

# SUPREME COURT OF QUEENSLAND

CITATION: *Aion Corporation Pty Ltd v Yolla Holdings P/L & Anor*  
[2013] QSC 191

PARTIES: **AION CORPORATION PTY LTD**  
**ACN 136 497 731**  
(applicant)

v

**YOLLA HOLDINGS PTY LTD**  
**ACN 138 802 829**  
(first respondent)

and

**HOPE ISLAND RESORT PRIMARY  
THOROUGHFARE BODY CORPORATE**  
(second respondent)

FILE NO/S: BS 6834 of 2012

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 31 July 2013

DELIVERED AT: Brisbane

HEARING DATE: 5 April 2013

JUDGE: Jackson J

ORDER: The order of the court is that:

1. Declare that within the meaning of section 33 of the *Integrated Resort Development Act 1987* (Qld) Lot 989 on survey plan 197707 is primary thoroughfare and the first respondent is the registered proprietor of the lot.

CATCHWORDS: ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – where the registered owner of a lot of primary thoroughfare under the *Integrated Resort Development Act 1987* (Qld) failed to transfer the lot to the primary thoroughfare body corporate – where the approval of the scheme required that initial plan of subdivision to show a lot or lots that comprise the primary thoroughfare – where a lot comprising primary thoroughfare was not sub-divided by the initial plan of subdivision – where the relevant local government approved plans of subdivision which did not provide for the

subdivision of all of the identified primary thoroughfare land as required by the Act – where land identified in approval of scheme as primary thoroughfare was subsequently purchased by a third party for commercial value – whether the subsequent registered owner is obliged under s 33 of the *Integrated Resort Development Act 1987* (Qld) to transfer the lot to the primary thoroughfare body corporate

PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – DECLARATIONS – OTHER MATTERS – where the applicant seeks a declaration that land is “primary thoroughfare” within s 33 of the *Integrated Resort Development Act 1987* (Qld) – whether the applicant has standing – whether the applicant has right of way over land constituting primary thoroughfare

EQUITY – TRUSTS AND TRUSTEES – PROCEEDINGS BETWEEN TRUSTEES AND BENEFICIARIES OR THIRD PARTIES – PARTIES – where the applicant seeks a declaration that the respondent is trustee of “primary thoroughfare” for the primary thoroughfare body corporate – where the applicant is neither trustee nor beneficiary of the trust

*Acts Interpretation Act 1954* (Qld), s 32A

*Integrated Resort Development Act 1987* (Qld), s 3, s 4, s 7, s 17, s 22, s 27, s 30, s 31, s 32, s 33, s 59, s 90, s 100, s 102, s 103, s 105, s 111, s 115, s 116, s 120

*Land Title Act 1994* (Qld), s 16, s 82, s 184, s 185

*Trusts Act 1973* (Qld), s 98(1)

Whalan D, *The Torrens System in Australia*, Law Book Co, Sydney, 1982

Zamir and Woolf, *The Declaratory Judgment*, Sweet & Maxwell, 4<sup>th</sup> edition, London, 2011

Shorter Oxford English Dictionary, 6<sup>th</sup> ed, vol 2

*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; [\[2009\] HCA 41](#), cited  
*Allianz Australia Insurance Ltd v GSF Australia Pty Ltd and Anor* (2005) 221 CLR 568; [\[2005\] HCA 26](#), cited |  
*Ashmere Cove Pty Ltd v Beekink (No 2)* [\[2007\] FCA 1421](#); (2007) 244 ALR 534, cited

*Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493; [\[1980\] HCA 53](#), cited

*Bateman’s Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247; [\[1998\] HCA 49](#), cited

*Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566; [\[1998\] HCA 59](#), cited

*Beneficial Finance Corporation Ltd v Price Waterhouse* (1996) 68 SASR 19, cited

*Byrnes v Kendle* (2011) 279 ALR 212; [2011] HCA 26, cited  
*CE Heath Casualty and General Insurance Ltd v Pyramid Building Society (In liq)* [1997] 2 VR 256, cited  
*Day v Pinglen* (1981) 148 CLR 289 at 299; [\[1981\] HCA 23](#), cited  
*Employers Reinsurance Corp v Ashmere Cove Pty Ltd* [\[2008\] FCAFC 28](#); (2008) 166 FCR 398, cited  
*Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421; [\[1972\] HCA 61](#), cited  
*Foss v Harbottle* (1843) 2 Hare 461; (1843) 67 ER 189, cited  
*Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472, cited  
*Interchase Corporation Ltd (in liq) v FAI General Insurance Company Ltd* [2000] 2 Qd R 301, cited  
*JN Taylor Holdings Ltd (in liq) v Bond* (1993) 59 SASR 432, cited  
*Kathleen Investments (Aust) Pty Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117; [\[1977\] HCA 55](#), cited  
*North Thames Regional Health Authority v Shepherd Robson & Anor* (1995) 50 Con LR 79, cited  
*Occidental Life Insurance Co of Australia Ltd v Bank of Melbourne* (1991) 7 ANZ Ins Cas 61-201, cited  
*Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; [\[1981\] HCA 50](#), cited  
*QBE Insurance (Aust) Ltd v Lois Nominees Pty Ltd* [\[2012\] WASCA 186](#)  
*R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603; [\[2009\] HCA 12](#), cited  
*Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145; [\[1993\] HCA 1](#), cited  
*Robinson v Western Australian Museum* (1977) 138 CLR 283; [\[1977\] HCA 46](#), cited  
*Stern v McArthur* (1988) 165 CLR 489; [\[1988\] HCA 51](#), cited  
*Western Australia v Ward & Ors* (2002) 213 CLR 1; [\[2002\] HCA 28](#), cited

COUNSEL: M Hinson SC & G Coveney for the applicant  
R Traves SC for the first respondent  
No appearance for the second respondent

SOLICITORS: HW Litigation Pty Ltd for the applicant  
Baxters Solicitors for the first respondent  
No appearance for the second respondent

[1] **JACKSON J:** This difficult application calls for the resolution of a dispute as to the obligations attaching to the proprietor of a parcel of land (“disputed land”) within the site of a scheme approved under the *Integrated Resort Development Act* 1987 (Qld) (“the Act”).

