SUPREME COURT OF QUEENSLAND

CITATION:	*Shadbolt v Wise* [2002] QSC 348
PARTIES:	**NORMAN WILLIAM SHADBOLT and NOELE SHADBOLT** (applicants) v **FRANK WISE** (respondent)
FILE NO:	S2751 of 2001
DIVISION:	Trial Division
DELIVERED ON:	31 October 2002
DELIVERED AT:	Brisbane
HEARING DATE:	16-17 May, 1 August 2002
JUDGE:	Mullins J
ORDERS:	**1. The applicants forthwith pay to the respondent compensation of $15,000 for the encroachment of the pool and pool enclosure onto Lot 46 on Crown Plan C31729 in the County of Canning and Parish of Mooloolah ("Lot 46") as shown on the identification survey done by John Reader & Associates Pty Ltd dated 9 December 1998 (Ex 13) ("the encroachment").** **2. Subject to all necessary consents from Maroochy Shire Council and Greatwood Community Titles Scheme 19855 being obtained within 6 months of the date of this order, the respondent transfer to the applicants the fee simple interest in the land over which the encroachment extends ("subject land").** **3. The applicants must pay to the respondent all costs and expenses reasonably incurred by the respondent in order to give effect to the preceding order including, without limiting the generality of the foregoing, the costs of the preparation of the survey plan required to subdivide the subject land from Lot 46, obtaining the consent of the Maroochy Shire Council to the subdivision of the subject land from Lot 46 and all legal costs incurred by the respondent in respect of the transfer of the subject land to the applicants.** **4. Liberty to either party to apply on 3 days' notice in writing to the other.**

CATCHWORDS: TORRENS SYSTEM – ENCROACHMENT – application for relief in respect of encroachment under s184 *Property Law Act* 1974 (*Q*) – pool and pool enclosure constructed on lot in community titles scheme encroached on adjoining property –whether relief should be granted under s185 *Property Law Act* 1974 (*Q*) – where encroachment arose as a result of recklessness of encroaching owner as to the location of the relevant boundary – where encroachment is significant in terms of location but not area having regard to the total area of the adjoining property and the potential uses of that property – adjoining owner's concern to maintain integrity of boundaries is a consideration to which significant weight cannot be given – where demolishing pool and enclosure would cause significant loss to the encroaching owner – transfer of land on which encroachment is situated ordered subject to necessary consents from body corporate and local authority

TORRENS SYSTEM – ENCROACHMENT – COMPENSATION – unimproved capital value of the land upon which encroachment is situated is its market value – relevant to take into account the premium which the adjoining owner would pay to acquire the land and an encroaching owner would seek for purpose of enabling construction of pool and enclosure in that location – encroachment arose from negligence of encroaching owner – compensation to be 3 times unimproved value of the subject land plus all costs to be incurred by adjoining owner associated with subdivision and transfer of the subject land – *Property Law Act* 1974 (*Q*), s186

Body Corporate and Community Management Act 1997
Property Law Act 1974

Bunney v South Australia [2000] SASC 141
Haddans Pty Ltd v Nesbitt [1962] QWN 44
Kostis v Devitt (1979) 1 BPR 9231
re Profke (unreported, SupCt(Q), Cooper J, 19 June 1990)
Spencer v The Commonwealth (1907) 5 CLR 418, 432
Tallon v The Proprietors of Metropolitan Towers Building Units Plan No 5157 [1997] 1 QdR 102

COUNSEL: A McLean Williams for the applicants
SJ Keim for the respondent

SOLICITORS: Murray Lyons for the applicants
Justin Crosby for the respondent

[1] **MULLINS J:** Mr Norman William Shadbolt and Mrs Noele Shadbolt ("the applicants") seek relief pursuant to s 184 of the *Property Law Act* 1974 ("*PLA*") in

respect of an encroachment which they have constructed on land belonging to the adjoining owner, Mr Frank Wise ("the respondent").

Description of properties

[2] The applicants are the registered proprietors as joint tenants of the land described as Lot 4 on SP 120415 in the County of Canning Parish of Mooloolah ("Lot 4"). Lot 4 is part of a community titles scheme under the *Body Corporate and Community Management Act* 1997 ("*BCCMA*"). Community Management Statement 19855 applies to Lot 4. The name of the body corporate is Greatwood Community Titles Scheme 19855.

