SUPREME COURT OF QUEENSLAND

CITATION:	*Oakwood Constructions Pty Ltd v Wyndon Properties Pty Ltd* [2010] QCA 323
PARTIES:	**OAKWOOD CONSTRUCTIONS PTY LTD** ACN 052 282 863 (plaintiff/respondent/cross appellant) **v** **WYNDON PROPERTIES PTY LTD** ACN 080 418 891 (defendant/appellant/cross respondent)
FILE NOS:	Appeal No 7268 of 2010 Appeal No 9758 of 2010 DC No 3470 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	19 November 2010
DELIVERED AT:	Brisbane
HEARING DATE:	5 November 2010
JUDGES:	Muir and Chesterman JJA and McMurdo J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal and cross-appeal be dismissed.** **2. The appellant in each appeal pay the costs of the respondent to that appeal.**
CATCHWORDS:	RESTITUTION – MISTAKE: RESTITUTION ARISING FROM A PLAINTIFF'S MISTAKEN ACTIONS – RECOVERY FOR MISTAKENLY CONFERRED SERVICES – MISTAKEN IMPROVEMENT OF ANOTHER'S LAND OR GOODS – where the appellant agreed to sell vacant land to a third party – where that third party contracted with the respondent to build a house on the land before settlement – where the respondent claimed that it was not aware that the third party was not the registered owner of the land until after it had commenced work on the house – where there was some evidence available to the respondent before it commenced work which indicated that the third party may not be the registered owner of the land – where the appellant argued that even if the respondent's principal was not aware of the true owner of the land, one of

its employees must have known and that employee's knowledge should have been attributed to the respondent – whether the primary judge erred in finding that the respondent had a genuine but mistaken belief that the third party was the registered owner of the land at the commencement of the works

RESTITUTION – MISTAKE: RESTITUTION ARISING FROM A PLAINTIFF'S MISTAKEN ACTIONS – RECOVERY FOR MISTAKENLY CONFERRED SERVICES – MISTAKEN IMPROVEMENT OF ANOTHER'S LAND OR GOODS – where the respondent commenced work on the house under the mistaken belief that the third party owned the land – where the respondent subsequently learnt that it was in fact the purchaser under an uncompleted contract of sale – where up until that point there had been considerable expenditure and actual work in relation to the site – where the respondent continued work on the house until informed that settlement had not occurred, at which point the house was about 80 per cent complete – where the primary judge ordered the appellant to transfer the land to the respondent in exchange for compensation in the amount of the value of the unimproved land – whether the respondent was relevantly mistaken so as to engage s 196 of the *Property Law Act* 1974 (Qld) after it learnt that the third party was not the registered owner of the land – whether the primary judge erred in granting that relief if a significant amount of the improvements had been made whilst the respondent was not relevantly mistaken

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – where the respondent obtained judgment against the appellant at first instance – where the appellant was self represented – where the respondent made an offer to settle before the trial – where the respondent claims that it was entitled to its costs on an indemnity basis under r 360 of the *Uniform Civil Procedure Rules* 1999 (Qld) – whether the primary judge erred in finding that this was an exceptional case so as to make another order for costs appropriate

Land Title Act 1994 (Qld), s 130
Property Law Act 1974 (Qld), s 196, s 197
Uniform Civil Procedure Rules 1999 (Qld), r 360

Abdul-Rahman v Jeffs & Ors (Unreported, Supreme Court of Queensland, Dowsett J, 19 August 1988), considered
Anglo-Scottish Beet Sugar Corporation v Spalding UDC [1937] 2 KB 607, applied
Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9) (2008) 39 WAR 1; (2008) 225 FLR 1; [2008] WASC 239, cited

El Ajou v Dollar Land Holdings Plc [1994] 2 All ER 685; [1993] EWCA Civ 4, considered
Ex parte Karynette Pty Ltd [1984] 2 Qd R 211, considered
Oakwood Constructions P/L v Wyndon Properties P/L [2010] QDC 80, related

COUNSEL: E R Richards (representative) for the appellant
A C Barlow for the respondent

SOLICITORS: Walsh Halligan Douglas Lawyers for the respondent

[1] **MUIR JA:** I agree that the appeal and cross appeal should be dismissed with costs for the reasons given by McMurdo J.

