SUPREME COURT OF QUEENSLAND

CITATION:	*Elroa Nominees P/L v Registrar of Titles & Ors*; *Cayman Quays P/L v State of Qld & Ors* [2003] QCA 165
PARTIES:	**ELROA NOMINEES PTY LTD** ACN 006 553 180 (applicant/appellant) **v** **REGISTRAR OF TITLES** (first respondent) **STATE OF QUEENSLAND** (second respondent) **COUNCIL OF THE SHIRE OF NOOSA** (third respondent) **NATIONAL AUSTRALIA BANK LIMITED** ACN 004 044 937 (fourth respondent) **CAYMAN QUAYS PTY LTD** ACN 080 065 603 (appellant/applicant) **v** **STATE OF QUEENSLAND** (first respondent) **COUNCIL OF THE SHIRE OF NOOSA** (second respondent) **REGISTRAR OF TITLES** (third respondent)
FILE NOS:	Appeal No 5804 of 2002 Appeal No 5963 of 2002 SC No 4195 of 2002 SC No 125 of 2002
DIVISION:	Court of Appeal
PROCEEDINGS:	General Civil Appeal Application for Extension of Time/General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 April 2003
DELIVERED AT:	Brisbane
HEARING DATE:	1 April 2003
JUDGES:	Williams and Jerrard JJA and Muir J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Appeal No 5804 of 2002 – Appeal dismissed with costs** **Appeal No 5963 of 2002 – Application for extension of time within which to appeal dismissed with costs**

CATCHWORDS: CONVEYANCING – LAND TITLES UNDER THE TORRENS SYSTEM – INDEFEASIBILITY OF TITLE: CERTIFICATE AS EVIDENCE – CERTIFICATE AS CONCLUSIVE EVIDENCE – OF TITLE OF REGISTERED PROPRIETOR – where Deed of Grant made and re-survey of land conducted – whether re-survey subdivided freehold land and created new Lots – whether Deed of Grant defective due to description of land in the register

Harbours Act 1955 (Qld), s 77
Land Title Act 1994 (Qld), s 37, s 38, s 46, s 179, s 182, s 184

Attorney-General v Reeve (1885) 1 TLR 675, cited
Beames v Leader [2000] 1 Qd R 347, cited
Breskvar v Wall (1971) 126 CLR 376, applied
Brighton & Hove General Gas Company v Hove Bungalows Ltd [1924] 1 Ch 372, cited
Butcher v Lachlan Elder Realty [2002] NSWCA 237, cited
Colgate-Palmolive Co v Cussons Pty Ltd (1993) 46 FCR 225, cited
Southern Centre of Theosophy Inc v South Australia [1982] AC 706, cited
State of Queensland v Beames [2001] QSC 132, cited
Sunlea Investments Pty Ltd v State of NSW (1998) 9 BPR 16, 707, cited
Verrall v Nott (1939) 39 SR (NSW) 89, cited

COUNSEL: D M Beames, with leave for the appellant in Appeal No 5804 of 2002 and the applicant in Appeal No 5963 of 2002
R Douglas SC, with P Bickford, for the first and second respondents in Appeal No 5804 of 2002, and with R S Jones, for the first and third respondents in Appeal No 5963 of 2002
C J Carrigan for the 3rd respondent in Appeal No 5804 of 2002 and for the second respondent in Appeal No 5963 of 2002
B T Porter for the fourth respondent in Appeal No 5804 of 2002

SOLICITORS: The appellant in Appeal No 5804 of 2002 and the applicant in Appeal No 5963 of 2002 appeared on their own behalf
C W Lohe, Crown Solicitor for the first and second respondents in Appeal No 5804 of 2002 and for the first and third respondents in Appeal No 5963 of 2002
Wakefield Sykes for the third respondent in Appeal No 5804 of 2002 and for the second respondent in Appeal No 5963 of 2002
Thynne & Macartney for the fourth respondent in Appeal No 5804 of 2002

[1] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment prepared by both Muir J and Jerrard JA. I agree with all they have said.

[2] The title of Elroa Nominees Pty Ltd is derived from Deed of Grant, Volume 5669, Folio 224, entered in the Register on 14 September 1997. That appellant obtained title to the land therein described by transfer, and is now the registered proprietor of that land. So much is established by the registration of its title; *Breskvar v Wall* (1971) 126 CLR 376 at 385-6.