[3] Adjoining Lot 4 on its southern side is the land described as Lot 46 on Crown Plan C31729 in the County of Canning Parish of Mooloolah ("Lot 46") which is owned by the respondent.

Encroachment

[4] The applicants constructed a swimming pool during September/October 1998 and a pool enclosure in about November 1998. The swimming pool is a sprayed concrete steel reinforced pool of approximate dimensions of 9m x 4.5m. It is supported by pylons. The pool enclosure has a powder coated aluminium frame which is covered by a strong shade cloth in order to keep the leaves out of the pool and includes a hardwood timber decking around the pool. The elaborate nature of the pool and pool enclosure is apparent from the various photographs that were tendered in evidence.

[5] It is common ground that the pool, pool enclosure and a metal garden shed encroach onto Lot 46. The extent of the encroachments are shown in the identification survey prepared by John Reader & Associates Pty Ltd on 9 December 1998 which is Ex 13. Slightly less than half of the pool and pool enclosure encroaches onto Lot 46. It is conceded by the applicants that the garden shed could be relocated (as is the case) and it therefore does not qualify as a "building" within the meaning of that term as defined in s 182 of the *PLA*. This application is therefore concerned with the encroachment by the pool and pool enclosure.

[6] The land upon which the encroachment is situated is elevated. Looking east there are distant ocean views. Lot 46 slopes away steeply from its boundary with Lot 4.

[7] From the point on the boundary which marks the western end of the encroachment, the encroachment goes for a maximum distance of 12.65m to the east. The width of the encroachment varies from 4.55m towards the eastern end of the encroachment to 1.82m at the western end.

[8] Each of the valuers was instructed that the land the subject of the encroachment was approximately 108m². The identification survey plan which is Ex 13 contains an encroachment diagram. From that diagram the metal garden shed encroaches over an area of about 3.5m² on Lot 46. The calculation of the area of the encroachment formed by the pool and pool enclosure is approximately 46m². It appears that the measurement of 108m² was arrived at during negotiations between the parties in considering a negotiated transfer by the respondent of the land on which the encroachments are situated together with some surrounding land in order to provide

for clearances between the pool enclosure and the boundary and to provide for a regular boundary, rather than one which coincides with the encroachment. The power of court under s 185(1)(b) of the *PLA* is limited to ordering a transfer or lease or granting rights in respect of the land over which the encroachment extends: *Tallon v The Proprietors of Metropolitan Towers Building Units Plan No* 5157 [1997] 1 QdR 102, 107.

Powers of court

[9] Under s 185(1) of the *PLA*, the court may make such order as it may deem just with respect to:

(a) the payment of compensation to the adjacent owner; and

(b) the conveyance, transfer, or lease of the subject land to the encroaching owner, or the grant to the encroaching owner of any estate or interest in the land or of any easement, right, or privilege in relation to the land; and

(c) the removal of the encroachment.

[10] Section 185(2) of the *PLA* lists the matters which, amongst others, the court may consider in the exercise of its discretion as to whether or not to grant any relief. These matters are:

> "(a) the fact that the application is made by the adjacent owner or by the encroaching owner, as the case may be; and
> (b) the situation and value of the subject land, and the nature and extent of the encroachment; and
> (c) the character of the encroaching building, and the purposes for which it may be used; and
> (d) the loss and damage which has been or will be incurred by the adjacent owner; and
> (e) the loss and damage which would be incurred by the encroaching owner if the encroaching owner were required to remove the encroachment; and
> (f) the circumstances in which the encroachment was made."

[11] The applicants seek an order that the respondent transfer to them the land which is the subject of the encroachment, conditional only upon the payment of reasonable compensation for that land by the applicants to the respondent. The applicants also seek an order that the respondent pay the applicant's costs of the application. The respondent seeks an order for the removal of the encroachment and for the costs of the application.

Preliminary point

[12] At the outset of the hearing of the application the respondent raised, by way of a preliminary point, that the court should require notice to be given of the applicants' application to the body corporate, on the basis that the body corporate was a person interested in the outcome of the application.

[13] The interest which the body corporate has in the application is that, if an order were made ordering the transfer of the encroaching area to the applicants to be amalgamated with Lot 4, the land comprising the scheme land under the relevant community title scheme would be altered.

