SUPREME COURT OF QUEENSLAND

CITATION:	*State of Queensland v Beames* [2002] QCA 209
PARTIES:	**STATE OF QUEENSLAND** (plaintiff/respondent) v **DOUGLAS MACLEOD BEAMES** (defendant/appellant)
FILE NO/S:	Appeal No 5021 of 2001 SC No 7742 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	25 March 2002
JUDGES:	Davies JA, Muir and Mullins JJ Judgment of the Court
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	REAL PROPERTY - FENCING AND BOUNDARIES OF LAND - LAND BOUNDED BY WATER - ACCRETION AND ENCROACHMENT - where defendant was the registered proprietor of land - where one boundary of the land was a tidal navigable river - whether the high-water mark at common law differed from that defined in the *Land Act* 1994 (Qld) PROCEDURE - SUPREME COURT PROCEDURE - QUEENSLAND - PRACTICE UNDER RULES OF COURT - SUMMARY JUDGMENT - where defendant was the registered proprietor of land - where land resurveyed - where resurvey showed apparent increase in land area - where plaintiff pleaded apparent increase in land area was not caused by gradual and imperceptible degrees of accretion and erosion, but by reclamation - where defendant applied for summary judgment - where defendant raised questions of fact - whether the defendant was entitled to summary judgment on any part of the plaintiff's claim *Land Act* 1994 (Qld), s 8, s 9, s 10 *Attorney-General v Chambers* (1854) 4 De G M & G 206; 43 ER 486, considered

Svendsen v State of Queensland & Anor, Demack J, Supreme Court Rockhampton No 32 of 1996, 29 April 1999, considered

COUNSEL: Appellant appeared on his own behalf
R J Douglas SC, with D J Campbell, for the respondent

SOLICITORS: Appellant appeared on his own behalf
C W Lohe, Crown Solicitor, for the respondent

[1] **THE COURT:** This is an appeal from a judgment given in the Supreme Court on 8 May 2001. The judgment was principally one refusing an application for summary judgment by the defendant Mr Beames in an action against him by the State of Queensland. In order to understand these proceedings it is necessary to say something about the relevant facts.

[2] At all times since 12 December 1995 Mr Beames, whom we shall refer to as the defendant, is and was the registered owner of a parcel of land which may be described, for present purposes, as Lot 29 Norman Park. The land has as one of its boundaries, Norman Creek. Although, in the action, the defendant did not admit in his defence that Norman Creek was and is, at that boundary, a tidal navigable river within the meaning of s 8 of the *Land Act* 1994 (hereinafter "the Act"), he plainly accepted that it was for the purpose of his application.

[3] The land had been surveyed in 1915 and that plan of survey became Registered Plan number 12574. The title to Lot 29 is described by reference to that Plan.

[4] Section 9 and s 10 of the Act, set out fully below, became law on 1 July 1995. On 12 October 1995 the defendant became the registered proprietor of Lot 29.

[5] In 1997 the land was resurveyed and a plan of resurvey based on that resurvey was registered some time in 1998[1] as Registered Plan number 905522. It stated on its face:

> "This plan is a resurvey only and does not cancel or otherwise effect [sic] the title to lot 29 on RP 12574".

[6] Registered Plan 905522 purports to show the area of lot 29, at the date of survey, as 1157 square metres, measured on the basis that the boundary of the lot with Norman Creek is the high-water mark, according to the common law definition thereof, at that date. It also purports to show the bank of Norman Creek as depicted by Registered Plan 12574. The area of Lot 29 as shown on the Registered Plan 12574 was 556 square metres. Although, in his defence in this action, the defendant denied that Registered Plan 905522 shows any increase in the area of Lot 29,[2] it does appear to show an increase of 601[3] square metres in the area of Lot 29[4] over that shown in Registered Plan 12574.

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1 Following the decision of this Court in *Beames v Leader* [2000] 1 QdR 347.

2 Further Amended Defence and Counter-claim filed 5 February 2001, par 8(a).

3 The difference between 1157 square metres and 556 square metres.

4 Further Amended Statement of Claim par 8A.

[7] In its statement of claim in the action the State of Queensland ("the plaintiff") alleged that this apparent increase in area was:

> "(a) not caused by a shift in the ordinary high water mark at spring tide by gradual and imperceptible degrees of accretion or erosion;
>
> (b) caused by the reclamation of Norman Creek, by works on and adjacent to Lot 29, which raised up the land, which previously had been below the ordinary high water mark at spring tides, to be land which was above the ordinary high water mark at spring tides ("the reclamation")."[5]

Those allegations involved assessment of complex and, arguably, contradictory evidence and could not be resolved satisfactorily on an application for summary judgment. It is not entirely clear why the defendant sought to argue these matters in this Court.

