SUPREME COURT OF QUEENSLAND

CITATION:	*North & Anor v South East Qld Water Corp Ltd* [2003] QSC 407
PARTIES:	**LEOFRIC DUDLEY NORTH** **MARY LYNETTE NORTH** (plaintiffs) **v** **SOUTH EAST QUEENSLAND WATER CORPORATION LIMITED** ACN 088 729 766 (defendant)
FILE NO:	7317 of 2003
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	20 November 2003
JUDGE:	Muir J
CATCHWORDS:	LANDLORD AND TENANT - FORM AND CONTENTS OF LEASE - CONSTRUCTION OF LEASES - where the plaintiff sought the defendant's consent to the assignment of its lease and such consent was refused - where the defendant contended that under the terms of the lease the proposed assignment would give rise to a right to terminate the lease and that this entitled it to refuse the assignment - consideration of the meaning of the term 'contiguous to the demised land' under the lease *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310 *L Schuler AG v Wickham Machine Tool Sales Ltd* [1974] AC 235 *Spillers Limited v Cardiff (Borough) Assessment Committee & Pritchard (Revenue Officer)* [1931] 2 KB 21 *Waihi Grand Junction Gold-Mining Co Ltd v Dudson* (1909) 29 NZLR 499
COUNSEL:	H B Fraser QC, with A P J Collins, for the plaintiffs B R Gore QC, with D J Campbell, for the defendant

SOLICITORS: Woodgate Hughes for the plaintiffs
Clayton Utz for the defendant

[1] **MUIR J:** This case concerns the construction of clauses 3(a) and (b) of a lease entered into in 1995 (with a commencement date of 1 January 1993) between the plaintiffs as lessees and the defendant as lessor over land situated between Lake Wivenhoe's full supply and full flood levels. Such land was described in correspondence between the parties leading up to the entering into of the lease as "the flood reserve area of Lake Wivenhoe".

The background to the dispute

[2] The following entry appears on the front page of the instrument of lease –

> "5. **Description of premises being leased**
> That part of the said land shown hatched in black on the plan herewith."

[3] Item 2 on the front page contained the words –

> "**Description of lot**
> See Annexure."

[4] Annexure A contains the description "Lot 241 on Plan SL1100". A copy of that plan forms part of the lease and has hatched in black on it the area of the demised premises. That land is shown on the plan in four discrete parcels. D is the southern most parcel lying entirely to the east of the Wivenhoe Somerset Road and comprising 138.6 ha. Parcel C, which is 1.7 ha in area, is to the west of the road, level, approximately, with the middle of parcel D. Parcels B and A are on the shores of the lake to the north of parcel D. Parcel B is separated from parcels D and A by the road and is prevented by the road from having a frontage to the lake except where part of a small inlet from the lake is crossed by the road. It is 22 ha in area. Parcel A, the northern most portion, is 37.1 ha in area. Its southern boundary is the road and its eastern and north eastern boundaries are the lake. For convenience, a plan showing the demised area and other relevant property boundaries is an appendix to these reasons.

[5] Clause 3(b) of the lease makes reference to "the adjoining land". That term is defined as "the lands set forth in the said Schedule". The Schedule of adjoining land lists the following four parcels –

> "Description — Area
> Lot 77 on Plan SL 12375 — 105.5 hectares
> Lot 19 on RP 158231 — 52.21 hectares
> Lot 24 on RP 158231 — 4.473 hectares
> Lot 29 on RP 158154 — 15.5 hectares"

[6] At the time the lease was entered into, the plaintiffs were the registered proprietors of the four lots comprising the adjoining land. Lots 24 and 29 have the road as their eastern boundary. Lots 19 and 77 are to the west of the road. Lot 18, which is not within the description of "adjoining land", separated Lot 19 from Lot 77. In mid 2002 lots 18, 19 and 77 were subdivided to produce the property boundaries shown on the plan in the Schedule.