[14] Under s 27(1) of the *BCCMA* a community titles scheme may be changed only by the recording of a new community management statement. That can only occur, however, if the body corporate consents to the recording of the new statement and endorses its consent on the new statement: s 50(2) *BCCMA*. The consent of the body corporate to the recording of a new community management statement for the scheme in the place of the existing statement for the scheme must be in the form of a resolution without dissent: s 55(2) *BCCMA*.

[15] The point was made by the respondent that if the court were disposed to grant to the applicants the relief which they sought, the relief may be nugatory unless the body corporate were prepared to pass the appropriate resolution.

[16] As the parties had prepared for their hearing on 16 May 2002, I decided to proceed with the hearing of the application at that time and made orders on 17 May 2002 in respect of the notification to the body corporate of the application and to give the body corporate an opportunity to pass the requisite resolution without dissent or to otherwise seek an opportunity to be heard with respect to the orders sought by the applicants.

[17] An affidavit of Mr DH Hodgson who is the solicitor for the applicants filed on 27 June 2002 deals with the service on the secretary of the body corporate of the documents which I required to be served by my order of 17 May 2002. According to Mr Hodgson, he was subsequently contacted by solicitors engaged to advise the body corporate.

[18] The body corporate has neither passed the requisite resolution without dissent nor did it seek an opportunity to be heard with respect to the orders sought by the applicants.

[19] When the matter was re-listed in order to deal with the position of the body corporate on 1 August 2002, it was clear from the affidavit of Mr Hodgson sworn on 30 July 2002 and filed by leave on 1 August 2002 that the solicitors for the body corporate sought to have the applicant sign a deed of indemnity which the applicants refused to do, although they indicated that they would be prepared to pay the reasonable costs associated with a new community management statement, if required, together with survey fees and costs associated in dealing with other owners in the scheme, including their mortgagees.

[20] A further affidavit of Mr Hodgson sworn on 30 July 2002 and filed by leave on 1 August 2002 dealt with a telephone inquiry which he made of Mr Colin McKay, a valuations administration officer employed in the Department of Natural Resources at Nambour. Mr McKay informed Mr Hodgson that the total unimproved value of the six lots in Greatwood Community Title Scheme 19855 comprising a total area of 5.072 hectares is $365,000 and that if the encroaching area were added to Lot 4, it would only marginally affect the value.

[21] At the hearing on 1 August 2002, it was submitted on behalf of the applicants that it was not necessary for the body corporate to be made a party to the application. It was also submitted that were an order to be granted in favour of the applicants requiring the transfer of the subject land to Lot 4, the applicants would need to obtain the requisite resolution without dissent from the body corporate to enable a new community management statement to be recorded reflecting the addition of that land to Lot 4 and that if the body corporate refused to pass a resolution without

consent, the applicants would be able to proceed to obtain an order from an adjudicator or the District Court pursuant to s 223(3)(t) of the *BCCMA*. This submission assumes that if the body corporate did refuse to pass a resolution without dissent that the applicants would ultimately be successful in obtaining an order from the adjudicator or, on appeal, from the District Court ordering the body corporate to lodge a request with the registrar for the recording of a new community management statement. It is not possible on this application to determine whether the body corporate ultimately would have to facilitate the recording of a new community management statement, if the subject land were ordered to be transferred to the applicants. The fact that the addition of the subject land to Lot 4 would add marginal value to the total unimproved value of the land comprising the relevant community titles scheme is only one consideration.

[22] I am satisfied that sufficient notice of this application has been given to the body corporate to enable the body corporate to take advice and to elect whether or not it requires to be heard on the application.

[23] As the relief which is sought by the applicants is discretionary, it is relevant to whether or not the relief is granted and the form in which it is granted, as to whether the relief will be of effect. The fact that any transfer of the subject land to the applicants would require the consent of the body corporate to the recording of a new community management statement to reflect the addition of that land to Lot 4 is a relevant consideration on this application.

Facts

[24] The applicants purchased Lot 4 in or about November 1994. At that stage the area of Lot 4 was 1030 m^2 and Lot 4 did not adjoin Lot 46. A substantial two storey brick dwelling house had been constructed on Lot 4. The area between Lot 4 and Lot 46 where the applicants' pool was constructed was common property of the body corporate to which the applicants were entitled to exclusive use for recreational purposes. Prior to the applicants' constructing the pool, the members of the body corporate were considering expanding the area of each lot by adding to that lot the area of the common property in respect of which that lot had exclusive use. A surveyor, Mr B Livingstone, prepared a plan for the body corporate dated 15 February 1998 (Ex 14) which showed the proposed boundary realignments.

