



Transcript of Proceedings

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State Reporting Bureau
Date: 3 October, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

HELMAN J

No S10 of 2003

EDMUND PATRICK CODY

Applicant

and

ALAN CHARLES UNDERWOOD AND
MAUREEN MARGARET UNDERWOOD

Respondents

No S14 of 2003

ALAN CHARLES UNDERWOOD AND
MAUREEN MARGARET UNDERWOOD

Applicants

and

EDMUND PATRICK CODY

Respondent

MARYBOROUGH

..DATE 02/10/2003

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WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: There are two applications before the Court. In the earlier in time, an originating application filed on 4 August 2003, Mr Edmund Cody of 4 North Street, Maryborough, sought a number of orders against Mr Alan Underwood and his wife Maureen, who live in Victoria. In the second application, an originating application filed on 16 September 2003, Mr and Mrs Underwood have sought a number of orders against Mr Cody.

The disputes that have given rise to these applications concern two blocks of land in Maryborough. Mr and Mrs Underwood are the registered owners as joint tenants of land at 2 North Street, Maryborough: lot 3 on registered plan 105121 in the County of March, Parish of Maryborough, title reference 13753151. Mr Cody is the registered owner of an adjoining lot, lot 4 on registered plan 161678 in the County of March, Parish of Maryborough. There is registered on the title to the lot 4 an easement, no. 601761059, of which lot 3 is the dominant tenement. It is recorded as burdening lot 4 and deriving from an old system indenture no. 89 book 60. On the title records for lot 3 that easement is recorded as being over lot 4, and another easement, no. 601761058, is also shown as being over lot 4.

A plan showing lots 3 and 4 can be seen on p.11 of exhibit APA to Mr Cody's affidavit filed on 29 September 2003 in support of his application. Lot 3, which has an area of 895 square metres, is marked clearly on the exhibit with the

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number "3". Lot 4, which has an area of 305 square metres, is shown on the exhibit marked "LANE" and "RIGHT OF WAY". Other helpful plans showing lots 3 and 4 are at p.13 of exhibit APA and in exhibit ACU5 to Mr Underwood's affidavit filed on 24 September 2003.

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Mr Cody's residence Rockvilla is on land of which he is the registered owner on the southern side of lot 3. Rockvilla and lot 3 are on a bank of the Mary River, and lot 4 is a narrow piece of land running behind lot 3 to the Rockvilla land, providing access to North Street. Across lot 4 from lot 3 is another piece of land on which there is a house called Riverview, 6 North Street. There is no house or other building on lot 3.

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Mr and Mrs Underwood purchased the Riverview land and lot 3 in 1994. Settlement was on or about 15 November 1994. From then until they sold Riverview in 2001, they let it to tenants. Lot 3 remained as vacant land and is still so, as I have indicated. This year Mr and Mrs Underwood decided to sell lot 3 and on 23 June 2003 they agreed to sell it to Mr Richard Leask and Mrs Karin Leask. Settlement was to take place on 17 July 2003, but it has been deferred because on 14 July 2003 a caveat, no. 706793707, was lodged over lot 3 on behalf of Mr Cody by his son-in-law Mr Kenneth Shaw, who with leave conducted Mr Cody's case before me on the application. In the caveat Mr Cody claimed: "(A) OWNERSHIP THROUGH ADVERSE POSSESSION; AND (B) ABANDONMENT ON EASEMENT OVER LOT 4 ON

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RP 161678".

By a letter dated 21 July 2003, solicitors then acting for Mr and Mrs Underwood gave Mr Cody notice pursuant to s.126 of the Land Title Act 1994:

"re: Caveat No. 706793707
Property described as Lot 3 on RP 105121 County
March Parish Maryborough

We act for Alan Charles Underwood and Maureen Margaret Underwood the registered owners of the abovementioned real estate.

We note that you have lodged the abovementioned Caveat on the freehold land register.

We hereby give you notice pursuant to section 126 of the Land Title Act 1994 that our clients (the Caveatee) require you (the Caveator) to start a proceeding in a Court of competent jurisdiction to establish the interest claimed under the Caveat.

Please note that the Caveat will lapse unless you start a proceeding in a Court of competent jurisdiction within 14 days after service of this notice."