[3] That title does not include any of the land between the current southern bank of the Noosa River and the northern boundary of Lot 9 as shown in Plan Mch 3882.

[4] If there is any doubt as to the ownership of the land between the northern boundary of Lot 9 shown on Plan Mch 3882 and the bank of the Noosa River (and I am far from persuaded that there is any doubt), there is no basis on which Elroa Nominees Pty Ltd could claim title to that land.

[5] For the reasons given by both Muir J and Jerrard JA there is absolutely no substance in the contentions advanced on behalf of Elroa Nominees Pty Ltd and its appeal must be dismissed.

[6] Because there was no appeal within time from the decision of Fryberg J in the proceedings brought by Cayman Quays Pty Ltd, it was appropriate for the judge at first instance in the application brought by Elroa Nominees Pty Ltd to order that that company pay the costs of the parties it made respondents to its application on an indemnity basis; the second application sought to re-litigate issues determined by the earlier decision.

[7] It was, however, not unreasonable for the Court of Appeal to be asked to rule on the correctness of the reasoning of both Fryberg J and Chesterman J. In those circumstances the appropriate order to make on dismissing the appeal by Elroa Nominees Pty Ltd is that the respondents should have their costs assessed on the standard basis.

[8] The issues which would be raised by Cayman Quays Pty Ltd if itwere granted an extension of time within which to appeal are identical with those considered in the appeal by Elroa Nominees Pty Ltd. In those circumstances the appropriate order to make with respect to the application by Cayman Quays Pty Ltd is that the application for an extension of time within which to appeal be dismissed with costs.

[9] **JERRARD JA:** I have read and respectfully agree with the reasons for judgment and proposed orders of Muir J. I add the following comments.

[10] The appellant's argument, presented in detail by Mr Beames, identified a possible basis for invalidity in some of the reclamation work which had been carried out on the land described as Chaplin Park. This was that the Order in Council dated 30 March 1967 authorised reclamation work by the Noosa Shire Council of the land lying below the "high water mark" in the Noosa River, and by definition of that mark in s 77 of the *Harbours Act* 1955, that would be the ordinary high water mark at spring tide.[1] The appellant's written argument in reply contended that the evidence demonstrated that soil had been placed by the respondent Noosa Shire Council on freehold land in Chaplin Park above the high water mark. The argument did not identify when that land emerged above that mark; i.e. whether it was before or as part of the reclamation.

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1 See the discussion in *State of Queensland v Beames* [2001] QSC 132 at [7]-[9].

[11] The appellant's oral argument rejected the proposition that the land held by Hassett Holdings Pty Ltd had been added to by accretions. Mr Beames agreed that application of what is described as the doctrine of accretions, to the title to subdivision 9 held by Hassett Holdings Pty Ltd, would result in a finding that surrender of that title on 27 September 1976 to the Crown necessarily included the surrender of accretions to that land,[2] irrespective of the fact of that surrendered title being described with respect to a specified area, namely "one rood six perches 'be the same more or less.'"

[12] Instead, the appellant's argument was that Hassett Holdings Pty Ltd had a title, which Mr Beames submitted was equitable, to the (invalidly) reclaimed land north of the boundary of the appellant's Lot 9, and lying between that boundary and the Noosa River. That argument did not explain or suggest any basis for that title,[3] if not acquired by accretions, nor why it was an equitable title.

[13] Mr Beames next submitted that that equitable title had not been surrendered to the Crown by Hassett Holdings Pty Ltd, and had been retained. His final proposition was that it had been transferred to the appellant, apparently when the appellant acquired the title to Lot 9 by transfer from Hassett Holdings Pty Ltd, subsequent to the issue of the Deed of Grand of Land to Hassett Holdings Pty Ltd on 8 September 1977.

[14] The description of Lot 9 in that Deed of Grant did not include any of the reclaimed land to the north. Mr Beames' submissions did not explain how the transfer to the appellant of the title of Lot 9, granted by that Deed of Grant, could possibly include the asserted equitable title to that reclaimed land. On that ground alone the appellant is bound to fail.

[15] Regarding the costs orders, the appellants' conduct in litigating all the issues in the one appeal contrasts with the manner in which the same issues were unsuccessfully litigated in more than one application below, as described in the reasons for awarding indemnity costs. I therefore agree with the orders proposed as to costs.