[8] In his defence and counter-claim the defendant made a number of related counter allegations[6] which similarly could not be resolved satisfactorily on an application for summary judgment. These included that because there had been no recorded movement of the ordinary high-water mark at spring tides other than in 1995, the plaintiff could not know if there had been any shift therein before or since 1995.

[9] The plaintiff claimed the following relief:

> "1. A declaration that the Plaintiff is the owner of the land comprising the bed and banks of Norman Creek, Brisbane in the State of Queensland contiguous with or adjacent to Lot 29 on Registered Plan 12574, County of Stanley Parish of Bulimba:
>
> (a) below the ordinary high water mark at spring tides, being the long term average of the heights of two successive high waters during those periods of 24 hours (approximately once a fortnight) when the range of tide is greatest at full and new moon:
>
> (b) alternatively below the mean high water mark, being the line of the medium high tide between the highest tide each lunar month, being the springs, and the lowest tide each lunar month, being the neaps, averaged out over the year,
>
> but in either case, ignoring the effect of any reclamation works undertaken on or adjacent to Lot 29;
>
> 2. A consequential declaration as to the true boundaries of such lands [sic];
>
> 3. An order that the Registrar of Land Titles bring in and register a re-survey plan reflecting such true boundaries;
>
> …"[7]

[10] The defendant counter-claimed for:

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5 Further Amended Statement of Claim par 10.

6 Further Amended Defence and Counter-claim par 10.

7 Further Amended Statement of Claim.

(a) a declaration that Lot 29 as resurveyed by Registered Plan 905522 has an area of 1157 square metres subject to the ambulatory Norman Creek boundary;
(b) alternatively a declaration as to the position of the ambulatory boundary of Lot 29.[8]

[11] By order of a Supreme Court judge dated 15 December 2000 the defendant was granted leave to apply for summary judgment "to argue the effect of section 10 of the *Land Act* 1994". In order to understand what his Honour had in mind by that order it is necessary to set out s 9 and s 10 and say something of their context in the Act.

[12] Section 5 of the Act, contained in Part 3 of Chapter 1 thereof, provides that the Act applies to all land including land below high-water mark. Sections 8 to 13 of the Act, with which we are concerned here, follow, almost immediately, in Part 4 of Chapter 1. There is nothing in that Part which would restrict its provisions to land other than freehold land. On the contrary Part 4 seems plainly to be a Code with respect to the ownership of land above and below high-water mark, defined in Schedule 6 of the Act to mean the ordinary high-water mark at spring tides.

[13] Section 9 and s 10 of the Act are in the following terms:

"**9 Land below high-water mark owned by the State**

(1) All land below high-water mark, including the beds and banks of tidal navigable rivers -

(a) is the property of the State, unless the land is inundated land or a registered interest in the land is held by someone else; and

(b) may be dealt with as unallocated State land.

(2) To remove any doubt, it is declared that if a tidal navigable river forms the boundary of a parcel of land or a person owns land on both sides of a tidal navigable river -

(a) the land below high-water mark is and always has been the property of the State; and

(b) if the line of the high water mark shifts over time by gradual and imperceptible degrees - the boundaries of the parcel shift with the high-water mark.

(3) No act to occupy, use, build works or remove material or product, with or without lawful authority, divests the State of its ownership of land below high-water mark.

10 Accretions owned by the State

Land that becomes raised above high-water mark, whether gradually and imperceptibly or otherwise, because of the carrying out of works, belongs to the State and may be dealt with as unallocated State land."

[14] The application for summary judgment came before another Supreme Court judge. It seems to have proceeded on the contention of the defendant that, whatever the facts may reveal, the plaintiff is not entitled to the relief which it seeks on the basis of s 9 or s 10 of the Act. Her Honour rejected that contention but expressed views about the construction and operation of those sections.

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[8] Further Amended Defence and Counter-claim par 21(e) and par 22.

[15] In this Court the defendant seeks the following declarations:

(a) section 9 of the Act does not alter the common law in relation to the ownership of lands bounded by a watercourse;

(b) in the alternative, s 9 of the Act does not alter the common law in relation to the boundary of freehold land adjoining a tidal navigable river;

(c) save for s 9(2)(a) of s 9, s 9 and s 10 of the Act have no application to freehold land;

(d) the ambulatory boundary of lot 29 is located at the time of survey by measurement of the mean high-water mark of Norman Creek as defined by the common law and not by measurement of the ordinary high-water mark at spring tides.

He also sought such further or other order as may be appropriate. Whether he may now seek declarations from this Court in this appeal may be doubted. But the declarations sought do, to some extent, clarify the arguments which the defendant, a solicitor who is representing himself, seeks to advance.