[25] The respondent's grandfather purchased Lot 46 in 1901. He died in 1917 and the respondent's father was entitled to succeed as the owner. The transmission to the respondent's father was never registered. He died in or about 1930. Lot 46 was subsequently registered in the name of the respondent. Lot 46 has an area of 32.375 ha. In recent years Lot 46 has been used by the respondent's family for running cattle. The respondent's son, Mr Peter Wise, who is conducting this proceeding on the respondent's behalf, described the land along the northern boundary of Lot 46 as open bloodwood and blackbutt country. The aerial photographs which comprise Exs 8 and 9 show the nature of the terrain and vegetation of Lot 46 in the vicinity of Lot 4.

[26] After the applicants had purchased Lot 4, they were aware of a fence between the common property of the body corporate in the vicinity of Lot 4 and Lot 46. The fence had been in place for approximately 90 years. It was a timber post and barbed wire fence. The exact location of the fence is shown in the identification survey

which is Ex PRG2 (to which I will refer as "Ex PRG2") to the affidavit of surveyor Mr Peter Griffiths which was filed on 10 August 2001. In the vicinity of the most eastern point of Lot 4, where it adjoins Lot 46, the fence is about 5.3m south of the boundary and therefore located on Lot 46. The fence runs at an angle to the boundary line, so that the distance from the boundary of Lot 46 in the vicinity of the most western point of Lot 4 is 3.2m. There is a hand painted notice on a piece of tin on part of the fence which is shown in Ex 10 and states:

> "NOTICE
> KEEP OUT
> NO INTARY *(sic)*
> NO TRESPASSING
> OUT F. WISE"

[27] At all times, however, there has been a wooden survey peg, painted white, which was on the boundary between the common property and Lot 46. That survey peg is described as "O Line Peg" in the upper drawing of Ex PRG2. That peg is 0.9m from the western edge of the pool enclosure. The applicants never at any stage sought to check what that peg indicated. They assumed that the peg marked the boundary between Lot 4 and the common property. Prior to the expansion of the boundaries of Lot 4 to incorporate the area of the common property to which Lot 4 had exclusive use, that peg did not indicate any boundary involving Lot 4. North east of that peg within the common property, but south of the original part of Lot 4 on which the dwelling-house was constructed, the common property was the site of two concrete tanks each 3.5m in diameter and a pump which were used for providing water for the development of which Lot 4 forms part.

[28] The applicant erected the metal garden shed in advance of constructing the pool and the pool enclosure in what they considered to be the most accessible place, having regard to the terrain. About one-third of the area of the shed encroaches onto Lot 46.

[29] Under the exclusive use by-law, the applicants required the consent in writing of the body corporate to construct the pool and the pool enclosure and the body corporate was required to ensure that the construction took place in accordance with the Bushland Management Plan. There is no formal record of the body corporate in respect of a resolution approving the construction of the pool and pool enclosure on the common property. By letter dated 20 May 1998 the male applicant requested the chairman of the body corporate to advise the members of the body corporate of the applicants' intention to build an in-ground swimming pool on the area of exclusive use land for Lot 4 and requested that any objections be advised to him. The then chairman of the body corporate, Mr Glen Adamson, gave evidence at the hearing of this application that there were no objections to the applicants' constructing their pool and enclosure, but there was no formal meeting or resolution about it.

[30] The applicants engaged Ibis Pools to construct the pool and engaged Trueline to undertake the aluminium fabrication for the pool enclosure. The applicants left it to the pool contractor and aluminium fabricator to organise all necessary permits and approvals. The applicants were away at times during the construction. The development permit for the building works associated with the pool was approved with conditions on 7 August 1998. The development permit is Ex PFW3 to the affidavit of Mr Peter Wise filed on 10 August 2001.

[31] Condition 2 of the development permit states:

> "Inspections are required by law and must be called for. Give 48 hours notice of inspections at the following stages:
>
> **INGROUND SWIMMING POOL**
>
> a) When excavations are complete, steel in place and prior to pouring of concrete.
>
> b) On completion of swimming pool, including all mechanical equipment, pipe work and fencing prior to filling of the swimming pool."