### **The concept of primary thoroughfare**

- [2] A purpose of the Act is to provide for the approval of a scheme for the development, by subdivision, of land for particular uses. The purpose is achieved, inter alia, by creating a category of land described in the Act as “primary thoroughfare”. Primary thoroughfare is intended to serve as access to other land within the site of the approved scheme. That purpose is achieved under the Act by the mechanism of providing for a statutory right of way over primary thoroughfare to occupiers of land within the site. Thus, instead of the roads and any canal within the site being dedicated to or transferred to the State, the Act provides for such land to be designated as primary thoroughfare under the scheme and thereafter to be subdivided into a lot or lots to be held by a statutory body corporate created on the subdivision of primary thoroughfare, known as the primary thoroughfare body corporate (“PT body corporate”). The PT body corporate has the functions of holding, managing, maintaining and insuring the primary thoroughfare.
- [3] From the time when a scheme is approved under the Act, the proprietor of the land becomes obliged to lodge a plan or plans with the relevant local government that will subdivide the site into a lot or lots comprising the primary thoroughfare in accordance with the approved scheme and another lot or lots comprising the balance land. It is the balance land which the applicant for the scheme or developer will develop, subdivide and sell.
- [4] The power of the local government to approve a relevant plan of subdivision, after a scheme is approved, is conditioned on the plan subdividing the site into a lot or lots comprising the primary thoroughfare. The power of the registrar of titles to register the plan of subdivision is conditioned on the approval of the local government and subdividing the site into a lot or lots comprising the primary thoroughfare, on the plan. On creation of the lot or lots comprising the primary thoroughfare, the registered proprietor is immediately obliged to transfer the primary thoroughfare to the PT body corporate.

### **The creation of Lot 989**

- [5] Approval of The Hope Island Resort Scheme of Development was made by order in council, notified by gazette notice on 15 February 1992. The applicant for approval of the scheme was Shinko Australia Pty Ltd. The scheme as approved consisted of the provisions contained in the schedule to the order in council and the plan referred to in the schedule, which was identified as the Hope Island Resort Integrated Resort Development Plan (“the plan of development”).
- [6] The plan of development identifies a number of areas as “precinct 1 – primary thoroughfare”. The schedule describes the purposes of that precinct as being intended for development, inter alia, by roadways and paths, and waterways. The schedule also provides for permitted uses in particular precincts and that a use which is not permitted within a precinct is prohibited in that precinct. The permitted uses for primary thoroughfare are not confined to a road, bridge or canal, but those uses are included in the permitted uses of thoroughfare and tidal waterway.
- [7] The plan of development identifies the disputed land as primary thoroughfare comprising a tidal waterway to be connected through other proposed waterway land

to the Coomera River and to be crossed by a bridge and road connecting through other proposed roads, to the Oxenford Southport Road. At about the time of approval of the scheme the disputed land formed part of Lot 999 on registered plan 842758.

- [8] Following the approval of the scheme, but contrary to the requirements of the Act, the Gold Coast City Council appears to have approved plans of subdivision which did not provide for subdivision of **all** of the identified primary thoroughfare land. In further contravention of the requirements of the Act, the registrar of titles registered those plans of subdivision.
- [9] A number of plans of subdivision relating to Lot 999 were put into evidence. Some of them provided for subdivision of part of the land identified as primary thoroughfare on the plan of development. The plan of development was amended from time to time, but not in a way that materially affects the disputed land. The registered plans of subdivision were not in accordance with the approved scheme because they did not provide for the creation of a lot or lots over **all** of the identified primary thoroughfare land under the approved scheme and thus did not discharge the proprietor's obligation under the Act. They only provided for some of the land identified in the scheme map, as intended for use as primary thoroughfare, to be subdivided into a lot or lots. The rest of the proposed primary thoroughfare land remained in the lot or lots, comprising the balance land for the site.
- [10] The consequence of those non-compliances was that on the registration of the initial plan of subdivision, the primary thoroughfare which had been subdivided did not include the disputed land and that land was not transferred to the Hope Island Primary Thoroughfare Body Corporate ("HIPT body corporate") as the Act envisaged and required. The HIPT body corporate acquired some of the identified primary thoroughfare, not including the disputed land.<sup>1</sup>
- [11] Over the period between approval of the scheme and the present, land within the scheme has been developed, subdivided and transferred, including the disputed land. There have been a number of developers who have acquired the land within the scheme or parts of it and continued to develop and sell lots.
- [12] It is unnecessary to trace all the subdivisions. The relevant subdivision of the disputed land was made by registration of survey plan 197707. That plan was certified by the then registered owner of the land to be subdivided, Mirvac Queensland Pty Ltd ("Mircac"). It was approved by the Gold Coast City Council on 2 July 2009 and registered by the chief executive "in or around July 2009".<sup>2</sup> It created two lots, one of them being Lot 989 on survey plan 197707 ("Lot 989"), which corresponds to an area of primary thoroughfare on the current version of the plan of development. Lot 989 is the disputed land. Mirvac became the registered owner of Lot 989 on 7 July 2009.
- [13] For present purposes, it is sufficient to identify that Mirvac's signature, as owner on survey plan 197707, signifies that at some point it acquired land which included the disputed land and subdivided it to create a Lot 989. Lot 989 and another lot, Lot 2

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<sup>1</sup> See for example, survey plan 144041 which it certified as registered owner of lot 1.

<sup>2</sup> It seems surprising, but neither party appears to have tendered precise evidence of registration of SP 197707.

on survey plan 114526 (“Lot 2”), encircle adjacent land that was developed and subdivided into Group Titles Plan 107328, and subsequently sold.

- [14] Lot 989 and Lot 2 have been developed into a canal. Thus, the encircled lots on Group Titles Plan 107328 form an island which has frontage to the part of the canal which is situated on Lot 989. The island is known as Fairway Island (“the island”). The means of access to the island and the encircled lots are over a road bridge which crosses Lot 2. The bridge passes over the part of the canal which is located on Lot 2.

### **The transfer of Lot 989**

- [15] When Lot 989 was created, the non-compliances with the Act which had occurred in relation to that land might have been rectified by Mirvac transferring Lot 989 to the HIPT body corporate. For whatever reason, that did not happen. Instead, Mirvac sold Lot 989 to the respondent, Yolla Holdings Pty Ltd (“Yolla”), for a commercial price. Yolla contends that as a result of that transaction and its registration as owner of Lot 989 under the *Land Title Act 1994* (Qld), it holds an indefeasible title to Lot 989 which is not subject to any obligation under the Act, other than the restrictions on use imposed on scheme land as a result of approval of the scheme.
- [16] Although it did not say so directly, the consequence of Yolla’s position must be that none of the statutory rights of way of an occupier of a lot on the island provided for by the Act and none of the statutory rights and obligations of the body corporate in respect of primary thoroughfare under the Act are engaged in respect of Lot 989.
- [17] If that is so, a moment’s reflection demonstrates the serious consequences of the non-compliances with the provisions of the Act that have occurred. There was no evidence whether the island lot owners had the statutory right to go over the road bridge over Lot 2 onto the island.<sup>3</sup> No evidence was tendered which showed whether the HIPT body corporate was the owner of Lot 2. But irrespective of that, none of the island lot owners would have the statutory right to go onto the canal in the area of Lot 989. All such use would require the permission of Yolla. That is the consequence of accepting that Lot 989 is not primary thoroughfare within the meaning of the Act.<sup>4</sup> If that is the outcome then there is no doubt that the island lot owners, or some of them, including the applicant Aion Corporation Pty Ltd (“Aion”), are aggrieved.<sup>5</sup> Not only is the question of access over and use of the canal disputed, but also the obligations of management, maintenance and insurance would be affected.
- [18] The circumstances under which Mirvac sold Lot 989 to Yolla were not explained in evidence and Mirvac is not a party to the proceeding. For those reasons, it is

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<sup>3</sup> A plan showing the grant of an easement over a lot which preceded Lot 989 was tendered, but since the earlier lot was wholly cancelled when Lot 989 was sub-divided, it does not seem to be relevant.