[7] On 3 March 2003, the plaintiffs entered into a contract to sell lot 80 subject to the following condition –

> "This contract of sale is subject to and conditional upon the transfer of the benefit of the seller's lease from the South East Water Corporation Limited of *land adjacent to the subject property* to the buyers on or before the date of settlement." (emphasis added)

[8] The "land adjacent" to lot 80 is parcel B of the demised land. The plaintiffs sought consent to the assignment to the purchasers of lot 80 of their interest in the lease insofar as it concerns parcel B. Consent was refused and the plaintiffs then sought the defendant's consent to a sublease to such purchasers of parcel B. That consent was refused also. The grounds of refusal, which are relevant for present purposes, are that any such assignment or sublease would result in the adjoining land not being "contiguous to the demised land". Under those circumstances, the defendant asserted, clause 3(b) gives it the right to terminate the lease and clause 3(a) entitles it to refuse an assignment or subletting which would enliven the right of termination.

Clauses 3(a) and (b) of the lease

[9] Clauses 3(a) and (b) provide –

> "(a) The Lessee shall not assign transfer sublet set over or otherwise part with the possession of the demised land or any part thereof or enter into any agreement or arrangement so to do without the consent of the Lessor first had and obtained which consent shall not be unreasonably withheld only where the proposed assignee or transferee is in arrears by six months or more in the payment of rates legally payable to and demanded by the Esk Shire Council in respect of any land, or the proposed transferee or assignee is, or has been at any time following the commencement of the Wivenhoe Dam and Hydro-electric Works Act 1979, a lessee from the Lessor of any land and in the reasonable opinion of the Lessor the proposed transferee or assignee has an unsatisfactory record of rental payment. **In seeking any consent the Lessee shall be required to provide such information and advice as will satisfy the Lessor that this lease will not, as a result of the proposed assignment, transfer or subletting, at that time become liable to be determined pursuant to Clause 3(b) hereof.** [emphasis added]
>
> (b) The Lessor may at his option determine this Lease in the event that the person having the use and occupation of the demised land for the purpose of grazing stock is not for a period of one month or more identical with the person having the use and occupation for grazing purposes and whether or not for any other purpose of -
>
> (i) where the adjoining land is not owned by the Lessor, a parcel of at least 65 hectares of that adjoining land, such parcel being contiguous to the demised land, or the whole of such land where such land totals less than 65 hectares in area; or
>
> (ii) where the adjoining land is owned by the Lessor, the whole of such land.
>
> For the purposes of this Clause 3(b), the term 'adjoining land' means the lands set forth in the said Schedule. The Lessor shall upon the

> termination of this Lease use his best endeavours to provide the Lessee a maximum of one easement across the demised land in favour of the adjoining land for the purpose of piping water;".

The defendant's contentions

[10] The defendant argues that the plaintiffs' adjoining land is not contiguous with the demised land unless it is contiguous with each remaining parcel of the demised land. It contends that if parcel B is the subject of any assignment or sublease, no part of the adjoining land will be contiguous with parcel A which, as a result of the assignment or sublease, will be separated from parcels B, D and C. As matters presently stand, it is said, parcel A of the demised land is contiguous with lot 80 and parcel B.

[11] The defendant seeks to draw support for its construction from the concluding words of clause 3(a) which, it is submitted, have in contemplation that an assignment or sublease might create an island or "islands of demised land … which were not contiguous with the minimum 65 ha parcel" of the adjoining land.

[12] It contends that the reason for the contiguity requirement was a concern that in the event of a flood a lessee should have available land above flood level to which it could transfer its stock immediately. That contention, the defendant claims, is supported by the description of the demised land as the "flood reserve area" in correspondence between the parties preceding the entering into of the lease.