[32] The male applicant discussed with the pool contractor that the fence was the boundary with Lot 46 and instructed the contractor that the regulations required the pool to be 1500 mm from the boundary.

[33] It is common ground between the parties that the Council file indicates that the inspections required by condition 2 of the development permit were not conducted and that the first inspection referred to in condition 2(a) of the development permit would have had Council officers specifically address, as part of their inspection, that the structure was within the front, side and rear boundary clearances required by the standard building regulation and the approved drawings. Exhibit 4 is a copy of the form completed by the officer who undertakes the first stage pool inspection on behalf of the Council which confirms that a check was required of the boundary clearances.

[34] The male applicant described the actual position where the pool was constructed in the general location of where it was intended to be constructed as "an ideal position", even though the applicant was aware that would result in the pool encroaching onto the 1500 mm distance from what the male applicant assumed to be the boundary fence.

[35] Condition 15 of the development permit provided:

> "Back wash must be discharged to council's satisfaction where no underground stormwater system is available backwash is to discharge to an absorption disposal trench with a capacity large enough to accept the total back wash waste water."

The photos comprising Ex 12 show the pipe that comes from the pool to discharge the backwash. There is no absorption disposal trench. The pipe discharges straight onto the respondent's property.

[36] The pool and pool enclosure were constructed at a significant cost:

Removal of trees	$1,350
Construction of pool enclosure	33,495
Construction of pool	18,910
Total	**$53,755**

[37] The applicants have obtained quotes from Trueline and Ibis Pools for demolishing the pool, screen enclosure and timber decking. These quotes are for at least a total sum of $15,600.

[38] Because of the nature of the use being made of Lot 46 by the respondent's family, it was not necessary for Mr Peter Wise or his brother to traverse Lot 46 in the vicinity of Lot 4. Mr Peter Wise first became aware of the applicants' metal garden shed

when he had gone by the tractor to that area of Lot 46 in late 1997 or early 1998 and noticed the shed, but he did not consider whether it was intruding over the boundary or not, as he could see it was a portable shed and only small.

[39] It was when Mr Peter Wise was inspecting part of the respondent's property in November 1998 that he noticed that the pool and pool enclosure had been constructed across the boundary. That was the first occasion that Mr Wise had seen any part of the construction. Mr Wise immediately alerted the applicants to the fact that they had built their pool and pool enclosure across the boundary.

[40] Correspondence ensued between the solicitors for the parties.

[41] This application could not be brought by the applicants until the relevant plan incorporating the exclusive use area for each lot as part of that lot's area was registered. That occurred on 25 July 2000. As a result of the registration of SP120415, Lot 4 adjoins Lot 46 where the encroachment has occurred, so that the applicants qualify as "encroaching owner" pursuant to s 182 of the *PLA* and the respondent qualifies as the "adjacent owner" under the same provision.

[42] Mr Peter Wise dealt with the history of Lot 46 in his affidavit and oral evidence. Lot 46 was one of the early pieces of land surveyed after Buderim was first settled. The property is the only property in Buderim whose boundary has not changed since 1883. It was the first property in Australia to grow coffee and part of the memorabilia that the respondent retains concerns that early coffee business. The respondent throughout his life had used Lot 46 for farming. Mr Peter Wise contemplates opening a tourist venture in the future on Lot 46 centred around the farming history of Buderim including the coffee industry and the brand name which he has registered "Buderim Mountain Gold".

[43] Mr Peter Wise stressed the importance to the respondent's family that the integrity of the boundaries of Lot 46 be maintained. Although not currently occupied, the old homestead that was built on Lot 46 in 1881 remains there.

Valuer's evidence

[44] The applicants relied on the opinion of valuer, Mr Peter Degotardi, a director of the Sunshine Coast office of Herron Todd White. Mr Degotardi inspected the encroachment on 10 April 2001. His written report sets out his valuation as at 10 April 2001 of that part of Lot 46 encroached upon as $1,000.

[45] On the basis that the subject land is contained within the Hillslope Residential precinct in the Maroochy Shire Town Plan, Mr Degotardi was of the opinion that the site encroached upon has subdivisional potential and the developed lots were likely to be around an average 2000m².