<sup>4</sup> Lot 989 extends beyond the vicinity of Fairway Island in the direction of the Oxenford Southport Road but I am not concerned with the rights of any adjoining owners in that area, or of the rights of owners which lie outside the outer canal boundary of Lot 989. No submission was made to me about the respective rights of any of those owners or occupiers.

<sup>5</sup> Yolla tendered undisputed evidence that Aion knew that Yolla claimed the right to license use of the canal, at the time it acquired its lots.

inappropriate for the court to comment further on how it could be that this state of affairs came to pass.

- [19] A state of affairs, such as this, is one that the Act specifically intended to avoid. That is why there must be primary thoroughfare as the price of obtaining the rights and privileges that the Act confers upon a successful applicant's approved scheme and which are transmitted to any owner of the balance land, as development proceeds. It is also why the Act specifically provides that a canal on the site may be constructed **only** on primary or secondary thoroughfare or part of the site that will become primary thoroughfare or secondary thoroughfare: s 90. Yolla disputes that it has any obligation to make Lot 989 primary thoroughfare.
- [20] By this application, Aion seeks to overcome Yolla's contentions and to have the court declare that Lot 989 is primary thoroughfare under the Act, which Yolla is obliged to transfer to the HIPT body corporate, either under the Act or because in the circumstances Yolla is a trustee of Lot 989 for the HIPT body corporate. Yolla challenges Aion's standing to bring the application, and resists all the declaratory relief sought.

#### **Aion's standing for the primary thoroughfare declaration**

- [21] Yolla's challenge to Aion's "standing" was based on s 184 of the *Land Title Act* and the common law.
- [22] It is appropriate to deal with the question by separating it into two parts. First, paragraph 1 of the application is for a declaration that Lot 989 is primary thoroughfare within the meaning of the Act ("the primary thoroughfare declaration"). Secondly, Aion applies for a declaration that Yolla holds Lot 989 on trust for the HIPT body corporate and an order that Yolla transfer Lot 989 to the second respondent.
- [23] In my view, Aion has a clear interest in having the question, whether Lot 989 is primary thoroughfare within the meaning of the Act, determined as between it and Yolla. If it is, Aion or those who occupy its lots have a right of way over Lot 989 under s 100(1) of the Act. That right will not be answered by Yolla's asserted indefeasible title to the land under the *Land Title Act*, unless s 100(1) of the Act operates subject to s 184 of the *Land Title Act*.
- [24] Section 184 provides:
- (1) A registered proprietor of an interest in a lot holds the interest subject to registered interests affecting the lot but free from all other interests.
  - (2) In particular, the registered proprietor—
    - (a) is not affected by actual or constructive notice of an unregistered interest affecting the lot; and
    - (b) is liable to a proceeding for possession of the lot or an interest in the lot only if the proceeding is brought by the registered proprietor of an interest affecting the lot.
  - (3) However, subsections (1) and (2) do not apply—
    - (a) to an interest mentioned in section 185; or

- (b) if there has been fraud by the registered proprietor, whether or not there has been fraud by a person from or through whom the registered proprietor has derived the registered interest.

- [25] The procedural restriction in s 184(2)(b) replaced a similar restriction in s 123 of the prior *Real Property Act* 1861 (Qld). The prior provision was described by Professor Whalan<sup>6</sup> as “the ejectment provision” containing “reinforcing negative statements” to the principal positive statement of indefeasibility, in what was known as the “paramountcy provision” in s 44 of that Act. In similar fashion, s 184(2)(b) is directed to a proceeding for possession of the lot or an interest in the lot. A proceeding “for” possession is one in which the relief claimed would give possession of the lot to the plaintiff, ordinarily a proceeding to recover or deliver possession of the lot.
- [26] The question arises as to the meaning of the restriction of a proceeding “for possession of... an interest in a lot” in s 184(2)(b). It is not entirely clear what would constitute recovery of possession of “an interest” in a lot. At common law, an action for a judgment that the plaintiff recover possession of a lot was an action in ejectment. In equity, an action for a judgment that the defendant deliver possession to the plaintiff, brought by a mortgagee, was an action for a judgment of delivery of possession. These causes of action were specifically recognised and separately dealt with under the *Rules of the Supreme Court* 1900.<sup>7</sup> Equity also distinguished between an interest vested in possession and one which was not.
- [27] An easement is an interest in land recognised under the *Land Title Act*. Although the *Land Title Act* recognises many different species of easement, an easement granting a right of way is the paradigm case, at least where there are dominant and servient tenements. Division 4 of Part 6 of the *Land Title Act* specifically deals with the creation of an easement over a lot, which “may only be created by registering an instrument of easement”: s 82(1). However, some of the easements now dealt with, including some created by statute in favour of public authorities, are easements in gross.
- [28] There is no doubt that the *Land Title Act* and the principal positive statement of indefeasibility provided for under s 184(1) are intended to extend to an interest in a lot comprising an easement. Section 185(1)(c) specifically recognises “the interest of a person entitled to the benefit of an easement if its particulars have been omitted from, or misdescribed in the freehold land register”.
- [29] Aion’s claim is not aptly characterised as an action for any relief of those kinds. Had it sought to directly vindicate an alleged right of way under s 100 of the Act, Aion’s claim might have been for an injunction to restrain Yolla from doing an act to interfere with Aion’s right of way over Lot 989 as primary thoroughfare. Instead, the proceeding is an application for declaratory relief, as to the status of the land. If the relief sought is granted, it may establish the relationship of Aion to Yolla, indirectly. But it does not directly claim injunctive relief directed to Aion’s alleged right of way.

<sup>6</sup> Whalan D, *The Torrens System in Australia*, Law Book Co, Sydney, 1982, at 294.