[2] **CHESTERMAN JA:** I agree that the appeal and cross-appeal should both be dismissed with costs, for the reasons given by McMurdo J.

[3] **McMURDO J:** The appellant, which I will call Wyndon, has been the registered proprietor of a property at Laidley since 1999. In 2004 a house was constructed on that land by the respondent, which I will call Oakwood. However, the construction was not undertaken for Wyndon. Oakwood built the house under a contract with a company called Fasta Financial Group Pty Ltd ("Fasta"), which had made a contract with Wyndon to purchase the land. The primary judge found that at least a substantial part of the work was undertaken by Oakwood when it mistakenly believed that Fasta was the owner of the land and upon that basis, he granted relief to Oakwood under s 197 of the *Property Law Act* 1974 (Qld).

[4] The primary judge ordered Wyndon to transfer the land to Oakwood in exchange for compensation of $95,000. That was the amount of the unimproved value of the land according to the only valuer who gave evidence. The valuer attributed $115,000 to the improvements, all of which had been constructed by Oakwood.

[5] In Wyndon's appeal, it challenges the finding that Oakwood performed all or at least much of the construction under a genuine but mistaken belief that Fasta was the owner, so as to enliven the jurisdiction under s 197. It further argues, upon several grounds, that the relief which was granted was inappropriate. In particular, it is contended that the appropriate relief (if any) was for Wyndon to retain its land and to pay some fraction of the value of the improvements rather than being deprived of its land.

[6] The primary judge made no order as to costs, in circumstances where Wyndon was not legally represented. Oakwood says that it should have been awarded costs and upon the indemnity basis and cross appeals in that respect.

The facts

[7] Oakwood's business is house building. Its principal is Mr Lewis, who does not live in the Laidley area. Oakwood employed a representative in that area, Mr Pfeffer. In June 2004, Mr Pfeffer introduced Mr Lewis to a Mr Beckett and a Mr McDonald who represented what they described as the Fasta Financial Group, which Mr McDonald said had offices throughout Australia and businesses which included the development of domestic and commercial property. Before long Oakwood had

contracted with Fasta to build four houses, one of them upon the subject land. The primary judge accepted the evidence of Mr Lewis that by then he had been told by Mr McDonald that Fasta owned each of these properties.

[8] Mr Pfeffer attended to the preparation and signing of the building contracts. The contract relating to the subject land was in the form provided by the Building Services Authority for domestic construction. It showed "the owner" as Fasta Financial Group Pty Ltd. It was signed for "the owner/s" by Mr Beckett and for Oakwood by Mr Pfeffer. The signatures were each dated 9 June 2004. The "starting date" for the construction was to be seven working days after the issue of duly approved plans by a certifier and the work was to be practically completed within 120 days from then. The contract sum was in total $116,647. The contract was subject to approval of finance from a certain lender in an amount which was "sufficient to complete".

[9] On 5 July 2004, Mr Beckett, on behalf of Fasta, signed a document which referred to Fasta as the "Owners" of various properties, including this one, and which was in terms of an authority to Oakwood to sign all relevant documents in relation to any necessary building and plumbing applications. On 7 July 2004, a development application for the construction upon this land was signed by Mr Lewis on behalf of not only Oakwood but also "Fasta Pty Ltd" as the "land owner".

[10] A private certifier, Mr Porter, was engaged. He ultimately approved the work by a decision notice of 18 August 2004. It seems that it was at this point that Oakwood began to construct this house. But the local Council had to be involved in relation to the plumbing and drainage work. The Council queried Mr Porter whether Fasta was the owner of this land and the others for which approval had been sought. In response, Mr Porter wrote to the Council on 27 July 2004 enclosing several contracts of sale for the relevant properties including the one made with Wyndon for the sale of the subject property. In his evidence, Mr Porter could not recall whether he had obtained those contracts from Mr Lewis or from Mr Beckett. The primary judge accepted the evidence of Mr Lewis that they did not come from him and that he was unaware of the Council's query.