[46] Mr Degotardi was advised that the encroachment was some 108m² in area. Mr Degotardi was not asked during the hearing whether his opinions would be the same if the actual area of the encroachment was 46m². In view of the fact that Mr Degotardi had actually inspected the encroachment and included photographs of the pool and enclosure in his report and in view of the tenor of his evidence, I infer that that difference in area of the encroachment was immaterial to Mr Degotardi's opinions. He considered the area of the encroachment in relation to the total area of Lot 46 which he described as an in globo parcel and, even allowing for the

subdivision of Lot 46, that the encroachment would be likely to be at the rear of a large lot and would have little or no effect on the end value of such lot. Mr Degotardi therefore concluded that the value of the encroached land was a nominal value of $1,000.

[47] Mr Degotardi conceded that a purchaser may be prepared to pay a premium over what would otherwise be the value of the subject land, in order to obtain it to construct a swimming pool at a cost of $50,000. Mr Degotardi was of the view that any premium paid would be relative to the cost of the construction of the pool, as the point would be reached where it would not be worthwhile to spend an amount of money on acquiring the land that was out of all proportion to what was proposed to be spent on the pool and associated structures. Mr Degotardi conceded that a premium between $4,000 and $6,000 might be appropriate when a person was proposing to spend $40,000 or $50,000 on a pool.

[48] The respondent relies on valuer Mr Thomas Kinivan whose valuation is dated 9 July 2001. He valued the unimproved value of the land encroached upon as $120 per m², relying on comparable sales of subdivided land in the vicinity, including the original sale of Lot 4 on 3 October 1992 at $126 per m². I have difficulty with the approach of using a dollar value per square metre which is based on an assumption that all subdivision costs for a residential subdivision have been incurred by the seller.

[49] Mr Kinivan also considered that the land obviously had a value for being added to the encroaching owner's land.

Whether any relief should be granted

[50] It is necessary to dispose of a threshold issue. Part 11 of the *PLA* is substantially a re-enactment of the *Encroachment of Buildings Act* 1955. That was remedial legislation designed to facilitate the resolution of parties' rights where an encroachment exists. In considering the *Encroachment of Buildings Act* 1955 Gibbs J (as he then was) in *Haddans Pty Ltd v Nesbitt* [1962] QWN 44 stated at 100:

> "… for it would be a rare and exceptional case in which the court would make an order under this Act in favour of a person who, with full knowledge, encroached on his neighbour's land. The court would indeed be reluctant to set the seal of its approval on a deliberate trespass."

[51] During the hearing of this application I commented more than once on what I considered was the flagrant disregard of the applicants of the rights of the respondent to enjoy his property without interference from the applicants. As a matter of prudence and with a view to ensuring that the not insignificant construction about to be embarked on was within the boundaries of the land on which the applicants were entitled to build, the applicants should have satisfied themselves as to what was the true boundary of Lot 46. This could have easily been done by a check survey. The lack of prudence on the applicants' part and their disregard for their neighbour's property rights is heightened by the fact that the body corporate had engaged a surveyor who was on site in February 1998 when the applicants were in the process of preparing for the construction of the pool and the pool enclosure and the applicants did not seek to engage the surveyor's assistance in identifying the relevant boundary. Particularly when the applicants were aware of the location of a survey peg which was in the vicinity of where the pool was being

constructed, it was a glaring error on the applicants' part to proceed with their construction, without taking the simple steps required to ensure that they did not encroach onto Lot 46.

[52] There was no warrant for the applicants to rely on the existing location of an old fence as the boundary, when they had no reliable information to confirm that the fence was on the correct boundary. Their conduct is aggravated by the fact that the actual location for constructing the pool and pool enclosure was chosen because it was the "ideal position" and captured ocean views. Their arrogance is confirmed by their lack of compliance with clearance requirements from what they assumed was the boundary for Lot 46 and directing the discharge of the backwash from the pool onto Lot 46. Mr McLean Williams of Counsel on behalf of the applicants conceded that he could not make a submission against the applicants being negligent in their conduct. I have concluded, however, that their recklessness falls short of being "full knowledge" of the encroachment and that this is therefore not case where the encroachment was deliberate.

[53] It is necessary to consider the matters set out in s 185(2) of the *PLA* and any other matters which are relevant to whether and, if so, what relief should be granted. The observations which I have set out above in respect of the recklessness of the applicants in undertaking the construction without a prior survey of the relevant boundary are relevant.

[54] This is an application which has been made by the applicants as the encroaching owner, as it is obviously in the interest of the applicants to endeavour to regularise the encroachment.