<sup>7</sup> Order 6 rule 7 permitted the special indorsement of a claim to recover possession of any land and Form 21 of Schedule 1 provided for a claim “to recover possession of allotment...”. Order 6 rule 11 allowed a mortgagee to specially indorse a claim for delivery of possession and Form 9 of Schedule 1 provided for a claim that “land comprised in the said mortgage may be delivered to the plaintiff”.

- [30] For present purposes, the question is whether the application for the primary thoroughfare declaration is a proceeding for possession of Lot 989 or for possession of an interest in Lot 989. In my view, it is not.
- [31] Had I reached the contrary conclusion, s 184 might have prohibited the bringing of the application for the primary thoroughfare declaration, unless that proceeding was for an interest mentioned in s 185, or the rights conferred upon Aion by s 100 operate outside the sphere of the *Land Title Act*.<sup>8</sup> It is unnecessary to consider those questions.

### **Primary thoroughfare within the meaning of the Act**

- [32] Although paragraph 1 of the application is for an order declaring that Lot 989 is primary thoroughfare “within the meaning of the Act”, it is clear that the dispute between the parties is not about the meaning of primary thoroughfare in all sections of the Act.
- [33] It was not in dispute that there is a valid approved scheme. That means that the scheme provides for “a primary thoroughfare” within the meaning of s 3(1)(a) of the Act. It was also not in dispute that there was a “plan of development” within the meaning of s 7(2)(c) of the Act, that the provisions of the Act apply to the approved scheme under s 16 of the Act, or that there was an obligation of the proprietor of land within the site to lodge a plan or plans subdividing land within the site into a lot or lots which comprises or together comprise “the primary thoroughfare”, as provided for in the approved scheme under s 30.
- [34] The dispute about the meaning of “primary thoroughfare” was directed to the operation of s 33 of the Act and the primary thoroughfare declaration should be seen as principally directed to the use of that expression in that section, in relation to Lot 989.

### **Section 33**

- [35] Section 33 of the Act provides (and has always provided, although it was renumbered in 1993):

- “(1) Immediately upon the registration of a plan or plans of subdivision creating a lot or lots comprising the primary thoroughfare, the registered proprietor of any lot shown on the plan as primary thoroughfare shall lodge with the registrar of titles all documents necessary to transfer free of mortgage that lot or those lots to the primary thoroughfare body corporate.
- (2) The primary thoroughfare body corporate shall not be required to make any payment or provide any consideration for such transfer.
- (3) Nothing in this section shall operate to relieve the applicant of the applicant’s obligation to effect at the applicant’s expense the initial construction of the primary

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<sup>8</sup> Cf *Hillpalm Pty Ltd v Heaven’s Door Pty Ltd* (2004) 220 CLR 472 at [53].

thoroughfare to a standard prescribed pursuant to section 89.”

- [36] Yolla submits that s 33 is not engaged to oblige it to transfer Lot 989 to the HIPT body corporate, because within the meaning of s 33:
- (a) no plan of subdivision created Lot 989 comprising the primary thoroughfare, because the subdivision of Lot 989 was not made under the initial plan;
  - (b) Lot 989 is not shown as primary thoroughfare; and
  - (c) it is not the relevant registered proprietor, because Mirvac was the registered proprietor when Lot 989 was created.
- [37] It is convenient to deal with those points in reverse order. A plan of subdivision is registered under the *Land Title Act*, following the processes provided for under ss 30 – 32 of the Act, by:
- (a) lodging a plan subdividing (ie showing the subdivision proposed of) the scheme land into a lot or lots which “comprise” primary thoroughfare under s 30;
  - (b) approval by the local government of the plan, as one which includes subdivision into a lot or lots “comprising” the primary thoroughfare under s 31; and
  - (c) registration by the registrar of titles of the plan, as one which includes subdivision into a lot or lots “comprising” the primary thoroughfare under s 31,
- thereby “creating” a lot or lots “comprising the primary thoroughfare”, within the meaning of s 33.
- [38] In that event, s 33 of the Act “immediately” imposes an obligation upon the registered proprietor of any lot shown on the plan as primary thoroughfare to lodge the necessary documents to transfer the lot or lots to the relevant PT body corporate.
- [39] On those facts, the “registered owner”<sup>9</sup> under the *Land Title Act* is the “registered proprietor” within the meaning of s 33. At the time of passage of the Act into law in 1987, a person registered as the proprietor of an estate in fee simple under the *Real Property Act* 1861 (Qld) was described as a “registered proprietor” of that estate.<sup>10</sup>
- [40] Let it be assumed that such a registered proprietor is obliged under s 33 to lodge the necessary documents to transfer the lot or lots to the relevant PT body corporate. Instead, and in breach of that obligation, it decides to sell and transfer one of the lots to a third party who thereby becomes the registered owner. Upon registration, does that person become the “registered proprietor” of the lot within the meaning of s 33?
- [41] Although the obligation to transfer is imposed upon the registered proprietor immediately upon the registration of the plan, in my view it is not discharged if the documents are not lodged immediately. The obligation continues. On a transfer of the lot to the third party being registered, the transferee becomes the registered owner. In those circumstances, there is no obvious reason to construe s 33 as continuing to impose the obligation upon the former registered proprietor. That

<sup>9</sup> Definition “registered owner”, Schedule 2, *Land Title Act*.

<sup>10</sup> See the definition of “proprietor” in s 3 of the *Real Property Act* 1861.

person no longer has the statutory right under the *Land Title Act* to transfer the lot as registered owner. There is also no reason to construe the obligation to lodge the documents, to bring about the transfer provided for by s 33, as being brought to an end, if a registered proprietor who is under that obligation manages to register a transfer to a third party.