[11] The contract for the sale by Wyndon of the subject land named the purchaser as Mr Beckett. It was dated 25 May 2004, had a price of $58,000 and provided for settlement within 60 days of the date of contract, subject to finance being approved within 21 days. On 1 June 2004, the solicitors acting for the purchaser wrote to Wyndon's solicitors requesting that "the contract be in the name of FFG Pty Ltd", to which Wyndon responded by its solicitors' email of 3 June 2004, to the effect that the property could be transferred to that company.

[12] On 19 July 2004, the purchaser's solicitors wrote requesting an extension of the settlement date until 30 September 2004, on terms that the purchaser would make further payments each of $5,000 on 23 July and 30 September 2004, but that Wyndon would "allow access to the property before settlement for our client to construct a dwelling on the property". Wyndon agreed and in consequence Wyndon and FFG Pty Ltd executed a so-called Deed of Consent to Occupancy, dated 26 July 2004, by which FFG was allowed into possession from that date to construct a house on the land. The deed provided for the payment to Wyndon of two sums, each of $5,000, on 23 July and 23 August 2004.

[13] When settlement of the contract of sale did not occur, Fasta commenced proceedings in the Supreme Court against Wyndon seeking specific performance of that contract and another contract between them in respect of another property owned by Wyndon. Ultimately those proceedings were not prosecuted and Fasta went into liquidation. The primary judge accepted that Oakwood would recover nothing from it.

[14] On 29 August 2004, Mr McDonald told Mr Lewis that the required finance for the acquisition of the subject property had not been obtained and that settlement was due on the following day. His Honour accepted the evidence of Mr Lewis that he believed what Mr McDonald had said, and that in consequence he agreed to lend $65,000 to Fasta to enable it to settle. Mr and Mrs Lewis caused that amount to be paid to Fasta's solicitors on the express basis that it was to be used for the settlement. But what happened was that $20,000 was used to procure extensions of time for Fasta under its contracts to purchase the subject land and that other land. Eventually only $45,000 was returned to Oakwood by the solicitors.

[15] In the first week of September 2004, Mr McDonald told Mr Lewis that settlement had been extended to 30 September by which time Fasta would have its finance and Oakwood's money would be returned, save that $20,000 of the funds had been sent to Wyndon "to extend the contracts". On 30 September, Mr Lewis was told by Mr McDonald that settlement had not occurred, whereupon Oakwood stopped work. By then the house was about 80% complete. At that point Mr Lewis rang Mr Richards of Wyndon. He offered to pay $65,000 for this land on the basis that credit was given for the $20,000 which, in effect, Oakwood had paid to Wyndon. Mr Richards rejected the offer.

The judgment in the District Court

[16] The primary judge found that it was not until 29 August 2004 that Oakwood, through Mr Lewis, learnt that Fasta was not the registered owner but was instead a purchaser under an uncompleted contract of sale. He found that until then Oakwood, through Mr Lewis, thereby believed that the land was owned by the company with which Oakwood had contracted. He found that by 29 August 2004 there had been "considerable expenditure and actual work in relation to the site" and that the work had included the pouring of the slab, considerable draining and plumbing and framing and provision of trusses.