Aspects of the plaintiffs' evidence

[13] Mr North, who negotiated the lease on behalf of the plaintiffs, swears that he was not informed by the defendant of any such considerations and did not know of any concern about stock movement or safety at the time the lease was entered into. Additionally, he swears –

> "4. The areas of Section A which are accessible to cattle are some of the highest land I have on my property. If the water level rose to EL75, being the highest level the dam could retain, then at least half of Section A would remain well above the water line and accessible to cattle. Since the dam was built about 20 years ago, to the best of my recollection the highest level in the dam occurred in February 1999. The water level then rose to about 2.5 metres above EL67. Nearly three quarters of the land in Section A remained above the water line and available to cattle.
>
> 5. Even putting aside the fact that there would be no need to move the cattle if there were the highest possible flood in the dam, it is not possible to move cattle from Section A directly to Lot 80 or directly to Section B. On the roadside boundary of Lot 80 and Section B the land is characterised by steep cliffs and gullies. That makes it practically impossible for cattle to enter these parcels of land. In addition, it would be irresponsible to attempt to walk cattle from Section A of the lease to Lot 80 or to Section B because of blind corners on the road in those areas."

This evidence is not disputed.

The plaintiffs' contentions

[14] It is submitted on behalf of the plaintiffs that, after the proposed sale and assignment or sublease, the plaintiffs will remain the proprietors of lots 78 and 79 and the parts of those lots not formerly within lot 18 (which was not within the definition of "adjoining land") exceed 65 hectares. Lots 78 and 79 are contiguous with the demised land as they both adjoin parcel C and are separated from parcel D only by the road. Contiguity, for the purposes of subclause (b), is established by contiguity with any of parcels A, B, C and D as the subclause does not require that the 65 ha parcel of the adjoining land be contiguous to each parcel of land comprising the demised land.

Construction of clause 3(b)

[15] Under clause 3(b), the right of termination of the lease, relevantly, will not arise where –

(i) a person has the use and occupation of the demised land for the purpose of grazing stock;

(ii) such person is the person who has the use and occupation for grazing purposes of a parcel of the adjoining land of at least 65 ha in area; and

(iii) such parcel of adjoining land is "contiguous to the demised land".

[16] It seems to be common ground that requirements (i) and (ii) are satisfied. The critical contest then is whether the plaintiffs' adjoining land can be said to be "contiguous to the demised land" in circumstances in which the plaintiffs no longer have the right to use and occupy parcel B for the purpose of grazing stock.

[17] Clause 3 (b) attaches its requirements, not to the lessee, but to "the person having the use and occupation of the demised land" for the prescribed purpose. That person must be the one who has the prescribed use and occupation of the parcel of adjoining land, contiguous to the demised land.

[18] Clause 3(a) contemplates that a lessee may sublease or otherwise part with possession of the whole or part of the demised land and it is implicit in the language of subclause (b) that the person having the use and occupation of the demised land may not be the lessee. What is sanctioned by subclause (a), plainly, is not implicitly prohibited by subclause (b).

[19] Having regard to these considerations, clause 3(b) should not be construed as addressing only the case where the lessee has the use and occupation of the whole of the demised land. If the subclause is construed literally, where there is a partial assignment or sublease, the subclause will cease to be applicable. In such a case there will be no "person having the use and occupation of the [whole of the] demised land". I do not regard that construction as tenable. Not only is it lacking in commercial sense but it is contrary to the implicit acknowledgement in clause 3(a) that a subletting or assignment may bring subclause (b) into operation. Commercial or business contracts ought be construed, wherever possible, so as to make commercial sense of them.[1]

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[1] *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310 at 313-314 and *L Schuler AG v Wickham Machine Tool Sales Ltd* [1974] AC 235 at 251.

[20] The object of clause 3(b) is not immediately obvious. It has two limbs under which the person having the use and occupation for grazing purposes of the demised land must also have such use and occupation of –

(a) either a parcel of at least 65 ha of the adjoining land contiguous to the demised land; or

(b) where such use and occupation is over an area of the adjoining land which "totals" less than 65 ha, the whole of such land (i.e. the adjoining land).

[21] The precise meaning of the two limbs is not immediately obvious. The first limb appears to refer to a piece of land of at least 65 ha which is not necessarily the whole of the land in a particular title. The second limb seems to require that the subject land be the whole of the land in the title or titles which relate to that land where its area is less than 65 ha.