On 4 August 2003 Mr Cody filed his originating summons to be heard on Monday of this week. He sought the following orders:

"1 That the Registrar of Titles (the Registrar hereafter) process the Applicant's application for adverse possession relating to lot 3 on RP 105121 (hereinafter also referred to as lot 3), including in relation to part of lot 3, in terms set out in the Land Title Act 1994, with particular reference to:

- (a) Division 5 (Application by adverse possessor) of Part 6 (Dealings directly affecting Lots) thereof (being sections 98 to 108); and
- (b) Subdivision B (Indefeasibility) of Division 2 (Consequences of registration) of Part 9 (Registrations of Instruments and its Effect) thereof (being sections 184 to 187).

2 That (provided the Applicant makes further

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application to this Court within 1 month from the date as set out in paragraph 8 hereof), if in due course, the Registrar declines to register the Applicant as owner of lot 3 or of part of lot 3 to the Applicant's satisfaction, this Court will then consider the Applicant's claim for adverse possession, but only after the processes set out in the Land Title Act 1994 have been exhausted, and only if the Applicant makes a further Application to this Court as set out in paragraph 8 hereof.

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3 That to establish the interest for adverse possession relating to lot 3 claimed by the Applicant, the Court orders that, as a general proposition, it is important that the evidence and improvements on lot 3 which support the Applicant's claim for adverse possession be preserved and not be destroyed.

4 That the Court orders that the particular evidence and improvements on lot 3 relating to the Applicant's adverse possession of lot 3 as referred to hereunder be preserved and not be destroyed.

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5 That the registered proprietor of lot 3 be ordered to preserve and to not destroy the evidence and improvements on lot 3 referred to herein, either directly or indirectly or in any way whatsoever, either personally, or through servants, associates, agents, contractors, licensees, permittees, tenants, purchasers, or otherwise.

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6 That any intending purchaser of lot 3 (pursuant to any contract of sale entered into with the registered proprietor thereof) be ordered to preserve and to not destroy the evidence and improvements on lot 3 referred to herein, either directly or indirectly or in any way whatsoever, either personally, or through servants, associates, agents, contractors, licensees, permittees, tenants, purchasers, or otherwise; and that the registered proprietor forthwith advise any such purchaser of this order and provide a copy thereof to the purchaser; and that in turn any such purchaser advise any subsequent purchaser of this order, and provide such purchaser with a copy thereof, and so on for all subsequent purchasers so that all persons interested in the said lot 3 are aware of this order and that this order binds all such persons accordingly;

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7 That this order will continue in force during the period up until the date which is one month after the date upon which the Registrar communicates to the Applicant, the Registrar's final determination in relation to the Applicant's application for adverse possession of lot 3 (including the Registrar's determination, if any, in relation to part of lot 3);

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8 That, provided the Applicant makes further application to this Court within one month of the date upon which the Registrar communicates to the Applicant the Registrar's final determination in relation to the Applicant's application to the Registrar for adverse possession, this order (apart from paragraph 1 hereof) will continue in force after that date, until the date upon which the Applicant's rights to have the matter heard by this Court have been exhausted or have expired;

9 That these orders relate to those parts of lot 3 and the improvements and vegetation relating thereto as follows:

(A) the land located within one metre on either side of the fenceline of the wooden fence near the boundary between the Applicant's home called 'Rockvilla' at 4 North Street Maryborough (being lot 2 on RP 3747 called 'Rockvilla' hereafter), and lot 3 (including all improvements generally, but without limiting the generality thereof, including particularly the in-ground concrete steps on the Rockvilla side of that fenceline, and the significant vegetation between those steps and the Mary River; and the wooden fence itself); and

(B) the land (including all improvements generally, but without limiting the generality thereof, including particularly the green personal gate, the round metal post (which is the only remains of a cyclone wire fence previously installed on the land and recently removed without the Applicant's consent), the power pole which supplies power to Rockvilla, and the aerial wires which convey power from North Street to Rockvilla) on lot 3 being the land under those aerial wires plus the land which is situated near to and including the western most corner of lot 3, near the northern most corner of Rockvilla, being an area of land bounded by:

(i) the boundary of lot 3 with Rockvilla; and

(ii) the boundary of lot 3 with the lane (lot 4 on RP 161678, called the 'lane' hereafter); and

(iii) the line through the gateway of the green personal gate at the top of the concrete stairs referred to herein from the boundary between Rockvilla and lot 3 up to a round steel corner post (of the cyclone wire fence which has been otherwise removed) near the far end of that gateway, being a line approximately parallel with the abovementioned boundary referred to in paragraph ii above, and at a distance of the order of three or four metres from the westernmost corner peg of lot 3, the line of