- [42] The direct or primary purpose of s 33 is to ensure that the land designated by the approved scheme to be primary thoroughfare, which is created as a separate lot under the *Land Title Act* comprising primary thoroughfare as required by the Act, is transferred to the relevant PT body corporate.
- [43] The indirect or secondary purpose of s 33 is to ensure that the rights and obligations provided for by the Act in respect of the PT body corporate, and those who deal with it, are engaged.<sup>11</sup> The interpretation of the section which will best achieve those purposes applies the words “registered proprietor” to the registered owner of the relevant lot to which the section applies, at the time when the section is first engaged. But it also applies then to a subsequent registered owner. In my view, the section is not confined, on its proper construction, to the registered proprietor at the time of subdivision. It extends to a subsequent registered owner who is not the PT body corporate.
- [44] Yolla’s contention that Lot 989 is not “shown on the plan as primary thoroughfare”, so as to engage s 33, is based on the absence of any words on survey plan 197707 stating that Lot 989 is primary thoroughfare. Yolla contrasts that with the express inclusion of such words on the plan in relation to adjoining land.
- [45] Again, let it be assumed that a plan of subdivision is registered under ss 30 – 32 of the Act, as previously set out, but also that the plan does not identify the primary thoroughfare by express words. Nevertheless, one can see, by comparing the plan of subdivision with the approved scheme plan of development, that a relevant lot or lots conforms to the designation of the land which under the approved scheme is to become primary thoroughfare. Because of the approval, the provisions of the Act apply in respect of the scheme relating to that land: s 16 of the Act. Those provisions include that a person must not use land within a precinct for a use that is not specified in the approved scheme as a permitted use: s 15(8) of the Act.<sup>12</sup>
- [46] On Yolla’s contention, the absence of words on the plan of subdivision stating that the relevant land is primary thoroughfare would have the effect that the statutory obligation upon the registered proprietor, to lodge the documents to transfer the primary thoroughfare to the body corporate under s 33, would never be engaged, or at least not until the plan was replaced or amended so as to state that the relevant lot or lots are primary thoroughfare.
- [47] In my view, the words “shown on the plan” in sub-section 33(1) of the Act do not have that effect, taken in their context. If I may be forgiven for some repetition, the requirement of a primary thoroughfare first appears in s 3(1)(a) of the Act. A scheme shall not be approved, unless it provides for a primary thoroughfare. An

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<sup>11</sup> The right of way of an occupier of land within the site over the primary thoroughfare under s 100 is obviously a fundamental aspect of the concept of primary thoroughfare employed in the Act, but it does not turn on the transfer of the lot to the PT body corporate under s 33.

<sup>12</sup> As previously stated, the approved scheme plan of development for the Hope Island Resort Scheme of Development identified Precinct 1, as primary development.

approved scheme must be notified by gazette notice: s 7(2). A copy of the approved scheme and the plan of development must be sent to the registrar of titles and the local government: s 7(2)(d). The site of the approved scheme consists of the land within the boundaries of the site set out in the approved scheme: s 27(1). A plan or plans subdividing land within the site into a lot or lots which comprise the primary thoroughfare, as provided for in the approved scheme, must be lodged with the local government: s 30(1)(a).

- [48] It is not provided that the plan to be lodged for subdivision must state which land is primary thoroughfare. The local government's power to approve the plan is conditioned upon satisfaction that the plan includes the subdivision of the site into a lot or lots comprising the primary thoroughfare: s 31(2)(a). The registrar of titles' power to register the plan is conditioned upon the approval of the local government and that the plan includes the subdivision of the site into a lot or lots comprising the primary thoroughfare: s 32(1)(b) and s 32(2)(a).
- [49] In that context, by referring to "any lot shown on the plan as primary thoroughfare" s 33(1) does not require that the plan must expressly state that the lot is primary thoroughfare. It is referring to the "lot or lots which comprises or together comprise the primary thoroughfare as provided for in the approved scheme" as required by s 30(1)(a). Provided that the lot or lots in question answer that description, in my view they are lots "shown on the plan as primary thoroughfare" for the purposes of the operation of s 33(1).
- [50] That contextual meaning comes within the wide range of ordinary meanings of the past participle of the verb "to show".<sup>13</sup> A separate area may be shown by lines drawn on a plan, without the area being named. No purpose of the Act is served by construing s 33(1) as engaged when the lot or lots comprising primary thoroughfare are stated, but as not engaged where that is not stated. In my view, the interpretation of s 33 that will best achieve the purpose of the Act is the one that I prefer.
- [51] The remaining question is more difficult. That is, whether the plan of subdivision created Lot 989 "comprising the primary thoroughfare", given that the subdivision of Lot 989 was not made under the initial plan of subdivision?
- [52] Yolla relies on the definition of "primary thoroughfare" in Schedule 7 of the Act, as follows:

***primary thoroughfare*** in respect of an approved scheme means the lot or lots that comprises or together comprise the primary thoroughfare as shown at the material time on the initial plan or plans of subdivision.

- [53] The expression "initial plan of subdivision" is also defined as follows:

***initial plan of subdivision*** means a plan of subdivision for the time being registered by the registrar of titles in accordance with section 32.

<sup>13</sup> Shorter Oxford English Dictionary, 6<sup>th</sup> edition, Vol 2, at 2817.

[54] Section 32 provides:

- “(1) The registrar of titles shall not register a plan of subdivision referred to in section 30 unless—
- (a) where the plan of subdivision subdivides land in a residential precinct—it is accompanied by the schedule referred to in section 30; and
  - (b) the plan and the schedule (if any) have been endorsed with the approval of the local government.
- (2) The registrar of titles shall not register a plan of subdivision of land within the site unless—
- (a) the plan includes the subdivision of the site into a lot or lots comprising the primary thoroughfare; or
  - (b) a plan or plans of subdivision subdividing the site into a lot or lots comprising the primary thoroughfare has or have been registered by the registrar of titles.
- (3) In determining whether a lot has access to a dedicated road, the registrar of titles is not obliged to make enquiries but may rely on the endorsement of the local government on the plan and the schedule under subsection (1).”

[55] Although the definition of “initial plan of subdivision” refers to a plan registered in accordance with s 32, that section does not facilitate the registration of a plan of subdivision. Rather, it prohibits registration unless stated requirements have been met. The registration of a plan by the registrar of titles which complies with s 32 of the Act ensues upon the following processes:

- (a) application for the scheme to be approved under s 4;
- (b) approval of the scheme by the Governor in Council under s 7;
- (c) lodgement of a plan or plans to subdivide the land within the site into a lot or lots which comprise primary thoroughfare and other land “as provided for in the approved scheme” under s 30;
- (d) approval of the plan or plans of subdivision by the local government under s 31; and
- (e) lodgement of the plan or plans of subdivision for registration by the registrar of titles under s 32.

[56] It can be seen from that structure and the text of the relevant provisions that what is envisaged and provided for is that the plan to be registered under s 32 will subdivide **all** the primary thoroughfare land provided for in the approved scheme. The Act does not envisage the initial subdivision of some of the primary thoroughfare land provided for in the approved scheme in the initial plan and a later subdivision of the rest of the primary thoroughfare land.

[57] However, the Act recognises two methods by which primary thoroughfare, under an approved scheme, might be added to.

[58] First, if an application for approval of a scheme made under s 4 identifies an area as a future development area for which provisional approval is sought, on the basis that a subsequent application for approval for that area under s 4 will be made, a provisional approval may be granted for that area under s 22 of the Act. On the

making of a subsequent application for approval of a scheme in relation to the future development area, an approval is taken to be an approval of a scheme, presumably under s 7(1). That would engage again the processes under ss 30 - 32 of the Act.