[22] The subclause thus contemplates that a person who has the use and occupation for grazing purposes of the minimum parcel of land into which the adjoining land may be subdivided may have the use and occupation of the whole demised land. Plainly, any common boundary (where there is one) may be quite short and may be near an extremity of the demised land. It is not even completely clear that such smaller parcel needs to be contiguous with the demised land, but I consider that, on the better construction of the provision, contiguity is required.

[23] It is far from obvious that the purpose of the subclause is to do with stock numbers on the demised land. Nor does it appear to be directed to ensuring that if stock are depastured on the demised land, there is a parcel of adjoining land sufficiently large to sustain them for any appreciable period if they need to be removed from the leased land because of flood or some other reason.

[24] The term of the lease is 60 years. There is no evidence as to the minimum area into which the adjoining land may be subdivided under the relevant Local Authority Planning Scheme but the parties to the lease must have understood there to be a realistic prospect that subdivision into lots of 1 ha or even less may have become permitted during the term of the lease. More significantly, there is evidence that there is adequate high ground on parcel A above any realistic flood level. Also there is no evidence of whether similar high ground exists on parcels B, C and D.

[25] Despite the foregoing analysis, I do not attach significance to the second limb of clause 3(b). It would be inappropriate to take any other approach as the parties disregarded it in argument, no doubt for good reason. I suspect that the second limb is standard form wording which the parties do not regard as applicable to the facts of this lease. A more relevant historical fact is that at the date of the lease the plaintiffs owned and were using the adjoining land for grazing purposes. It suited the purposes of the defendant and also those of the plaintiffs that the foreshores of the lake adjoining or abutting the adjacent land be made available to the plaintiffs for grazing purposes.

[26] Mr Fraser made the point in argument that there is but one lease and one "demised land" even though there may be physical separation between the four parcels comprising the demised land. In other words, the "demised land", although made up of separate parcels of land, is an indivisible concept. If regard is had to the aerial photograph, at p 73 of Exhibit 4 (the appendix to these reasons), it will be seen that

the demised land may be perceived as but one long parcel of land which has the road running beside and through part of it.

[27] There is some substance also in the point that if the defendant wanted a requirement of contiguity between the adjoining land and each parcel of the demised land of which the user and occupier of the adjoining land had use and occupation it would have been simple enough to state that expressly in the lease.

[28] In my view, however, the correct construction of clause 3(b) is that which requires the clause to be construed as if it provided –

> "… in the event that the person having the use and occupation of **the whole or part of** the demised land … is not … identical with the person having the use and occupation of a parcel of at least 65 hectares of that adjoining land, such parcel being contiguous with the whole or **that part of** the demised land (as the case may be)".

[29] On that construction, contiguity must be between the adjoining land and the part of the demised land under the same occupation. As the point of requiring contiguity seems to be to give a right of use and occupation of the demised land only to occupiers of land in close proximity (to use a neutral expression) to the demised land, that construction appears sensible. Once a sublease or assignment in respect of part of the land takes place, it no longer makes much sense for the contiguity requirement to continue to relate to the whole of the demised land as if no sublease or assignment had taken place.

Will there be sufficient contiguity between the retained part of the adjoining land and the demised land after assignment of parcel B of the demised land?

[30] What in this context is meant by "contiguous"? *The Oxford English Dictionary*[2] defines "contiguous" as –

> "1. Touching, in actual contact, next in space; meeting at a common boundary, bordering, adjoining. Const *to*, formerly also *with*. 2. Next in time or order, immediately successive. … 4. Continuous, with its parts in uninterrupted contact. 5. *loosely*, Neighbouring, situated in close proximity (though not in contact)."

"Contiguity" is defined as – "1. The condition of touching or being in contact".

[31] In *Waihi Grand Junction Gold-Mining Co Ltd v Dudson*[3] Edwards J said –

> "The word 'contiguous' … is not a word of precise meaning ... The definition of the meaning of the word 'contiguous' in standard dictionaries, and the mode in which that word has been used by the most eminent judges, as well as common usage, all warrant its being construed in the sense of near to, but not actually touching. This also is the case with the word 'adjoining' which would … convey to most men the meaning of actual contact more clearly than the word 'contiguous'."