[17] Sections 196 and 197 of the *Property Law Act* 1974 (Qld) are as follows:

> "**196 Relief in case of improvements made by mistake**
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> Where a person makes a lasting improvement on land owned by another in the genuine but mistaken belief that--
>
> (a) such land is the person's property; or
>
> (b) such land is the property of a person on whose behalf the improvement is made or intended to be made;
>
> application may be made to the court for relief under this division.
>
> **197 Nature of relief**
>
> (1) If in the opinion of the court it is .just and equitable that relief should be granted to the applicant or to

any other person, the court may if it thinks fit make any 1 or more of the following orders -

(a) vesting in any person or persons specified in the order the whole or any part of the land on which the improvement or any part of the improvement has been made either with or without any surrounding or contiguous or other land;

(b) ordering that any person or persons specified in the order shall or may remove the improvement or any part of the improvement from the land or any part of it;

(c) ordering that any person or persons specified in the order pay compensation to any other person in respect of -

(i) any land or part of the land; or

(ii) any improvement or part of the improvement; or

(iii) any damage or diminution in value caused or likely to be caused by or to result from any improvement or order made under this division;

(d) ordering that any person or persons specified in the order have or give possession of the land or improvement or part of the improvement for such period and upon such terms and conditions as the court may specify.

(2) An order under this division, and any provision of the order, may -

(a) include or be made upon and subject to such terms and conditions as the court thinks fit, whether as to payment by any person of any sum or sums of money including costs (to be taxed as between solicitor and client or otherwise), or the execution by any person of any mortgage, lease, easement, contract or other instrument, or otherwise; and

(b) declare that any estate or interest in the land or any part of the land on which the improvement has been made to be free of any mortgage, lease, easement or other encumbrance, or may vary, to such extent as

> may be necessary in the circumstances, any mortgage, lease, easement, contract, or other instrument affecting or relating to such land or any part of the land; and
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> (c) direct that any person or persons execute any instrument or instruments in registrable or other form necessary to give effect to the declaration or order of the court; and
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> (d) order any person to produce to any person specified in the order any title deed or other instrument or document relating to any land; and
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> (e) direct a survey to be made of any land and a plan of survey to be prepared."

[18] The primary judge found that the work done by Oakwood until 29 August 2004 constituted a "lasting improvement on land" which was made in the genuine but mistaken belief that the land was the property of Fasta. There was no such mistake attending the work done after that date. He found that s 196 was nevertheless engaged and he exercised his discretion under s 197 effectively as if all of the work had been done under that mistake. He reasoned that Oakwood had acted reasonably in continuing to build the house, it being under a "contractual imperative" to do so. In that last respect, the primary judge was clearly correct. By 29 August 2004, Fasta had the benefit of the Deed of Consent to Occupancy so that Fasta was able to provide the access to the site which the building contract required.

[19] The primary judge found that Wyndon was relevantly blameless. It had done nothing to bring about Oakwood's predicament. But it had benefited from the improvement to its land. There was no challenge to the valuation evidence that as of October 2009, the property was worth $210,000, $95,000 attributable to the land and $115,000 to the improvements. His Honour found that this was not a case in which the defendant had some special affinity with the land such that it would not be just or equitable to vest the land in Oakwood on appropriate terms. He referred to Wyndon's preparedness to sell the land in 2004 and again in 2007, when it had contracted to sell it to someone else for a price of $200,000. That contract was not completed, it appeared, because of a caveat lodged by Oakwood. He perceived that Wyndon preferred an order for transfer of its land with compensation to be paid to it, rather than an order that it pay compensation. Accordingly he ordered the transfer to Oakwood.

[20] He fixed the compensation at $95,000, essentially upon that valuation evidence. He said that the assessment of compensation should err on the side of generosity to Wyndon and that $95,000 would be generous in that Wyndon or Mr Richards had "$20,000, over and above the $95,000, of [Oakwood's] money".

Wyndon's appeal

[21] I come then to the first of the extensive submissions made for Wyndon by Ms Richards, a law student and daughter of Wyndon's directors, who was given leave in this Court and in the District Court to appear on its behalf.