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which is shown on Registered Plan 161678; and

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(iv) a line which is also shown on Registered Plan 161678 and which runs from the round metal post referred to in paragraph iii above, along the line of the cyclone wire fence (which has been removed but the line of which is still visible and is shown on registered plan 161678) to the boundary between lot 3 and the lane, to a point which is at a distance of approximately 8 metres along that boundary from the corner survey peg at the northern most part of Rockvilla and the western most part of lot 3;

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(C) The land under the abovementioned aerial wires and along and near the boundary of the lane and lot 3, being the land on either side of the line of the cyclone wire fence (including without limiting the generality thereof, the grass and the disturbed soil from the old postholes and the evidence of the location of the fence);

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(D) The remains on the land of that cyclone wire fence.

(E) The land on lot 3 (including in particular the vegetation and fencing thereon, and any other evidence of occupation by the Applicant) bounded by:

(i) the boundary of lot 3 with the Mary River; and

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(ii) the boundary of lot 3 with North Street; and

(iii) the boundary of lot 3 with Rockvilla; and

(iv) a line which runs parallel with and to the south-east of the boundary between lot 3 and the lane being at a distance of 20 metres from that boundary (in a generally south eastern direction from that boundary).

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10 That until the dates referenced in paragraphs 7 and 8 above, the Applicant be able to continue to occupy and use the improvements on the land referred to in paragraph 9 above, including, without limiting the generality thereof:

(A) the steps referred to herein; and

(B) the garden on the Rockvilla side of the wooden fence from the bottom of the said steps down to the Mary River; and

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(C) the land which is situated one metre on the far side of the wooden fence from Rockvilla, for the whole of the length of the land from the lane down to the Mary River; and

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- (D) the land which is situated at the western most corner of lot 3, near the northernmost corner of Rockvilla, being the land referred to in paragraph 9(B) above, and the gate and the power pole and aerial power lines and the parking space thereon; and
- (E) the land which relates to the said aerial power line wires referred to in paragraph 9(C) above, and the said powerwires; and
- (F) the land on lot 3 which is situated along the banks of the Mary River, being the land described in paragraph 9(E) above.

11 That until the dates referenced in paragraphs 7 and 8 above, there will be no dealings with lot 3."

Also filed on 4 August 2003 was an affidavit sworn by Mr Cody on that day in which only the most general assertions were made:

"I, Edmund Patrick Cody of 4 North Street Maryborough, retired, states on oath:

- 1 I refer to my Originating Application to the Supreme Court to which this statutory declaration relates.
- 2 I refer to the pieces of land referred to in paragraph 9 of my said Application.
- 3 I have been using lot 3 on RP 105121 (hereinafter also referred to as lot 3), the land referred to therein, at will and at my discretion, as though I owned it, without any permission or approval from the registered proprietor, for over 50 years.
- 4 Although I have not used every square metre of the land on lot 3, I have (together with my family and friends at my sole discretion and invitation) have been using those parts of lot 3 referred to in paragraph 10 of my said Application, openly and at will and at my discretion, as though I owned it, without any permission or approval from the registered proprietor, for over 50 years.
- 5 Pursuant to the law of adverse possession, and pursuant to my use of those pieces of land for over 50 years, and of other pieces of lot 3 for periods

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in excess of 12 years, I believe that I am entitled to:

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(a) continue to use, at will and at my discretion, either:

(i) the whole of lot 3; or

(ii) at the very least the areas nominated in paragraph 10 of my application; and

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(b) claim title to that land.

6 Accordingly, I claim:

(a) the right to continue to use, at will and at my discretion, either;

(i) the whole of lot 3 or;

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(ii) at the very least the areas nominated in paragraph 10 of my application; and

(b) title to that land."

It will be noted that there was no order concerning the easement sought in Mr Cody's application, and on 29 September Mr Shaw told me that that part of Mr Cody's claim was not pursued and that his caveat had been amended accordingly. There was no evidence that Mr Cody had ever asserted any right to ownership over lot 3 before 14 July 2003.

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It was not until last Friday, 26 September 2003, that Mr Shaw lodged, on Mr Cody's behalf, an application under s.99 of the Land Title Act for registration as owner of lot 3 on the ground that he had been an adverse possessor of the lot for twelve years or upwards, and it was not until the day of the hearing that the legal advisers to Mr and Mrs Underwood were given a copy of the application, a copy of which is exhibit

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APA to Mr Cody's affidavit.

