it is doubtful what was the land the subject of the surrender. The first alternative is apparently that Hassett Holdings Pty Ltd was, in reality, the proprietor of land extending over tidal flats to about where the present riverbank is located but it surrendered only that land depicted on the plan on the original Certificate of Title

which locates the northern boundary at the riverbank in about the location where the subsequent fixed boundary was drawn. The second alternative is that the surrender instrument makes it uncertain whether it was the greater or the lesser area of land which was meant to revert to the Crown.

[21] The argument seemed to be that because the surrender was invalid Hassett Holdings Pty Ltd remained the proprietor of the lot the northern boundary of which was fixed by the riverbank, which has now been extended by the reclamation works. It is to this enlarged area that the applicant has succeeded by the various intermediate transfers.

[22] The short answer to the submission is surely that Hassett Holdings Pty Ltd surrendered to the Crown all the land which it owned and which was described in and by its Certificate of Title. Whatever were the boundaries of that land all of it passed to the Crown. No part of it remained the property of Hassett Holdings which it could thereafter transfer.

[23] The title or estate which Hassett Holdings Pty Ltd acquired in September 1977 by virtue of the fresh grant is not the same as that which it formerly enjoyed. It is this new estate which has been the subject of further transfers culminating in the applicant becoming proprietor in December 1997. I cannot see that the applicant has any rights by reason of events which occurred prior to the fresh grant to Hassett Holdings Pty Ltd.

[24] A copy of the survey plan MCH 3882 which is in evidence shows that it is, as one would expect, a detailed surveyor's plan showing in detail the location and description of the boundaries of lot 9 by reference to survey marks, bearings and distances. There can be no doubt that the land depicted in the plan can be precisely identified and located.

[25] The applicant is the proprietor of the land described in its certificate of title, no more no less. I can see no basis for making an order pursuant to s 188 or s 188B of the *Land Title Act* to correct the description of its land. Accordingly I order that the application be dismissed.

[26] The applicant complains that it is resisted by more than the first respondent. It denies that any other respondent has an interest in resisting its claim for relief. The difficulty with that position is that the applicant made all respondents parties to its application and directed that the application be served on all of them.

[27] The respondents seek an order that their cost to the application be paid on the indemnity basis. It is submitted that the application was commenced and continued in circumstances where the applicant already must have known that it had no chance of success. See *Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225 and *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* [1988] 81 ALR 397. The court has usually been slow to award indemnity costs, but this appears to be a proper case for such an order. There is an element of vexation in the application. Identical applications were made on behalf of an adjoining owner represented by the same solicitor. The argument which I have rejected was advanced on that occasion but not persisted in when it met judicial scepticism. That applicant, Cayman Quays Pty Ltd made a second application despite the adverse adjudication. The second application was dismissed with indemnity costs.

There is neither merit nor legal justification in the application. The applicant, properly advised, would have known that its cause was hopeless. It should not have troubled the respondents with discredited arguments.

I order the applicant to pay the respondents' costs of the application to be assessed on the indemnity basis.