[22] The first ground of appeal challenges the finding that Mr Lewis had a genuine but mistaken belief that Fasta owned the land at the commencement of the works. The submission refers to aspects of the evidence of Mr Porter and of Mr Lewis as well as a fax which was sent to Oakwood by Fasta's solicitors on 28 July 2004. In that fax the solicitors wrote:

> "Mr Gerard McDonald has requested that we provide a copy of the enclosed facsimile, received today from the Seller's Solicitors for the above properties. …"

They were the properties which were the subject of the two contracts to which I have referred, including that for the presently relevant land. This fax was disclosed by Oakwood in these proceedings. But what was said to have been its enclosure was not disclosed and Mr Lewis said that he had never received it. It was not in evidence. In cross-examination, Mr Lewis was challenged with this fax on the basis that its reference to "the Seller's Solicitors" must have made him then realise that Fasta was not the owner. But still he maintained that it was not until 29 August 2004 that he learnt of this, and that he had not seen the significance in that phrase in the fax at the time. In all respects, the primary judge accepted his evidence.

[23] Mr Porter's evidence was that he asked Oakwood for information in response to the Council's query about the ownership of the land. He was unable to say whether he made that request of Mr Lewis or Mr Pfeffer. And he was unable to say whether the information which was passed on to the Council had been provided by Oakwood or the solicitors acting for Fasta.

[24] Wyndon's argument also referred to the fact that in the evidence of Mr Lewis about his conversation with Mr McDonald on 29 August 2004, he made no mention of being told that Fasta was not the owner. It was argued that this suggests that Mr Lewis was already aware of that fact. But the other evidence of Mr Lewis was that he was mistaken until that point.

[25] The primary judge did not specifically discuss that fax of 28 July 2004 from Fasta's solicitors. But I am not persuaded that he overlooked it. The judgment was given promptly following the trial and Mr Lewis had been challenged with the document in cross-examination. His Honour did discuss Mr Porter's evidence, and its limited value given that Mr Porter was unable to recall whether he inquired of Mr Lewis or Mr Pfeffer. In all of this, in my view there is not a sufficient basis to disturb the primary judge's findings as to Mr Lewis's state of mind.

[26] The second ground of appeal is that the knowledge of Mr Pfeffer ought to have been attributed to Oakwood. Mr Pfeffer did not give evidence. But upon Mr Porter's testimony that it was Mr Pfeffer, if not Mr Lewis, who provided him with a copy of Fasta's contract of sale prior to 27 July 2004, it followed that Mr Pfeffer must have been under no mistake as to at least the legal ownership of the land when the building work commenced.

[27] Ms Richards argued that Mr Pfeffer's knowledge was effectively that of Oakwood because he had signed the building contract on Oakwood's behalf and was in all relevant respects its authorised representative. Mr Lewis had described Mr Pfeffer as "my manager" or "marketing manager for Oakwood".

[28] Mr Pfeffer was an employee but not a director. Plainly he was actively involved in the making of this building contract. But there is no evidence that he was a decision

maker in the sense that he, with or without others, was the person who decided to build on this land and to do so at that point in time. Instead, that person was Mr Lewis and therefore it is his belief which was relevant. In the analogous context of recovery of a payment made under a mistake, it is the state of mind of the person who decides to make the payment for a company which is relevant: *Anglo-Scottish Beet Sugar Corporation Limited v Spalding Urban District Council*.[1] In that case, a payment was recoverable where it was made under a mistake of fact on the part of the employee who decided to make the payment, although the payer's managing director, who was not involved in the payment, knew the true facts. And an analysis in terms of who constituted the "directing mind" of the company requires an identification of the person who has "management and control in relation to the act or omission in point", as Nourse LJ said in *El Ajou v Dollar Land Holdings plc*.[2] The primary judge was correct in holding that it was the state of mind of Mr Lewis which was relevant.