[55] Although the area of the encroachment is insignificant in comparison to the total area of Lot 46, it remains a significant encroachment in view of the purpose for which the encroachment is used by the applicants and its location in a position which captures distant ocean views. The expenditure of the applicants of almost $54,000 in clearing the land and constructing the pool and pool enclosure is significant.

[56] The reality from the respondent's viewpoint is that, although an annoyance to have his property so invaded by the applicants, it will make no significant difference to the use of Lot 46 by the respondent, whether Lot 46 is continued to be used for running cattle, developed into a tourist venture or subdivided into large allotments permitted by the inclusion of this part of Lot 46 in the Hillside Residential precinct under the relevant town plan. Although I accept that the importance of the historical and family ties put forward by the respondent is not an irrelevant consideration, it is not something to which significant weight can be attached in all the circumstances of this encroachment in considering whether or not relief should be granted.

[57] The dismantling of the pool enclosure and demolition of the pool would result in the destruction of a significant asset at a significant cost. That easily outweighs the loss and damage to the respondent caused by the encroachment.

[58] The applicants blamed their contractors for failing to attend to all Council requirements, such as the inspections usually undertaken by the Council of a pool construction, which may have brought the existence of the encroachment to their notice at an earlier stage. The applicants had the ultimate responsibility of ensuring

that the contractors constructed the pool and pool enclosure on the land which they were entitled to use for that purpose.

[59] It is a question of balancing all the relevant factors. Although the circumstances in which the encroachment was made are of no credit to the applicants, I consider that the destruction of a substantial asset with the resultant cost to the applicants of that destruction is not justified, when the relevant provisions of the *PLA* can be utilised to ensure a just result to the respondent.

[60] I have therefore concluded that it is appropriate to grant relief to the applicants which will enable them to maintain the pool and pool enclosure.

[61] It was submitted by Mr Keim of Counsel on behalf of the respondent that if the court were disposed to order relief in favour of the applicants, that relief should be a time limited easement for support, relying on *Kostis v Devitt* (1979) 1 BPR 9231, 9237.

[62] The reasons which favoured the grant of an easement in *Kostis v Devitt* are not relevant to the current application. Those reasons were that the improvements which comprised the encroachments were old and approaching the end of their economic life and a transfer would result in an irregular block which would significantly affect its redevelopment potential.

[63] On the evidence that was adduced on the hearing, the appropriate relief would be a transfer of the land the subject of the encroachment by the pool and pool enclosure. Whether that can be carried into effect depends on whether the body corporate consents to the necessary recording of a new community management statement to incorporate the additional land as part of Lot 4. It is likely that the Maroochydore Shire Council will need to consent to the subdivision of Lot 46 to enable the transfer to be effected. No submissions were made on behalf of either party in respect of the likelihood of that consent being forthcoming.

[64] The parties did not canvass in their submissions, as to what should be the outcome, if it were not possible for the transfer of the subject land to be given effect, except to the extent that the respondent submitted that no relief in favour of the applicants should be granted. The possible alternatives would need to be considered in the light of why the transfer could not be effected and whether the body corporate's consent to the granting of any other rights to Lot 4 were required and whether that were feasible to obtain.

[65] Although it is unsatisfactory not to resolve this application finally, I have decided that it is appropriate to grant the relief sought by the applicants in respect of the transfer of the land upon which the encroachments exist, but make that subject to obtaining the requisite consent of the body corporate and any necessary consent of the Maroochy Shire Council within 6 months from the date of the order, and give the parties liberty to apply for alternative relief consistent with my judgment that the applicants should be granted relief which enables them to maintain the pool and pool enclosure, if the transfer does not proceed within that period of 6 months or such extended period as may be ordered.

Compensation

[66] On the basis that I will be ordering a transfer under s 185(1)(b) of the *PLA* or, some lesser interest if that transfer is unable to be implemented, s 186 of the *PLA* is applicable. Section 186 states:

> "186 Compensation
> (1) The minimum compensation to be paid to the adjacent owner in respect of any conveyance, transfer, lease, or grant under section 185 to the encroaching owner shall, if the encroaching owner satisfies the court that the encroachment was not intentional and did not arise from negligence, be the unimproved capital value of the subject land, and in any other case 3 times such unimproved capital value.
> (2) In determining whether the compensation shall exceed the minimum
> and if so by what amount, the court shall have regard to-
> (a) the value, whether improved or unimproved, of the subject land to the adjacent owner; and
> (b) the loss and damage which has been or will be incurred by the adjacent owner through the encroachment and through the orders proposed to be made in favour of the encroaching owner; and
> (c) the circumstances in which the encroachment was made."