- [59] Secondly, after approval of a scheme and registration of the initial plan, the primary thoroughfare may be added to by a plan of subdivision of a secondary lot within a residential precinct, which may include a lot or lots constituting primary thoroughfare: s 59(3B) of the Act. In that instance, s 33 applies to the primary thoroughfare as if it had been created on a plan mentioned “in the section”. A plan mentioned in the section is one “creating a lot or lots comprising the primary thoroughfare”. The clear intention is that the obligation under s 33 is engaged when a lot comprising additional primary thoroughfare is created.
- [60] In the present case, there is no doubt that the subdivision of Lot 989 was not made by an initial plan of subdivision which complied with s 32 for the approved scheme. In contravention of the obligations and processes previously identified, that was not done. However, the subdivision of Lot 989 did create a lot of land aptly described as “comprising” primary thoroughfare and “as provided for in the approved scheme”. The question of statutory construction is whether, notwithstanding the definition of the expression “primary thoroughfare” in Schedule 7, s 33 was engaged upon the creation of Lot 989, because Lot 989 was a lot “comprising the primary thoroughfare” within the meaning of that section. In my opinion, that question should be answered “yes”.
- [61] The role of the definitions in Schedule 7 of the Act is provided for in s 2, which provides that “the dictionary in schedule 7 defines particular words used in this Act.” However, “definitions in or applicable to an Act [provide meaning] except so far as the context or subject matter otherwise indicates or requires”: s 32A *Acts Interpretation Act 1954* (Qld).
- [62] The analysis of the operation of a definition ordinarily begins by the insertion of the words of the definition into the provision.<sup>14</sup> Section 33(1), inserting the combined definitions of “primary thoroughfare” and “initial plan of subdivision”, has the following effect:

“Immediately upon the registration of a plan or plans of subdivision creating a lot or lots comprising the *[the] lot or lots that comprises or together comprise the primary thoroughfare as shown at the material time on the plan or plans of subdivision for the time being registered by the registrar of titles in accordance with section 32*, the registered proprietor of any lot shown on the plan as *the lot or lots that comprises or together comprise the primary thoroughfare as shown at the material time on the plan or plans of subdivision for the time being registered by the registrar of titles in accordance with section 32* shall lodge with the registrar of titles all documents necessary to transfer free of mortgage that lot or those lots to the primary thoroughfare body corporate.”  
(inserted words italicised)

<sup>14</sup> *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd and Anor* (2005) 221 CLR 568 at 574-575, [12]; [\[2005\] HCA 26](#) at [12]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 44, [40]; [\[2009\] HCA 41](#) at [40].

- [63] That exercise shows that the insertion of the strict words of the definitions of “primary thoroughfare” and “initial plan” is not inapt to the use of “primary thoroughfare” in s 33, although the use of the expression “the primary thoroughfare” in s 33 causes a duplication of the article “the” before the word “lot”.
- [64] As a matter of substance, the engagement of the section thus extended has a number of elements:
- (a) registration of a plan or plans of subdivision;
  - (b) a lot or lots shown on the plan comprising primary thoroughfare; and
  - (c) the plan was registered in accordance with s 32.
- [65] As previously stated:
- (a) survey plan 197707 was registered;
  - (b) Lot 989 comprises primary thoroughfare, in the sense that it “comprises primary thoroughfare as provided for in the approved scheme”: s 30(1)(a); and
  - (c) s 32 was not contravened by registration of survey plan 197707, because that plan did include the subdivision of part of the site into Lot 989 comprising the primary thoroughfare on that plan.
- [66] It can be said, in that sense, that the plan was registered “in accordance with s 32”. In my view, s 32 was not intended to prohibit the correction of any prior non-compliance with that section by subdivision of primary thoroughfare which had been omitted from the initial plan of subdivision.
- [67] It was not submitted that there would be insuperable difficulties if survey plan 197707 were to be characterised as an “initial plan of subdivision” on registration. The Act contemplates that there may be more than one initial plan, but the constitution of the primary thoroughfare body corporate occurs only on the “first initial plan of subdivision”: Schedule 7, definition “primary thoroughfare body corporate”. It may be that this structure was adopted because of the possibility of an initial plan for subsequent stages under Division 2 of Part 8 of the Act. However, that does not mean that the provisions of the Act would be unworkable in their application to the registration of survey plan 197707.
- [68] Having regard to that analysis, and to the purpose of s 33 in the statutory scheme as previously discussed, in my view the context and subject matter of s 33 require that “primary thoroughfare”, within the meaning of that section, is not confined to primary thoroughfare shown on the first initial plan of subdivision. It extends to any subsequent plan of subdivision which conforms to the requirements of subdividing a lot or lots which comprises primary thoroughfare. Those requirements will not be satisfied if the lot in question does not comprise primary thoroughfare, as provided for in the approved scheme. But if it does, there is no purpose of the Act that will be achieved by interpreting s 33 as not extending to it.
- [69] In opposing that conclusion, Yolla submitted that there is a principle of statutory interpretation that “legislation does not interfere with vested proprietary interests”, relying on a recent case in which French CJ stated the principle in the following terms:

“As a practical matter it means that, where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights. That approach resembles and may even be seen as an aspect of the general principle that statutes are construed, where constructional choices are open, so that they do not encroach upon fundamental rights and freedoms at common law. It operates in the United Kingdom as a manifestation of a “principle of legality” and has been described in Australia as an aspect of the rule of law.”<sup>15</sup>

[70] In the context of the present dispute, it is correct to say that the conclusion that Lot 989 is primary thoroughfare within the meaning of s 33 interferes with Yolla’s private property rights, as registered owner of Lot 989. On the construction I prefer, Yolla is obliged to transfer the Lot to HIPT body corporate, but HIPT body corporate is not obliged to make any payment or provide any consideration for such transfer: s 33(2) of the Act.

[71] However, the alternative conclusion is that s 33 would never be engaged, in respect of the land comprised in Lot 989, because it was omitted from the initial plan of subdivision, which constituted the HIPT body corporate under s 102 of the Act, in circumstances where there was non-compliance with the requirement that all the primary thoroughfare be subdivided by that plan.

[72] Further, on Yolla’s argument as to the operation of the definition of “primary thoroughfare” in s 33, even a voluntary transfer of Lot 989 to the HIPT body corporate would not engage relevant rights or obligations under other sections, unless “primary thoroughfare” were given a wider meaning than the defined meaning in those sections.