[29] Next there are a series of grounds which, in substance, amount to a suggested error in the outcome having regard to the fact that much of the improvements were made after the time at which Mr Lewis became aware of the true ownership of the land. The argument for Wyndon sought support from a judgment of Dowsett J in *Abdul-Rahman v Jeffs & Ors*,[3] whilst the respondent relied upon a judgment of Carter J in *Ex parte Karynette Pty Ltd*.[4] In the former case, a claim under these provisions failed because there was no operative mistake on the part of the builder, who had acted in the belief, which was not mistaken, that the person for whom he had performed the work was the purchaser under an uncompleted contract of sale. In apparently the same circumstances, in *Ex parte Karynette Pty Ltd*, it was held that s 196 would be engaged, on the basis that the builder had a genuine but mistaken belief that the purchaser "would not be divested of the beneficial interest in the property which it had acquired from [its vendor under the uncompleted contract of sale]".[5] In *Abdul-Rahman*, Dowsett J doubted that a mistake of that kind could be within s 196. For Wyndon, it is argued that his judgment shows that there could have been no operative mistake here after 29 August 2004. For Oakwood, upon the basis of *Ex Parte Karynette Pty Ltd*, it is argued that there was a mistaken belief after that date, albeit a different mistake from that before then.

[30] The primary judge referred to each of these judgments but found it unnecessary to decide which of them should be followed. That was because of his view that once s 196 was engaged, as it was at least by the performance of work under the mistake which existed prior to 29 August 2004, the jurisdiction under s 197 became and remained exercisable. I agree with that analysis as to the jurisdiction. However, in my view it was relevant to decide whether there was a mistake (of the kind referred to in s 196) after as well as before that date, in determining what should be the relief under s 197.

[31] Oakwood's case that it was under a relevantly mistaken belief after 29 August 2004 cannot be accepted. Section 196 is engaged only where there is a difference, at the

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1 [1937] 2 KB 607 cited for this proposition in Goff & Jones, *The Law of Restitution* (7th ed, 2007) at [4-025].

2 [1994] 2 All ER 685 at 696 followed in *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239 at [6143].

3 (Unreported, Supreme Court of Queensland, Dowsett J, 19 August 1988).

4 [1984] 2 Qd R 211.

5 Ibid at 212.

time at which the improvement is made to the land, between the then ownership of the land and what the applicant for relief believed was the then ownership. Whether land which is the subject of an uncompleted contract of sale might be regarded for the purposes of s 196 as being "the property" of the purchaser is at least open to doubt. Be that is it may, I would agree with Dowsett J that there is no operative mistake where work is performed for a person who is known by the builder to hold such an interest and no more.

[32] The question then is whether the fact that much of the work was performed after that date should have led to a different outcome. There was no challenge to the finding that Oakwood was contractually obliged to complete the work for as long as it had access to the site. Accordingly, this was not a case where Oakwood could have been accused of some deliberate and high handed action in continuing with the work, such as to warrant a refusal of relief. The primary judge correctly concluded that it acted reasonably in proceeding with the construction. And that further work had undoubted benefits for the land and for its owner. Moreover, this work had been performed effectively with the approval of Wyndon, because for a distinct consideration, it had agreed to its purchaser having possession prior to settlement in order that building work could be undertaken. The relief which was granted here was of the kind described in paragraphs (a) and (c) of s 197(1), which are in terms which permitted these orders although the improvements made after 29 August would not themselves have engaged s 196.

[33] In summary, the primary judge did not err in granting this relief for the fact that some of the improvements had been made whilst Oakwood was not relevantly mistaken.

[34] It is then convenient to discuss the eleventh ground of appeal, which is that the only just and equitable order could have been for the payment of compensation by Wyndon. The power to order compensation against Wyndon existed by s 197(1)(c), by which the Court could order that any person pay compensation to any other person in respect of "… (ii) any improvement or part of the improvement". The improvement referred to in that provision is necessarily an improvement of the kind described in s 196. Accordingly, had an order for compensation been made against Wyndon, some distinct allowance for the value of the work performed prior to 29 August 2004 would have had to be assessed. But although that work was substantial, there does not appear to have been any evidence by which its value could have been reliably assessed. It may be inferred that its value would have been substantially less than Oakwood's contract price, so that had such relief been granted, Wyndon would have been better off than under the orders which were made. However, the question was what was just and equitable in all the circumstances, including the fact that the value of Wyndon's land had been enhanced by the work performed after 29 August, and that this work was still effectively the result of the mistaken belief which had affected Oakwood when it contracted and commenced to build. There were the further circumstances that Wyndon had shown an inclination over several years to sell this land and that according to the valuation evidence, it would be paid the land's unimproved value by an award of $95,000. In all of those circumstances, it was open to the primary judge to conclude that it was just and equitable to order as he did.