In the application Mr Cody relates how from 1950 to the present he has used parts of lot 3 and made minor improvements to it. He has used parts of it as a car park, for fishing and boating, and for entertaining friends. He has erected a power pole on it to which wires are attached. In paragraph 46 of his statutory declaration dated 26 September 2003 in support of his application to the Registrar of Titles, Mr Cody set out the essence of his case:

"46. The acts of ownership upon which the acts of adverse possession is based.

(a) **Possession and Improvements:** As set out above, I have occupied and improved the land as though I owned it. Although I have not set foot on every square metre of the vacant land, I have entered it at will and at my sole discretion, without any permission or approval of the registered proprietor for a period of over 50 years.

(b) **Intention to Possess the Land:** I have intended to possess the land, as evidenced by my use of the land independent of all parties other than my invitees. I sought permission from no-one to access, enter, use, improve, and maintain the land.

(c) **Adverse Possession:** I used and possessed the land adverse to the rights of the registered proprietors of the land who did not care whether I used the land or not, and who abandoned the land to my use. Pursuant to my possession of the land in question, the registered proprietors have not used, occupied, or possessed the land in question in all the time I have occupied 'Rockvilla', except for very occasional clearing from the land of vegetation which blocked Riverview's river views; and that the current registered proprietor, whose title only commenced in 1994, claims some occasional use of the land. That aside, together with my predecessors in title, I have possessed the land to the exclusion of all others (apart from my invitees), using, maintaining, and traversing the land as if it were my own since 1950."

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Mr Cody's case then appears to be one of discontinuance or abandonment of lot 3 by the registered owners and his taking possession of it. The difficulty with that assertion appears in the passage I have just quoted: "except for very occasional clearing from the land of vegetation which blocked Riverview's river views; and that the current registered proprietor whose title only commenced in 1994, claims some occasional use of the land". As Slade J. said in Powell v. McFarlane & Anor (1977) 38 P.& C.R. 452 at p.468: "The authorities however show that merely very slight acts by an owner in a relation to the land are sufficient to negative continuance".

From 1950 to 2001, when Mr and Mrs Underwood sold Riverview, lot 3 was owned by the owner or owners of Riverview. In a statutory declaration dated 26 September 2003, Mrs Ann-Marie Shaw, daughter of Mr Cody, sets out a history of Riverview and lot 3 and the relationship between the two pieces of land:

"48 In 1938, I believe the current house called Riverview was built by young Mr Williams (Mr H Williams), and was occupied by his spinster sister, Alice Williams until her death in about 1965.

49 Geoffrey William Sheldon, whom I believe to be Miss Williams' nephew, acquired title to both Riverview and the vacant land on 9 April 1965.

50 Following his death on 24 April 1980, Geoffrey William Sheldon's wife Jean Lydia Sheldon acquired title to both Riverview and the vacant land on 26 June 1981, pursuant to a transmission by death.

51 Following her death, Jean Lydia Sheldon's son John Barry Sheldon acquired title to both Riverview and the vacant land on 20 December

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- 1993, pursuant to a transmission by death. 1
- 52 On or about 18 August 1994, John Barry Sheldon entered into a contract to sell both the vacant land and Riverview to Alan Charles Underwood and Maureen Margaret Underwood who acquired both properties on or about 22 November 1994.
- 53 The name of Riverview is significant. Riverview could not have river views unless the vacant land remained vacant. i.e. a house thereon would block the River views, and diminish the value and amenity of Riverview. All of the big old riverbank trees have been cleared from the vacant land. I believe that Mr Williams or a predecessor may have cleared them so that Riverview could have river views. 1
- 54 Riverview and the vacant land were chalk and cheese. Riverview flat and manicured with views across the vacant land. The vacant land, denuded of its large timber, and very rugged and unmanicured. The vacant land was so steep that at its highest and best use was to keep tall timber off it to enhance the views and value of Riverview. However, the clearing of the vacant land compromised its integrity, by allowing significant erosion at the waters' edge and elsewhere, from surface runoff et cetera.
- 55 I do not know of either Miss Williams or any of the Sheldons actually setting foot on the vacant land which I believe was used solely so that Riverview could keep its River views.
- 56 Geoffrey William Sheldon was a solicitor. I think he fenced the boundary of the lane because of liability issues, but took no other proprietorial interest in the land, other than to preserve Riverview's views.
- 57 In due course, on 26 June 1981, there was a transmission by death to Geoffrey's wife, Jean Lydia Sheldon. Jean was reclusive. I don't know of Jean ever setting foot on the vacant land.
- 58 In due course, on 20 December 1993, there was a transmission by death of both parcels to Jean's son Barry Sheldon. John, known as Barry, didn't live at Riverview pursuant to inheriting it. On 18 August 1994, John sold both parcels to the Underwoods, who didn't live there and rented it to some nuns. The nuns didn't ever go onto the vacant land.