[73] The rights which would not be engaged include:

- (a) the right of way of an occupier of land within the site under s 100;
- (b) the powers, authorities, duties and functions of the HIPT body corporate under the Act, including the obligation to do all things necessary for the control, management and administration of the primary thoroughfare under s 103(5);
- (c) the right of the HIPT body corporate to the deemed contractual relationship under s 102(8);
- (d) the power of entry of the HIPT body corporate under s 111;
- (e) the power of the HIPT body corporate to develop or construct facilities and the obligation to maintain those facilities under s 115;
- (f) the duties of the HIPT body corporate under s 116; and
- (g) the obligation of the HIPT body corporate to effect insurance in accordance with s 120.

[74] The principle of interpretation relied on by Yolla may be accepted. Notwithstanding that, there are cases where the constructional choices faced by the court require that it adopt a construction which interferes with private property rights. From the approval of the scheme in the present case, the area of land which

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<sup>15</sup> *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at 619; [\[2009\] HCA 12](#) at [43].

became Lot 989 has been the subject of statutory obligations to use that land in accordance with the approved scheme and to subdivide that land for the purpose of giving effect to the approved scheme. Thereafter, when the land which became Lot 989 was created as primary thoroughfare, the Act provided that the registered proprietor was obliged to lodge documents to transfer that land to the HIPT body corporate for no payment by or consideration moving from it.

- [75] For the reasons previously given, I reject the constructional choice that would treat the obligation to transfer under s 33 as not arising if a relevant area of “primary thoroughfare” is created other than by the first initial plan of subdivision.
- [76] Accordingly, in my view, Aion has established its entitlement to a declaration that within the meaning of s 33 of the Act Lot 989 is primary thoroughfare and Yolla is the registered proprietor of the lot.

### **Entitlement to other relief**

- [77] It is necessary to return to Aion’s “standing”, in relation to the other orders sought in the application.
- [78] As previously mentioned, Aion applies for a declaration that Yolla holds Lot 989 on trust for the HIPT body corporate (“the declaration of trust”) and an order that Yolla transfer the lot to HIPT body corporate (“the transfer order”).
- [79] The basis of the application for those orders is that the Act constitutes Yolla as trustee of the land. The trust was argued to arise either directly under s 33 or because Aion was the knowing recipient of trust property, held by Mirvac as trustee, and which Mirvac transferred to Yolla in breach of trust. Given my conclusions that Lot 989 is primary thoroughfare within the meaning of s 33, that Yolla is the registered proprietor within the meaning of s 33, and that s 33 continues to operate in respect of Lot 989, it is unnecessary to consider the knowing receipt alternative.
- [80] Aion contends that the trust in question is one constituted by the duty to transfer all of the land which is primary thoroughfare to the HIPT body corporate (“putative trust”). Putting the matter that way tends to elide the subdivisional and transfer steps provided for under ss 30 – 33 of the Act. Nevertheless, the putative trust would be a private trust of which Yolla is the trustee and the HIPT body corporate is the beneficiary.
- [81] Aion relied on *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation*.<sup>16</sup> The case is useful to show that a statutory obligation to hold and administer property for another’s benefit may be characterised as creating a trust, without using the word “trust”, and that there is no conceptual difficulty with the creation of a trust under statute. That is commonly done expressly.
- [82] Of closer relevance to the present case are cases which show that a statute may on its proper construction create an implied trust, although usually for a public purpose,<sup>17</sup> or even give rise to a remedial constructive trust.<sup>18</sup>

<sup>16</sup> (1993) 178 CLR 145; [\[1993\] HCA 1](#).

<sup>17</sup> *Western Australia v Ward & Ors* (2002) 213 CLR 1 at 144-145; [\[2002\] HCA 28](#) at [241].

- [83] In the present case, Aion did not contend that there was any obligation to be performed by the trustee in the execution of the putative trust beyond lodging the documents to transfer Lot 989 to the HIPT body corporate. As such, the putative trust might be described as a bare trust, although the meaning of that expression is not always clear.<sup>19</sup> As well, an analogy may be drawn between the putative trust in the present case and the trust characterisation of the relationship between a vendor and purchaser, under an incomplete contract of sale of land where the purchaser has paid the price.<sup>20</sup>
- [84] However, it is not appropriate to pursue any of these arguments to their conclusion unless the application of Aion for the declaration of trust or the transfer order sought is for an order which it is entitled to seek.
- [85] Undoubtedly, HIPT body corporate would have “standing” to pursue orders of that kind, as the beneficiary of the putative trust. A beneficiary is a party entitled to bring a proceeding formerly described as an administration action or a claim for specific relief for an unperformed trust obligation or a claim for breach of trust. As well, the statutory power to make a vesting order concerning any property subject to a trust may be made by any person “beneficially interested in the property”.<sup>21</sup>
- [86] Aion is not alleged to be a beneficiary or to have a beneficial interest in Lot 989. It is either a member of the HIPT body corporate or a member of a principal body corporate, which is the member of the HIPT body corporate. By analogy, it is in a position like that of a shareholder in the corporate beneficiary under the putative trust, HIPT body corporate. A shareholder of a company beneficiary would not ordinarily have a right to bring either an administration action or a beneficiary’s claim for specific relief or for breach of trust. The rule in *Foss v Harbottle* prevents it.<sup>22</sup>
- [87] There is no authority which was cited to me or of which I am aware that justifies Aion’s “standing”, as if it were a beneficiary of the trust for which it contends. Putting aside a successor trustee or a co-trustee, ordinarily “no-one can obtain redress for a breach of trust except a beneficiary or someone who stands in his shoes, like his personal representative or trustee in bankruptcy”.<sup>23</sup> No case was referred to which suggests that the right of a beneficiary to bring an administration action or for specific relief of the same genus was governed by a different principle.
- [88] Thus, if the putative trust exists, in my view Aion is not a party entitled to bring a proceeding to enforce it. The same result follows if the basis of the claim is a constructive trust to which HIPT body corporate is entitled. It follows, in my view, that the transfer order which was applied for by Aion is not one for which it is entitled to apply, as an order to enforce the putative trust.

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<sup>18</sup> *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 583-584; [\[1998\] HCA 59](#) at [38] – [40].

<sup>19</sup> *Byrnes v Kendle* (2011) 279 ALR 212 at [21]; [2011] HCA 26.

<sup>20</sup> *Stern v McArthur* (1988) 165 CLR 489 at 523; [\[1988\] HCA 51](#).

<sup>21</sup> Section 98(1) of the *Trusts Act* 1973 (Qld).

<sup>22</sup> (1843) 2 Hare 461 at 495; (1843) 67 ER 189 at 203.

<sup>23</sup> *Occidental Life Insurance Co of Australia Ltd v Bank of Melbourne* (1991) 7 ANZ Ins Cas 61-201 at 78,320.