[16] The main contention of the defendant in this Court appears to be that, whatever the true facts are as to how or when accretions to his land occurred, he is entitled, at least, to whatever gradual and imperceptible accretions there have been down to the high-water mark according to the common law meaning of that term. It was held by the learned primary judge that the definition of high-water mark in the Act differs from the common law definition of high-water mark which is, the learned primary judge found, the mean high-water mark and her Honour accepted, for the purpose of the application, that the high-water mark at common law and as defined in the Act differed in the following way:

> "(i) The mean high water mark is the line of the medium high tide between the highest tide each lunar month, being the springs, and the lowest tide each lunar month, being the neaps, averaged out over the year (*Attorney-General v Chambers* (1854) 4 De G M & G 206 at 215; 43 ER 486 at 489).
>
> (ii) The ordinary high water mark at spring tides is the long term average of the heights of two successive high waters during those periods of 24 hours (approximately once a fortnight) when the range of tide is greatest at full and new moon (*Svendsen v State of Queensland & Anor*, Demack J, Supreme Court Rockhampton No 32 of 1996, 29 April 1999, paragraph [4])."

We are prepared to accept the correctness of that distinction for present purposes.

[17] The defendant contends that neither s 9 nor s 10 applies to Lot 29 and that, consequently, he is entitled to have his riparian boundary measured by reference to the common law definition of high-water mark as held by her Honour. In order to explain why, in our opinion, both s 9 and s 10 determined the riparian boundary of Lot 29 at all times during which it was owned by the defendant, it is necessary to say something of the relevant statutory history in relation to the defendant's ownership of Lot 29.

[18] In the *Harbours Act* 1955 "high water mark" was defined in the same way as it was later defined in the Act, that is, as ordinary high-water mark at spring tides. Tidal navigable river was also similarly defined.[9]

[19] The relevant operative sections of the *Harbours Act* were s 77 and s 79. The first of those relevantly provided:

> "(1) All … land lying under the … tidal navigable rivers in … Queensland, shall, unless and until the contrary is proved, be deemed to be the property of the Crown in right of this State.
>
> (2) Where a tidal navigable river forms the boundary wholly or in part of a parcel of land, lying under the bed thereof, alienated by the Crown -
>
> (i) Before the commencement of this Act, the bed and banks (to the line of high water mark) thereof shall be deemed to have remained the property of the Crown and not to have passed with the land so alienated;
>
> (ii) After the commencement of this Act, the bed and banks (to the line of high water mark) thereof shall, notwithstanding such alienation, remain the property of the Crown, and shall not pass with the land so alienated.
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> …
>
> Provided that as the line of high water mark forming wholly or partly the boundary of such land shifts by gradual and imperceptible degrees, so shall the boundary of that land shift also:
>
> Provided further that the provisions of this subsection shall be read so as not to prejudice or other affect any lease, conveyance, grant, disposal, right, interest, power, or privilege, of, in, over, or in relation to such bed and banks or any part thereof lawfully issued, made, granted, had, or conferred, whether before or after the commencement of this Act.
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> (3) No right or title to or interest or estate in any part of … any tidal navigable river in … Queensland being -
>
> (i) Crown land; or
>
> …
>
> shall by reason only of length of possession, usage, or continued occupation be allowed to be asserted or established against -
>
> (a) The Crown; or
>
> … "

[20] The relevant meaning of the second proviso to s 77(2) appears from s 79 which relevantly provided:

> "(1) Except with the prior permission of the Governor in Council or unless permitted by some Act, no land, being land other than Crown land, lying below high water mark shall be granted, sold, or otherwise transferred by any Harbour Board, Local Authority, or person whomsoever.

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[9] *Harbours Act* 1955 s 8. The definition of tidal navigable river is not identical but there does not appear to be any material difference. What is a tidal navigable river under the *Land Act* was necessarily a tidal navigable river under the *Harbours Act*.

> Every contract or arrangement for the granting, sale, or transferring otherwise of any such land shall, unless the grant, sale, or other transfer has been so permitted, so far as it relates to such grant, sale, or other transfer, be void and no effect shall be given thereto.
>
> (2) Except as provided or permitted by this Act, no part of any … land … lying under any … tidal navigable river in … Queensland shall be leased, conveyed, granted, or disposed of by or on behalf of the Crown to any Harbour Board, Local Authority, or person whomsoever without the special sanction of an Act:
>
> Provided that that provisions of this subsection shall not prejudice or otherwise affect the provisions of any other Act granting or conferring or authorising or permitting the granting or conferring of any lease, right, or interest, of, over, or in any land as aforesaid (including the provisions of 'the Mining Acts, 1898 to 1951,' 'the Fish and Oyster Acts, 1914 to 1945,' 'the Pearl-Shell and Bêche-de-mer Fishery Acts, 1881 to 1931,' and section forty-five of 'the Local Government Acts, 1936 to 1954,') nor any such lease, right, or interest whether granted before or after the commencement of this Act.
>
> Moreover no land as aforesaid shall at any time be deemed to be alienated from the Crown, irrespective of whether that land is or is alleged to be first alienated before or after the commencement of this Act, save with the special sanction of an Act or under an instrument issued under the authority of an Act wherein the intention to alienate that land is apparent."