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2 2nd ed.

3 (1909) 29 NZLR 499 at 505.

[32] A rather more restrictive approach to the meaning of contiguous was taken in the judgment of the court in *Spillers Limited v Cardiff (Borough) Assessment Committee*[4] where it was said –

> "No person of education or intelligence would understand, or suspect, that a writer or speaker was using the word 'contiguous' in its loose sense of 'neighbouring,' unless there was something in the context that compelled that conclusion. If a man spoke or wrote of 'contiguous islands' he must necessarily mean 'neighbouring,' because one island must be separated by water from another. But if he spoke of 'contiguous houses' it would be difficult to suppose that he meant anything but houses touching each other.
>
> The legal canon is the same. If there is a demise of one house in a street, and a covenant by the lessor as to 'contiguous' houses, and if there be evidence that at the date of the lease all the houses in the street existed as detached and separate buildings, then the word 'contiguous' may be rightly construed as meaning 'next adjacent,' or 'contiguous houses' as 'houses on contiguous plots.' *Haynes v. King* [1893] 2 Ch. 439 is an example of such a case. And if legal authority for so self-evidence a proposition is needed, it may be observed that North J. in that case says that 'contiguous' means 'touching.' And so it does, and must, unless the context, or the subject-matter, necessarily requires the improper alternative meaning."

[33] Legal dictionaries contain numerous examples of circumstances in which "contiguous" has been held to mean "in actual contact", "touching" or "sharing a common border". They also contain examples of the word being used in the broader sense of "close proximity", "near" or "neighbouring".[5]

[34] In clause 3(b) "contiguous" cannot be used in its strict or, to my mind, normal sense of "touching" or "bordering" as it is implicit that the adjoining land, as defined, is contiguous with the demised land, although separated from parcels A and D and by the road. Each of the four parcels of the demised land are also separated from each other by the road.

[35] But "contiguous" in its natural or even strict meaning can accommodate, readily enough, parcels of land bordering or touching save for a public road which forms a common boundary. On the other hand, what the *Oxford English Dictionary* describes as the loose meaning of the word must be used before parcel A can be regarded as contiguous to lots 78 and 79. The existence of the road between those lots and parcel D does not matter for the reasons already advanced. But once a person other than the plaintiffs has the use and occupation of parcel B, parcel A is separated from parcel D, and thus from the balance of lots 78 and 79, by a parcel of land in the possession of another as well as by two stretches of roadway.

[36] Although I accept that the impracticability of moving stock from the southern area of parcel A to parcel B and vice versa is relevant, it does not seem to me to be determinative of the issue under consideration. The principal criterion of contiguity for present purposes, as is generally the case, is physical location of land rather than its manner or extent of use. There is nothing in the wording of the lease or the

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4 [1931] 2 KB 21 at 43.