[67] In view of my finding that the encroachment arose from negligence on the part of the applicants, the compensation must be a minimum of three times the unimproved capital value of the land upon which the encroachment exists. There is no definition of "unimproved capital value" for the purpose of s 186 of the *PLA*. In *re Profke* (unreported, SupCt(Q), Cooper J, 19 June 1990) Cooper J applied the traditional test of market value, as set out in *Spencer v The Commonwealth* (1907) 5 CLR 418, 432 where the question is asked:

> "What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?"

A similar approach was adopted by Debelle J in *Bunney v South Australia* [2000] SASC 141 at para 35 where the following meaning was given to "unimproved capital value" where used in similar legislation:

> "In my view, it means the market value of an unencumbered estate in fee simple in the land assuming that there are no improvements upon the land."

[68] In determining market value in the circumstances of this case, it must be a relevant consideration that the land is sought for the purpose of the construction of a pool and pool enclosure for the enjoyment of the adjoining owner. There was logic in Mr Degotardi's approach that even though the subject land would otherwise have a nominal value, a purchaser who required the particular land to enable such construction to take place would be prepared to pay a premium for that land relative to the cost of the construction and, correspondingly, a vendor would not fail to take into account the use to which the land could be put by the adjoining owner in setting the fair price at which the vendor is prepared to sell.

[69] On the basis of Mr Degotardi's opinion, I consider the unimproved capital value of the subject land is $5,000. That makes the minimum compensation $15,000. No submissions were directed at the date at which compensation should be assessed, whether the date when the applicants qualified for seeking relief under s 184 of the

PLA or the date of the making of the application or some other date. In view of the method in which I have arrived at market value and the evidence of land values in the area given at the hearing, it would not make any significant difference to the conclusion as to value if one of the possible dates for assessment of compensation was preferred to the others.

[70] In addition under s 186(2)(b) of the *PLA*, the respondent is entitled to be compensated for the additional costs to be incurred as a result of the order for a transfer of the subject land in favour of the applicants. I consider it appropriate to make the order for compensation at this stage, as the applicants have had the benefit of use of the subject land since constructing the pool and pool enclosure in late 1998. Even if there is some difficulty in implementing the transfer that is proposed, I have indicated that what should be considered in the alternative is some grant of an interest in favour of the applicants which will enable them to continue to enjoy the pool and pool enclosure. If that is the interest which is ultimately granted, they are still liable for compensation to the respondent.

Orders

The orders which are appropriate to make at this stage are:

1. The applicants forthwith pay to the respondent compensation of $15,000 for the encroachment of the pool and pool enclosure onto Lot 46 on Crown Plan C31729 in the County of Canning and Parish of Mooloolah (“Lot 46”) as shown on the identification survey done by John Reader & Associates Pty Ltd dated 9 December 1998 (Ex 13) (“the encroachment”).
2. Subject to all necessary consents from Maroochy Shire Council and Greatwood Community Titles Scheme 19855 being obtained within 6 months of the date of this order, the respondent transfer to the applicants the fee simple interest in the land over which the encroachment extends (“subject land”).
3. The applicants must pay to the respondent all costs and expenses reasonably incurred by the respondent in order to give effect to the preceding order including, without limiting the generality of the foregoing, the costs of the preparation of the survey plan required to subdivide the subject land from Lot 46, obtaining the consent of the Maroochy Shire Council to the subdivision of the subject land from Lot 46 and all legal costs incurred by the respondent in respect of the transfer of the subject land to the applicants.
4. Liberty to either party to apply on 3 days’ notice in writing to the other.

Costs

[71] The applicants had to bring this application as a result of their negligence in constructing the pool and pool enclosure in such a way that it encroached significantly onto Lot 46. As the applicants have sought an indulgence from the court by this application, it would normally follow that they should bear the costs of the application. It may be that it is appropriate to consider ordering that the applicants pay the respondent’s costs of the application on an indemnity basis. As I have not heard full submissions on the question of costs and these reasons will no doubt have a bearing on the arguments advanced in respect of costs, I will defer making an order for costs until the parties have had an opportunity to consider these reasons and make full submissions.