[16] **MUIR J:**

The proceedings at first instance in Appeal 5804 of 2002

The appellant, Elroa Nominees Pty Ltd, by originating application, applied to the Supreme Court for orders, which included –

(a) An order directing the first respondent Registrar of Titles to correct the description of a parcel of freehold land registered in the appellant's name and recorded as "Lot 9 on Unregistered Plan Mch. 3882 in the County of March; Parish of Tewantin" by altering the plan reference in the description to "Registered Plan 32784";

(b) An order "about the amount of compensation to be paid" to the appellant by the second respondent State of Queensland "for the

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2 *Southern Centre of Theosophy Inc v South Australia* [1982] AC 706 at 716 and *Sunlea Investments Pty Ltd v State of NSW* (1998) 9 BPR 16, 707

3 The common law makes land gained from the sea, by harbour works, the property of the Crown. See *Attorney-General v Reeve* (1885) 1 TLR 675, the commentary in Australia Real Property Law by Bradbrook, MacCullum, and Moore, 3rd Edition, at [15.29], and *Beames v Leader* [2000] 1 Qd R 347 at [10].

unlawful deprivation of the [appellant's] title through the incorrect description".

[17] The application was dismissed with the appellant being ordered to pay the respondents' costs on an indemnity basis. This is an appeal from that decision.

The grounds of appeal

[18] There are three grounds of appeal. One is that the primary judge erred in finding that "any of the respondents had the standing to oppose the application". Another is that costs should not have been awarded on an indemnity basis "when no respondent had the standing to oppose the application". The ground which raises the substantive issues for determination on the appeal is that the primary judge erred in finding that –

> "(a) Mch 3882 which is a resurvey of Lot 9 (and certain other Lots) on Registered Plan 32784; sub-divided freehold land and thereby created new Lots;".

Relevant facts

[19] Plan 32784, registered in 1906, is a plan of survey of Subdivisions 1 to 15 of Section 1 and Subdivisions 1 to 12 of Section 2 of part of Portion 151, Parish of Tewantin. The northern and southern boundaries of the allotments appearing on the plan are depicted respectively as the Noosa River and the northern boundary of a road, subsequently named Hilton Terrace. It seems that the river frontage of the lots, one of which encompassed the land the subject of this application, changed over the years. A plan of re-subdivision of Lots 13 to 15 on Plan 32784, made in about 1940, indicates that between the boundaries of the lots and the Noosa River there existed "land cleared of mangroves and subject only to exceptional tides". These lots were approximately 75 metres east of the subject land which is or encompasses the land formerly described as Subdivision 9 of Section 1 of Subdivision 1 of Portion 151 on Registered Plan 32784. For convenience, it will be referred to at Lot 9.

[20] An Order in Council dated 30 March 1967 made pursuant to the *Harbours Acts* 1955-1966 authorised the third respondent to reclaim land lying below the high water mark of the Noosa River in a location which included the river frontage of Lot 9. It "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".[4]

[21] Survey plan Mch 3883, registered on 8 February 1980, shows a tract of land divided into Portions 163, 164 and 165 between the Noosa River and most of the lots contained in Registered Plan 32784 (including Lot 9) which have Hilton Terrace as their southern boundary.

[22] The plan identifies Portion 165, which comprises the great bulk of the land contained in the plan, as "Chaplin Park".

[23] A subsequent plan, Mch 5463 which was registered on 6 July 1989 replaced plan Mch 3883 and Lots 163 to 165 on that plan became Lot 165 on Registered Plan 5463. Lot 165 was declared a recreation reserve and the second respondent was

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[4] Judgment at first instance para [24].

appointed trustee of the reserve by Order in Council under the *Land Act* 1962 dated 3 August 1989.

[24] It is now proposed to discuss the dealings which have a direct bearing on the subject land and on the appellant's claims. In summary, they evidence the surrender by the registered proprietor of Lot 9 on Registered Plan MB-176 of all its title and interest in the lot and the subsequent grant by the Crown to that entity of freehold title to Lot 9 on Plan Mch 3882. The essential difference between the two parcels of land being that the northern boundary of the former was ambulatory, being defined by reference to the Noosa River, whereas the latter has a fixed straight line boundary.