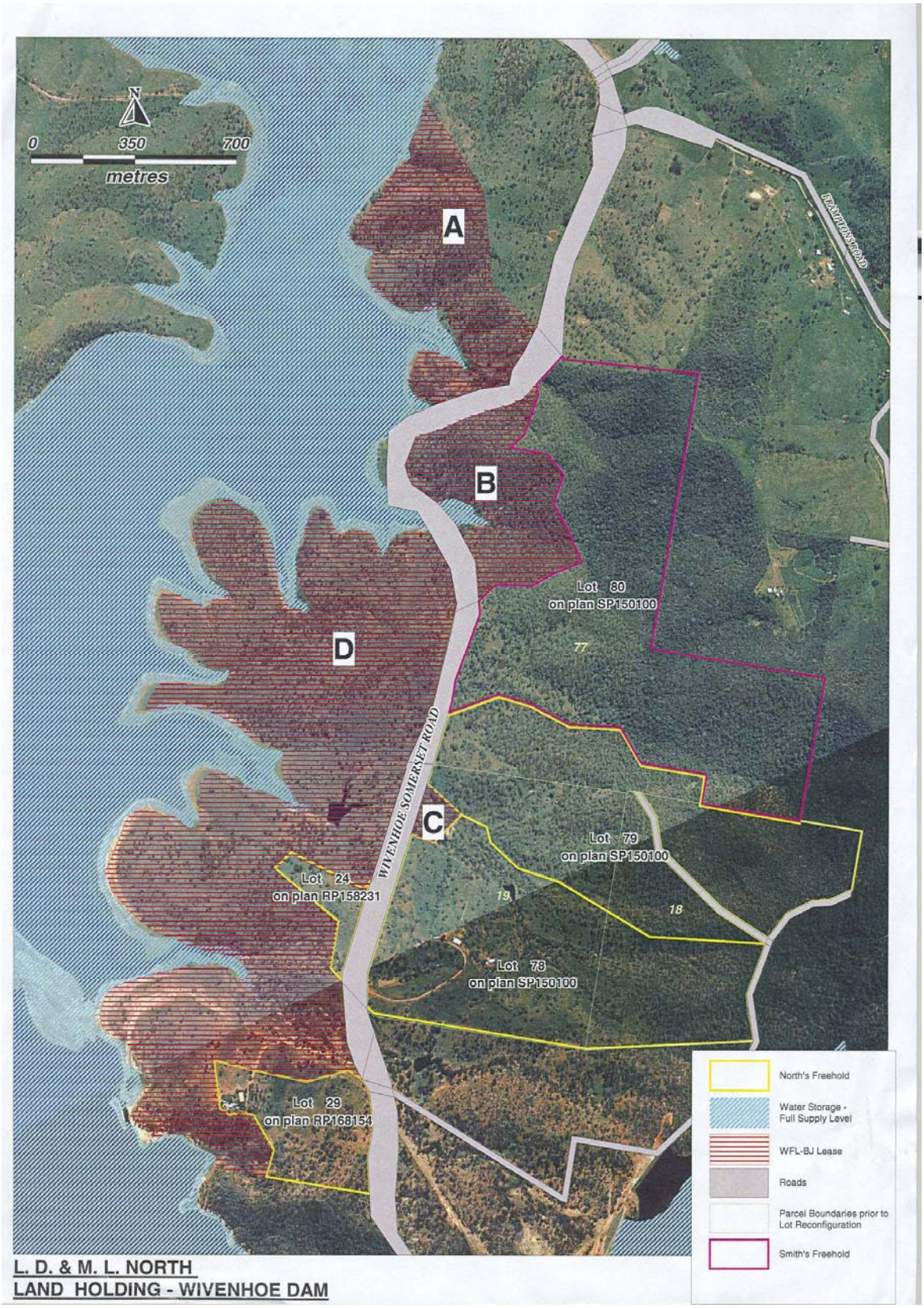
5 Vol 9 *Words and Phrases*, Paul Minn West Publishing Co 1976; *The Dictionary of Canadian Law*, 2nd ed; *The New Zealand Law Dictionary*, 3rd ed 1979.

circumstances surrounding its execution which suggest that “contiguous” should be given an expanded meaning. In my view, on the better construction of clause 3(b), after the proposed transaction is effected, the remaining part of the adjoining land will cease to be “contiguous to the demised land” for the purposes of clause 3(b) as a result of the plaintiffs ceasing to have the use and occupation of parcel B.

Conclusion

[37] Having regard to the above reasons, I doubt that it is necessary to make any declarations, but I will hear submissions as to the appropriate forms of order.

Appendix


N
0
350
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metres
A
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D
WIVENHOE SOMERSET ROAD
FRAMPTONS ROAD
Lot 80
on plan SP150100
77
Lot 79
on plan SP150100
19
18
Lot 24
on plan RP158231
Lot 78
on plan SP150100
Lot 29
on plan RP168154
North's Freehold
Water Storage -
Full Supply Level
WFL-BJ Lease
Roads
Parcel Boundaries prior to
Lot Reconfiguration
Smith's Freehold
L. D. & M. L. NORTH
LAND HOLDING - WIVENHOE DAM