[35] The sixth ground of appeal challenged the primary judge's view about what was meant by a "genuine but mistaken belief". It was submitted that "negligent

behaviour" on the part of Oakwood deprived it of such a belief. That cannot be accepted. In a particular case, the unreasonableness of an asserted belief could be telling against an applicant's case, because of a resulting improbability that such a belief was in fact held. But s 196 is engaged where there is an actual but mistaken belief, albeit an unreasonable or careless one. It was argued that "shutting one's eyes to the obvious in failing to obtain evidence of title, in circumstances where such evidence is reasonably available" was fatal to the engagement of s 196 here. Again, in a particular case, an applicant which had refrained from making inquiries as to the ownership of the land, in case the truth should prove to be inconvenient, might not be able to claim that it was genuinely mistaken. But that was not this case according to the judge's findings.

[36] Grounds seven, eight and twelve may be considered together. They pointed to evidence from Wyndon's Mr Richards that it was the practice of builders to obtain some evidence of title before commencing work and that the Building Services Authority General Conditions of Contract provided for inquiries of that kind. It was said that Oakwood's predicament was largely the result of its failing to make the usual and reasonable inquiries and that this should have affected at least the type of relief which was granted. But the primary judge did take these matters into account,[6] and they did not require a different outcome.

[37] The ninth ground of appeal is that the primary judge erred in finding that Wyndon had received $20,000 effectively from Oakwood and in taking this into account in deciding on the appropriate compensation to be paid by Oakwood. In this respect, the judge's reasoning is susceptible to some criticism. Wyndon had received $20,000, including two payments each of $5,000 in respect of the contract for the sale of the subject land, all of which had been contributed by Oakwood. But that was Wyndon's entitlement against Fasta under those contracts and the variations to them. The basis for bringing these payments into account in assessing what should be paid under s 197 was not clearly apparent. However, the argument somewhat misstates the judge's reasoning. His view was that he should err on the side of generosity to the party whose land was being divested. But he awarded $95,000 as compensation because that corresponded with the unchallenged evidence as to the unimproved value of the land. He could not have legitimately awarded any higher figure for that component. He was sympathetic to an award also of something for the holding costs of the land, but he could not have done so absent evidence in that respect, which Wyndon had not tendered. Ultimately, his reference to the $20,000 was by way of saying that Wyndon had at least had that collateral benefit. But the reference was superfluous because regardless of it, the judge could not have awarded more than $95,000 according to the evidence.

[38] Ground ten of the appeal alleges that the primary judge erred by not accepting the evidence of Mr Richards that he was unable to sell the land to Oakwood in 2004 (when Oakwood offered to buy it) because of ongoing concerns about the position of Wyndon vis-à-vis Fasta. However, the trial judge was not obliged to accept that evidence and there is no apparent error in that respect. Moreover, the point seems to have been inconsequential.

[39] Ground 14 complains that the primary judge should have directed Wyndon to produce evidence of the costs of holding the property, such as rates, because

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6 *Oakwood Constructions Pty Ltd v Wyndon Properties Pty Ltd* [2010] QDC 80 at [40].

Wyndon, being without legal representation, could not have been expected to anticipate its relevance. That cannot be accepted. It was for Wyndon to establish the extent of any such costs and to advance its case in that respect.

[40] Ground 15 complains that it was irrelevant for the judge to take into account the fact that Wyndon had wanted to sell its land in 2007. In my view, it was clearly relevant in deciding whether it would be just and equitable to divest Wyndon of the property. Wyndon had not advanced some particular case of why it should be permitted to retain its land, such as any proposed further development of it.