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- 59 From 1902 up until August 1994, the two properties had been managed as one by the Williams/Sheldon families: Riverview for its River views, and the vacant land abandoned to the use of the Cody family except that the Riverview occupants occasionally arranged for clearing of the vacant land to thereby preserve Riverview's River views.
- 60 In October 2000, the Underwoods advertised Riverview for sale by tender, and in November 2000, the Lunns entered into a contract to purchase Riverview."

From that passage, it is difficult to see how it could be alleged that the registered owners or any of them abandoned lot 3 while it was owned by the owner or owners of Riverview since keeping it in its undeveloped state was necessary for the full enjoyment of Riverview.

Mr Cody's case appears, as I have said, to be one of discontinuance or abandonment. If, however, it were to be based on an allegation of his dispossessing the registered owner or owners, it would encounter the obstacle that there is no evidence that Mr Cody ever asserted to a registered owner his right to lot 3 before Mr Shaw lodged the caveat on his behalf. In *Powell v. McFarlane & Anor*, Slade J. accepted that in the absence of concealed fraud, it is irrelevant that the owner is ignorant that he has been dispossessed, but added:

"In view of the drastic results of a change of possession, however, a person seeking to dispossess an owner must, in my judgment, at least make his intentions sufficiently clear so that the owner, if present at the land, would clearly appreciate that the claimant is not merely a persistent trespasser, but is actually seeking to dispossess him." (p.480)

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Not all of the owners in question occupied Riverview, but it appears from Mrs Shaw's statutory declaration that many did.

Thus analysed, and subject to a qualification I shall mention, Mr Cody's case would appear not to be a particularly strong one. That is, of course, upon a consideration of his case at its highest as he has now revealed it in the papers lodged with the Registrar. Mr and Mrs Underwood have put before me further evidence which, if accepted, could cast further doubt on Mr Cody's case. What I have just said refers to Mr Cody's claim to the entirety of lot 3. He may have a stronger case in that part of his claim that relates to small areas of land enclosed or partly enclosed by fencing (some concrete stairs and a small car park) and the power pole.

What is sought in Mr Cody's application is temporary relief pending a final determination of his claim to lot 3. No final determination is sought in this court at present in relation to lot 3, although the originating application indicates that such relief may, or may not, be sought if Mr Cody fails before the Registrar.

I am not persuaded that Mr Cody should have the relief he now seeks. I am not satisfied on the evidence before me that it has been demonstrated that he has a serious question to be determined, with the possible exception of his claim in relation to the small areas and the power pole I have mentioned. His evidence suggests that, at best for him,

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he made use of lot 3 over the years either with the tacit permission of tolerant and friendly - or at least not unfriendly - neighbours or as a persistent trespasser who nonetheless never declared himself to be intending to dispossess the registered owners. The balance of convenience does not favour granting the relief sought in relation to the small areas I have referred to. Photographs and plans can supply the evidence required to advance Mr Cody's claim to those areas. There are already such photographs and plans available as Mr Cody's and Mr Underwood's affidavits show.

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Mr Cody's dilatoriness in revealing his claim in the first place, and then after he lodged the caveat, tend to indicate he will not prosecute his application to the Registrar in a timely fashion if the constraints he seeks are imposed. I shall then dismiss Mr Cody's application.

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Mr and Mrs Underwood sought the following orders in their originating application:

- "1. That pursuant to Rule 670 of the Uniform Civil Procedure Rules, the Respondent give the Applicant security for the costs of the Applicants, Alan Charles Underwood and Maureen Margaret Underwood in relation to their role as Respondents in Maryborough Supreme Court proceedings number S10 of 2003.
2. That Caveat Number 706793707 (the 'Caveat') be removed from the title of Lot 3 on RP 105121 County March Parish Maryborough (Title Reference 13743151) ('Lot 3') forthwith.
3. That the Respondent shall not be entitled to lodge any further Caveat over Lot 3 on the same grounds to that of the Caveat, or on any grounds arising from the same facts, matters and circumstances upon which the Caveat is based.