[21] It appears clearly enough from these provisions of the *Harbours Act* 1955 that, at least from 1 January 1956, the date on which that Act commenced, the land which, at that date included Lot 29 extended no further than the ordinary high-water mark at spring tides notwithstanding that it had been alienated by the Crown before the commencement of that Act: s 77(2)(i). The *Harbours Act* was repealed[10] on 30 June 1994 but s 77 and s 79 were continued[11] until repealed upon the commencement of the Act.[12]

[22] It appears plainly to have been the legislative intention of these changes and the enactment of s 9 and s 10 to bring "into lands legislation and ownership and tenure issues for land below high-water mark, originally dealt with in the *Harbours Act* 1955"[13] and that, relevantly for present purposes, s 9 and s 10 do no more than continue the effect of s 77 and s 79. It may be, of course, that the effect of s 77 and s 79 was to resume part of lot 29 (that part between high-water mark at common law and high-water mark as defined) without compensation. But the legislature could

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10 By s 15 of the *Transport Infrastructure Amendment Act* 1994.

11 By s 10 thereof inserting s 103(1).

12 See s 527 thereof.

13 Land Bill 1994, Explanatory Notes, cl 9, cl 10

do that.[14] And, in any event, by the time the defendant acquired lot 29 on 12 October 1995 its riparian boundary was determined by s 9 and s 10.

[23] It follows from what we have said that the defendant fails in all of his contentions expressed in terms of the declarations which he seeks in his notice of appeal. Dealing with those in turn:[15]

> (a) and (b) Since the commencement of the *Harbours Act* 1955 the riparian boundary of lot 29 has been high-water mark as defined therein and subsequently in the Act.
>
> (b) and (c) Section 9 does not distinguish between freehold and other land. It applies to all land alienated by the Crown. So does s 10.
>
> (d) The ambulatory boundary of Lot 29 is, as appears from what we have said, defined by the high-water mark as that term is defined in the Act.

[24] It follows also that the defendant's contention in this Court, that he is entitled to whatever gradual and imperceptible accretions there have been down to the high-water mark in accordance with the common law definition must also fail.

[25] The rejection of these contentions does not result in a decision upon whether the plaintiff has any real prospect of success on all or any part of its claim though it does clarify that as between the parties the riparian boundary of Lot 29 is the ordinary high-water mark at spring tides. It follows that, leaving aside the question of the effect of any reclamation work on or adjacent to Lot 29 the plaintiff would be entitled to a declaration that it is the owner of the land comprising the bed and banks of Norman Creek, Brisbane in the State of Queensland contiguous with Lot 29 on Registered Plan 12574 County of Stanley Parish of Bulimba below the ordinary high-water mark at spring tides.

[26] However, as we understood the defendant, he also contends that, even if the reclamation work alleged in the statement of claim, which occurred before s 9 and s 10 became law, increased the size of Lot 29, the plaintiff is not entitled to a declaration which ignores the effect of that reclamation work; that is the declaration sought in paragraph 1(b) of the plaintiff's claim. It seems to us that that will depend upon issues of fact.

[27] In the first place, because the defendant has denied that any such reclamation work increased the area of Lot 29[16] that question of fact will need to be determined. But another of question which may need to be determined is whether, if it did increase the size of Lot 29, whether it did so gradually and imperceptibly. This question may arise in the following way.

[28] It seems to us to be correct, as the learned primary judge held, that s 9 is retrospective but s 10 is not. Section 9, which appears in any event to reproduce the

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14 *Pye v Renshaw* (1951) 84 CLR 58 at 79 - 80; *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at [149].

15 See [15].

16 Amended Defence par 10(ii).

first proviso to s 77(2) of the *Harbours Act*,[17] provides, in effect, that the high-water mark shifts over time only by gradual and imperceptible degrees: s 9(2)(b). It is unlikely, if reclamation work increased the size of Lot 29, that it would have done so by gradual and imperceptible degrees. But that question of fact may also need to be determined.

[29] These questions of fact cannot be resolved on this summary judgment application.

[30] It follows that the defendant was not entitled to summary judgment on any part of the plaintiff's claim. Accordingly the appeal should be dismissed with costs.

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17 Which in turn reproduced the common law: *Attorney-General of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599.