- [89] The remaining question is whether Aion has a basis to apply for the claimed declaration of trust.
- [90] It is sometimes counter-intuitive to frame the question as to an applicant's right to an order in private law as a separate question of "standing". As was said in *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd*,<sup>24</sup> "in private law there is, in general, no separation of standing from the elements in a cause of action".
- [91] However, looking at the application for a declaration of trust more broadly, and distinguishing the present case from those concerned with the grant of declarations where there is no personal or private right which equity may protect by injunction, although the power to grant declaratory relief is wide, statements of the highest authority adhere to the requirement that a plaintiff must have a "real interest to raise" the question about which the declaration is sought.<sup>25</sup>
- [92] The evidence shows that Aion has an interest in obtaining a right or permission to put in a pontoon or other mooring in the canal in the vicinity of one or more of its lots. By establishing HIPT body corporate's entitlement to Lot 989, or not, Aion will establish the party with whom it must deal to obtain those rights or permissions. As well, as previously mentioned, Aion is an adjoining lot owner to the owner of the canal and the management of and maintenance of the canal has the potential to affect the enjoyment of Aion's lots. Thirdly, Aion's right as a lot holder to pass over the canal as primary thoroughfare is potentially affected. The value of the lots on the island could be affected if the rights and obligations of lot owners are unclear. Do those matters give Aion a sufficient "real interest" to maintain the declaration sought?
- [93] HIPT body corporate is a submitting respondent to the proceeding, so would be bound as against Aion by whatever decision the court might make on Aion's application for a declaration of trust. HIPT body corporate is prepared to accept a transfer of Lot 989 if that is what the court decides. Accordingly, the parties most materially interested in the suit, being Aion, HIPT body corporate and Yolla are parties. But neither HIPT Body corporate nor Yolla makes a claim against one another. There is thus no issue joined between HIPT body corporate and Yolla.
- [94] As well, other persons are potentially affected. Lot 989 adjoins the lots on the island. But it also adjoins lots on the outer side of the canal surrounding Fairway Island and other lots which have frontage on the part of the canal which runs from the island towards the Oxenford Southport Road.
- [95] No case was referred to which represents a close analogy to the present. It is difficult to generalise in this field, and it is necessary to recognise that different considerations may apply when a public right is involved.<sup>26</sup> Thus, the detailed consideration of the question of standing by the High Court, in public right cases, may not give much guidance.<sup>27</sup> I also note the development of a "more flexible

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<sup>24</sup> (1998) 194 CLR 247 at [43]; [\[1998\] HCA 49](#).

<sup>25</sup> *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437; [\[1972\] HCA 61](#).

<sup>26</sup> *Day v Pinglen* (1981) 148 CLR 289 at 299; [\[1981\] HCA 23](#).

<sup>27</sup> *Robinson v Western Australian Museum* (1977) 138 CLR 283; [\[1977\] HCA 46](#); *Kathleen Investments (Aust) Pty Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117; [\[1977\] HCA 55](#); *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493; [\[1980\]](#)

approach”,<sup>28</sup> to what is a sufficient interest in recent English authority,<sup>29</sup> but I approach the question on the basis that in Australia the question is whether there is a sufficient “real interest”.

- [96] An analogy to the present case is presented by a claim by a third party to an insurance contract for a declaration as to the liability of an insurer to indemnify the insured in respect of the third party’s claim. Australian cases at intermediate appellate court level show the differences in attitude to that question.<sup>30</sup> No clear statement emerges from them which would have the effect that a stranger to a trust as applicant cannot maintain a proceeding for a declaration of trust as between two respondents, because the outcome of the proceeding will not create a *res judicata* as between the respondents.
- [97] “Accepting that a third party can in appropriate circumstances obtain declaratory relief in respect of the private rights and duties of others, such occasions are likely to be very rare”.<sup>31</sup>
- [98] In the present case, the greatest cause for concern is that the decision would not bind Yolla, as between it and HIPT body corporate. As well, there may be questions as to their rights and obligations, *inter se*, which would be affected by a declaration of trust, beyond the simple question of the existence of a bare trust to transfer Lot 989.
- [99] In the result, in my view, although Aion has a genuine commercial interest to maintain the application for a declaration of trust, I do not consider that the court should make a declaration of that kind at Aion’s application where neither Yolla nor PT body corporate will be bound by it *inter se*.
- [100] For those reasons, it is inappropriate to further analyse the contention that Yolla holds Lot 989 as trustee for HIPT body corporate.

### Conclusion

- [101] Thus, in the result, there should be a declaration that, within the meaning of section 33 of the *Integrated Resort Development Act 1987* (Qld), Lot 989 on survey plan 197707 is primary thoroughfare and the first respondent is the registered proprietor of the lot.

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[HCA 53](#); *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; [\[1981\] HCA 50](#); *Bateman’s Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247; [\[1998\] HCA 49](#).

<sup>28</sup> Zamir and Woolf, *The Declaratory Judgment*, 4<sup>th</sup> edition, London, 2011, at [5-21].

<sup>29</sup> Cf *North Thames Regional Health Authority v Shepherd Robson & Anor* (1995) 50 Con LR 79 at 88-92.

<sup>30</sup> *Interchase Corporation Ltd (in liq) v FAI General Insurance Company Ltd* [2000] 2 Qd R 301 at 315 and 320; cf per Davies JA in dissent at 311; cf *QBE Insurance (Aust) Ltd v Lois Nominees Pty Ltd* [\[2012\] WASCA 186](#); *JN Taylor Holdings Ltd (in liq) v Bond* (1993) 59 SASR 432; *Ashmere Cove Pty Ltd v Beekink (No 2)* [\[2007\] FCA 1421](#); (2007) 244 ALR 534 and, on appeal sub nom *Employers Reinsurance Corp v Ashmere Cove Pty Ltd* [\[2008\] FCAFC 28](#); (2008) 166 FCR 398; *Beneficial Finance Corporation Ltd v Price Waterhouse* (1996) 68 SASR 19; *CE Heath Casualty and General Insurance Ltd v Pyramid Building Society (In liq)* [1997] 2 VR 256.

<sup>31</sup> *QBE Insurance (Aust) Ltd v Lois Nominees Pty Ltd* [\[2012\] WASCA 186](#) at [40] per McLure P, in dissent.

[102] As to costs, my preliminary view is that the applicant has succeeded on the principal dispute and that although it was unsuccessful in obtaining relief which might have followed from the determination of the principal point if HIPT body corporate had been an applicant in the proceeding, the costs of the proceeding should follow that event.

[103] However, I will hear the parties on the question of costs.