[25] By Memorandum of Transfer registered on 8 July 1977, Hassett Holdings Pty Ltd, the registered proprietor of Lot 9, surrendered and transferred "its entire estate or interest in the said piece of land" to the Crown. The document described the land being transferred and surrendered as "all that piece of land situated in the County of March, Parish of Tewantin containing one rood six perches be the same more or less, being Subdivision 9 of Section 1 of Subdivision 1 of Portion 151 on Plan MB-176 being the whole of the land contained in Certificate of Title, Vol 1670, Fol 173".

[26] That description corresponds with the description in Certificate of Title No 307183, Vol 1670, Fol 173, which came into existence in 1926, save that the description in it includes the words "as shown on the Plan hereon, and therein edged red". That plan showed the Noosa River to be the lot's northern boundary.

[27] Deed of Grant, Volume 5669, Folio 224, entered in the register on 14 September 1977, after reciting the surrender of the land described in Certificate of Title No 307183, describes a grant to Hassett Holdings of "Subdivision of Section 1 of Subdivision 1 of Portion 151 as delineated on Plan of Survey Catalogue No Mch 3882 deposited in the Office of the Surveyor General and as shown edged in red on the diagram hereon" containing an area of 1,191 square metres. In the diagram the Hilton Terrace boundary of the new parcel coincides with the Hilton Terrace boundary of the surrendered parcel, but the northern boundary of the new parcel is a straight line marked on a plan not, as was previously the case, the Noosa River. The other two boundaries continue to run from the southern boundary at the same angles as before.

[28] Plan Mch 3882 is a resurvey plan of Subdivisions 1 to 12 and Resubdivisons 1 to 15 of Subdivisions 13 to 15 of Section 1 of Subdivision 1 of Portion 151 in the County of March, Parish of Tewantin. It was brought into existence in December 1970. Its significance for present purposes, apart from being the plan referred to in the Deed of Grant, is that it shows a large tract of land identified as Lot 165 on Mch 3883 between the northern boundary of Lot 9 and the Noosa River.

[29] The appellant acquired its interest in Lot 9 by a transfer from successors in title of Hassett Holdings registered on 10 December 1997. A copy of that transfer is not in evidence.

The appellant's substantive arguments

[30] Mr Beames, who appeared for the appellant, argued that because Plan Mch 3882 is unregistered, it does not cancel Registered Plan 32784 which created the subdivisions which included Lot 9 and that the proper description of Lot 9 should

contain reference to Registered Plan 32784 and not Mch 3882. For the appellant, the happy consequence of this would be to greatly increase the area of the lot by making its northern boundary the Noosa River rather than, as shown on the Deed of Grant, the straight line boundary provided in Plan Mch 3882.

[31] Mr Beames repeatedly made the point that the ambulatory northern boundary of Lot 9 could not be altered to the straight line boundary shown on the Deed of Grant merely by virtue of a surveyor preparing a plan which showed the boundary as a straight line rather than the Noosa River.

[32] That contention is quite correct. Even registration of a plan of survey does not operate to change the lawful boundaries of land contained in a certificate of title in respect of the whole or part of the land the subject of the plan of survey.[5] Contrary to the appellant's understanding, however, the learned primary judge did not find to the contrary.

[33] Mr Beames also mounted an attack on what the appellant saw as a deficiency in the state of the title in relation to Lot 165 and on the first respondent's certification of the appellant's title to Lot 9. The alleged problem with the certification was that it identified Lot 9 by reference to Plan Mch 3882. The latter point, however, is merely a consequence which flows from the issue and registration of the Deed of Grant which describes the land the subject of the grant by reference to Plan Mch 3882. If the Deed of Grant is valid the certification is accurate.

[34] It is unnecessary to investigate the appellant's attack on the second and third respondents' title to Lot 165 (Chaplin Park). Whatever may be the state of those respondents' title to the parklands, it does not have any bearing on the appellant's title to Lot 9, or for that matter, on the area of Lot 9.

[35] A limb of the appellant's argument is that the Deed of Grant is defective because it describes the land contained in it by reference to an unregistered, rather than a registered plan. No authority for this proposition was cited and there is nothing in the *Real Property Act* 1861 as amended or the *Land Act* 1962-1975 (the relevant legislation in existence at the date of the Deed of Grant) which supports it. The argument has the curious feature that, if correct, it might produce the result (subject to the effect of registration under the *Real Property Act* 1861 and the *Land Title Act* 1994) that the appellant had no interest at all in Lot 9. The fourth respondent, not surprisingly, expressly disassociated itself from the argument.