[41] It is convenient to mention next ground 18, by which it is argued that the primary judge failed to rule upon whether Oakwood improperly interfered by a caveat with Wyndon's sale in 2007. It is said that he should have concluded that it was lodged without reasonable cause.[7] His Honour was not obliged to decide that question. And the orders were made upon the basis of a valuation of the property at a higher figure than the sale price under that 2007 contract.

[42] Ground 16 was a contention that the orders made were inappropriate and unjust, given that the property has an area of 6,025 square metres and that the building occupies only 140 square metres. But there was no case advanced to the effect that Wyndon was proposing to subdivide the land.

[43] Lastly, there was a claim that his Honour should have considered also some evidence of sale prices of other properties in the area, rather than simply the evidence of the valuer. But his Honour was correct not to rely upon those prices as evidence of value.

[44] On Wyndon's appeal none of the grounds of appeal is made out. Wyndon's appeal should be dismissed.

Oakwood's appeal on costs

[45] In the principal judgment, his Honour discussed what should be the appropriate outcome on costs. He said that if Oakwood had sought its costs, it had done so "very faintly",[8] and that he would not have been prepared to award costs in its favour. He held that an owner of land in Wyndon's position was entitled to defend an application of this kind "strenuously". But because Wyndon was self-represented, there could be no order for costs in its favour. He said that an award against Wyndon would be far from "just and equitable".

[46] After that judgment was given, the primary judge was informed of an offer to settle which had been made by Oakwood in February 2010, under which Oakwood said that it would:

> "accept the sum of $60,000 inclusive of [Oakwood's] costs in full satisfaction of [Oakwood's] claim and [Wyndon's] counterclaim, that sum to be paid:
>
> (a) if Lot 24 (the property the subject of the Claim) is sold and the settlement date is within 12 months of the date of this Offer, at the date of settlement;
>
> (b) otherwise, within 12 months of the date of this Offer."

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7 *Land Title Act* 1994 (Qld), s 130.

8 *Oakwood Constructions Pty Ltd v Wyndon Properties Pty Ltd* [2010] QDC 80 at [47].

[47] Oakwood argued that it was entitled to the benefit of r 360 of the *Uniform Civil Procedure Rules* upon the basis that it had obtained a judgment no less favourable than the offer to settle. The primary judge said that the difficulty was in concluding that this offer would have been less favourable to Oakwood than the judgment. The offer involved recompense for Oakwood's building work whereas the judgment involved a transfer of land with payment by Oakwood for the unimproved value. He concluded then that the case did not come within r 360(1). But he went further and held if the rule did apply in the circumstances of this case, another result would be appropriate, which was that there should be no order as to costs. In summary, his reasons for that conclusion were the unusual nature of the remedy and what he said was the blamelessness of Wyndon. His Honour said:

> "It is a strong thing to say that such a defendant ought to anticipate the court's exercising a novel discretion against it, on pain of suffering a costs order of a punitive or disciplinary nature."

[48] I share the primary judge's doubt that r 360 was engaged. But if it was engaged, I see no error in his Honour's conclusion that in terms of that rule, another order for costs was appropriate in the circumstances. I would prefer not to describe the jurisdiction under s 197 now as novel. But the circumstances in which it was exercised, at least in this case, were somewhat unusual. Wyndon was not at all responsible for Oakwood's predicament. And although the primary judge was persuaded to accept the evidence of Mr Lewis that initially he had acted under a mistaken belief, clearly there was evidence which indicated a real prospect of that matter not being proved. Thus it was reasonable for Wyndon to contest that threshold question. Ultimately, the nature of these proceedings was that Oakwood was seeking an indulgence by being relieved from the consequences of its own mistake to which Wyndon had not contributed. All of these circumstances combined to make this an exceptional case so far as r 360 was concerned.

[49] I would dismiss the cross appeal as to costs. The costs of Wyndon's appeal are another matter. They should follow the event as should the costs of this cross appeal by Oakwood.

Orders

[50] The appeal and cross-appeal should be dismissed. The appellant in each appeal should be ordered to pay the costs of the respondent to that appeal.