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4. That it be declared that the Applicants have title to all the land within the surveyed boundaries of Lot 3 as shown on its title, and all improvements thereupon;
5. That the Respondent be restrained from making any or any further Application to the Registrar of Titles or the court seeking adverse possession of any portion of Lot 3. 11
6. A declaration that the Applicants are entitled to remove such portion of the wooden fence currently constructed within the bounds of Lot 3, on the side of Lot 3 bordering Lot 2 on RP 3747 County March, Parish Maryborough (Title Reference: 15980240) (the 'Respondent's Property').
7. A declaration that any further fence to be constructed along the boundary of Lot 3 and the Respondent's Property must be constructed upon the surveyed boundary line. 2
8. A declaration that the owner of Lot 3 is entitled to the use of Lot 4 on RP 161678, County March, Parish Maryborough (Title Reference 18008057) (the 'Easement Lot') in accordance with Easements No 601761058 (2471), and No 601761059 (8960) (the 'Easements').
9. A declaration that it is an authorised use of the Easement Lots within the meaning of the Easements that the owner of Lot 3 be entitled to bring all such vehicles onto the Easement Lot as may be required for the construction of a residence upon the land, such works incidental thereto and the subsequent habitation thereof. 3
10. Such further or other order as to the Court seem meet. 4
11. That the Respondent pay the Applicant's costs of and incidental to this Application, including the costs of any necessary steps in relation to removal of the Caveat."

At the hearing, the applications for orders nos. 1, 3, and 8 were not pursued. 5

Mr Cody was served in the solicitors' letter of 21 July 2003 with a notice under s.126(2) of the Land Title Act requiring

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him to start a proceeding in a court of competent jurisdiction to establish the interests claimed in the caveat. He failed to do so within fourteen days after the notice was served on him or at all, so that his caveat has lapsed. As I have mentioned already, Mr Cody's application to this Court made no claim to relief concerning the easement over lot 4 and made no claim to final relief establishing his claim over lot 3. All that he sought was temporary relief pending a final determination. Mr and Mrs Underwood are entitled to order no.2, since by operation of s.126(4) and (5) the caveat has lapsed.

Order no.4 and the consequential orders nos. 5, 6, and 7 were sought before Mr Cody had given any particulars of the bases of his claim, apparently resting only upon the general assertions in his affidavit filed on 4 August 2003, and before Mr Cody had lodged his application with the Registrar of Titles. Had that affidavit been all Mr Cody was relying upon, Mr and Mrs Underwood may well have been entitled to order no.4. Since Mr Cody has now belatedly revealed the particulars of his claim and lodged his application, I think the proper course is to permit the application under s.99 to proceed and not to anticipate the determination of the Registrar, who will consider in detail the relevant facts. It is not appropriate for me to decide the matter in a summary way on these applications. I have gone no further - nor should I, I think - than to decide Mr Cody's application according to the rules applicable to applications for

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interlocutory injunctions. Accordingly, orders nos. 4 and 5 should not be made.

Orders nos. 6 and 7 should also be refused I think. Any demolition and re-erection of a fence may be subject to local authority and other regulatory requirements, about which I heard no argument. The owner of the land is of course at liberty to proceed with such works upon the land as the law permits.

The construction point arising from the application for order no.9 came down to a dispute as to whether motor vehicles could be brought onto lot 4 pursuant to the terms of the easements. The documents in question (easement no. 601761059 granted by an indenture made on 31 December 1886, and easement no. 601761058 granted by an indenture made on 23 September 1902) granted a right of way to the occupier of lot 3 in identical terms: "...at all times hereafter by day or by night and for all purposes with or without horses carts carriages or wagons laden or unladen to go pass and repass and to drive cattle and other animals along over and upon" the right of way. Notwithstanding the failure to mention motor vehicles, which could possibly fall within the description "carriages", horseless carriages, the general words, wide as they are, may properly be construed in my opinion as permitting the passage of motor vehicles on the servient tenement. Mr and Mrs Underwood are therefore entitled to a declaration to that effect.

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I shall invite further submissions on the form of the orders
to be made to give effect to my determinations and costs.

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