[36] The appellant's arguments generally proceed by ignoring the reality of the nature and derivation of its title. Detailed reference has been made to title descriptions above in order to show that Hassett Holdings' transfer and surrender registered on 8 July 1977 disposed of the whole of that company's interest in the land the subject of its Certificate of Title at the date of the transfer and surrender. The appellant's response is to assert that it did not dispose of that part of the land between the Noosa River and the northern boundary of Lot 9 as depicted in the Deed of Grant. But the Certificate of Title shows that, at the time of the transfer and surrender, the northern boundary of Lot 9 was identified by reference to the river.

[37] The description in the Certificate of Title included reference to Plan MB-176. That plan has not been able to be located but, having regard to the plan on the Certificate

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5 *Beames v Leader* [2000] 1 Qd R 347 at para 26.

of Title itself, it is safe to conclude that Plan MB-176 also showed the Noosa River as being the northern boundary of Lot 9. By operation of law, any gradual and imperceptible accretions to Lot 9 brought about by the operation of nature, whether or not assisted by artificial means, became the property of the registered proprietor of Lot 9 and within its title.[6] Conversely, if the accretions were not of this nature they were not included in the title.

[38] Because of the foregoing it is unnecessary to consider the appellant's novel, and implausible, contention that it had an "equitable title" (based on an "intention to transfer" by the unidentified transferor to the appellant of Lot 9) in the land bounded by the Noosa River in the north, the northern boundary of Lot 9 marked on Plan Mch 3882 in the south and in the east and west, by the projection to the north of the eastern and western boundaries of Lot 9 shown on that plan.

[39] Returning now to the chain of title. Deed of Grant Volume 5669 Folio 224 was issued and registered in respect of the land described in it. That description was by reference to Lot 9 in Plan Mch 3882. The grantee got title to the land described in the grant, nothing more and nothing less. When the grantee transferred its interest in the land contained in the Deed of Grant, plainly it could dispose of nothing more than that title provided. The appellant obtained its title by transfer from a successor in title to Hassett Holdings, the original grantee. If for some reason, which remains to be revealed, there is a parcel of land to the north of Lot 9 on Crown Plan Mch 3882 to which neither the second nor third respondents have title, that cannot lead to the conclusion that the appellant has title to it.

[40] The appellant's contentions also overlook the following principle expressed by Barwick CJ, in whose reasons Windeyer J concurred, in *Breskvar v Wall*–[7]

> "The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration."

[41] The *Land Title Act* 1994 did not abolish those principles.[8]

Conclusion and costs

[42] The appellant is hardly in a position to complain about the respondent's lack of standing. It joined them as parties. Nor has the appellant been able to demonstrate that the primary judge's use of discretion miscarries because costs were awarded on an indemnity basis. The history of the subject claim and that in matter S4195 of 2002 and the lack of merits of the appellant's argument when coupled with the discretion vested in the primary judge, justified the order. The respondents sought indemnity costs on the appeal but I do not consider that they should be ordered. The appellants have sought to have their points tested in one appeal. The points lack

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6 *Brighton & Hove General Gas Company v Hove Bungalows Ltd* [1924] 1 Ch 372; *Verrall v Nott* (1939) 39 SR (NSW) 89 and *Butcher v Lachlan Elder Realty* [2002] NSWCA 237 at para 10.

7 (1971) 126 CLR 376 at 385-6.

8 See *Land Title Act* 1994, ss 37, 38, 46, 179, 182 and 184.

merit but the appellant's conduct in bringing the appeal to have the points determined falls outside that range of conduct which is usually thought necessary to justify an order for indemnity costs.[9]

[43] For the above reasons, I would order that the appeal be dismissed with costs.

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[44] The appeal in this matter was not commenced within time and the applicant needs an extension of time within which to institute its appeal. It is common ground between the parties that the issues which would be raised in this appeal are the same as those raised in Appeal 5804 of 2002 and that the outcome of the appeal would follow that in Appeal 5804. Consequently, I would decline any extension of time and order that the application for extension of time be dismissed with costs.

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[9] See eg., *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225.