SUPREME COURT OF QUEENSLAND

CITATION:	*Sherrard & Ors v Registrar of Titles & Anor* [2003] QSC 352
PARTIES:	**EAMON DAMIEN SHERRARD AND COLLETTE MARY SHERRARD** (first applicants) **FERENC KECZAN AND ILONA KECZAN** (second applicants) **v** **REGISTRAR OF TITLES** (first respondent) **ALEXANDER PROPERTIES PTY LTD** ACN 073 675 831 (second respondent)
FILE NO/S:	SC No 7369 of 2003
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	16 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	14 October 2003
JUDGE:	de Jersey CJ
ORDER:	**Applications dismissed**
CATCHWORDS:	CONVEYANCING – LAND TITLES UNDER THE TORRENS SYSTEM – INDEFEASIBILITY OF TITLE: CERTIFICATE AS EVIDENCE – EXCEPTIONS – ADVERSE POSSESSION OF OTHERS – AFTER CERTIFICATE – QUEENSLAND – where applicants applied for registration as proprietors by adverse possession of parts of second respondent's lot – whether applications for registration as proprietors by adverse possession of part of lot valid *Judicial Review Act* 1991 (Qld) *Land Title Act* 1994 (Qld), s 99, s 103, s 107, s 108 *Real Property Acts Amendment Act* 1952 (Qld), s 47
COUNSEL:	N Thompson for the applicants B Clarke for the first respondent
SOLICITORS:	Grays for the applicants Crown Law for the first respondent

[1] **de JERSEY CJ**: The second respondent is the purchaser of lot 142, land situated at Ferry Road, Southport. It is a rectangularly shaped parcel of land. To its north lie

two squarely shaped parcels, lots 64 and 65. The applicants Keczan own lot 64 and the applicants Sherrard lot 65.

[2] The surveyed northern boundary of lot 142 follows a straight line, which also forms the southern boundary of lot 64 and then its adjoining lot 65. Fences run the length of the northern boundary of lot 142, between it and lots 64 and 65. The fences follow a straight line, but the line of the fences does not coincide with the surveyed line of the northern boundary of lot 142. The fence line is parallel to that surveyed line, but offset throughout approximately one metre to the south.

[3] The second respondent purchaser asserted, against the applicants, that the fencing constituted an encroachment into lot 142, to that depth of approximately one metre. The second respondent sought removal of the encroachment and the construction of a new fence along the correct boundary line.

[4] The position taken by the applicants has been and is that the existing fencing need not be removed, because the one metre strips within lot 142 enclosed by the fencing have become their respective property by reason of their adverse possession of those strips of land.

[5] The applicants applied to the first respondent Registrar under part six of division five of the *Land Title Act* 1994 for registration, as proprietors by adverse possession, of the parts of lot 142 enclosed by the fencing respectively bordering lots 64 and 65. The Registrar requisitioned each application in the following terms:

> "I wish to advise that the Registrar will not entertain an application for title by adverse possession over part of a lot brought about by fencing not being erected on the correct surveyed boundary.
>
> An application for title by adverse possession is not an appropriate mechanism for dealing with situations such as this.
>
> An application for title by adverse possession cannot be made over part of a lot although the Registrar is empowered to register an applicant as owner of part of a lot.
>
> The Registrar will not permit that requirement being circumvented by completing the application as if it were an application for the entire lot and then requesting adverse possession of part of that lot for which no property description exists."

[6] The applicants challenge the first respondent's approach, by these applications under the *Judicial Review Act* 1991, on the basis it is legally wrong.

[7] Section 99 of the *Land Title Act* provides that "a person … may apply to be registered as owner of a lot by lodging an application under this division". The term "lot" is defined in schedule two of the Act as "a separate, distinct parcel of land created on – (a) the registration of a plan of subdivision; or (b) the recording of particulars of an instrument; …". (I note at once the use of the word 'created', suggesting something already accomplished, rather than 'created or to be created'.)

[8] Mr Clarke, who appeared for the first respondent, submitted that the definition contemplated a "lot" already in existence, or in terms of the definition, already

"created" by the prescribed process of registration or recording. Neither applicant applied to be registered as the owner of an existing lot, that is, lot 142, but of part only of that lot.

[9] Mr Thompson, who appeared for the applicants, submitted however that the definition of "lot" could apply, in a prospective sense, to land not already the subject of separate registered title, land which could become the subject of separate title. But it is inescapable that the definition must be read as referring to a "lot" already in existence as the subject of separate registered title, and that s 99 relates to an application in respect of such land. Significantly, s 99 does not refer to an application for registration as proprietor of "a lot or part of a lot".

[10] Consistently with this approach, s 99(2) requires that an application for registration be accompanied by "the documents of title for the lot that are in the possession or under the control of the applicant". Likewise, s 103(1)(a) contemplates notification of the application to "all registered proprietors of the lot".

[11] The applicants may at first blush appear to gain some support from s 108, which provides that "the Registrar may register the applicant as owner of all or part of the lot if the Registrar is satisfied that the applicant is an adverse possessor of the lot or part of it". Registration in respect of part of a lot may be facilitated by the provision in s 99(2) that the first respondent may require production of "a plan of survey of the lot".

[12] But s 108(1), in envisaging registration in respect of part only of the lot, is recognizing that under s 107, the first respondent may reach the view that the evidence of adverse possession does not warrant the conclusion that the applicant has acquired title to the whole of the lot in respect of which he or she asserts title. Section 107(1) allows the first respondent to "register the applicant as the holder of a lesser interest in the lot that the Registrar considers appropriately reflects – (i) the use made of the lot by the applicant; and (ii) the period that the applicant has used the lot." Then, in the immediately following section, appears the reference to registration in respect of part only of the lot.

[13] In summary, division five contemplates an application in respect of the whole of an existing registered "lot" as ordinarily understood, excluding an application in respect of part only of a lot; and to the extent to which s 108 envisages the possible outcome of registration over less than the whole, the legislature contemplated the situation where the evidence did not establish the asserted adverse possession of the whole.

[14] This construction of division five of the *Land Title Act* sits comfortably with our legislative history of comparable provisions. Prior to the commencement of the *Land Title Act* provisions in April 1994, the relevant law was contained in part three of the *Real Property Acts Amendment Act* 1952. Section 47 provided:

> "Whereas parts of parcels of lands under the Acts may have been before the passing of this Act or may be hereafter encroached upon by a building or any part thereof or by the enclosure of those parts with contiguous lands by means of a wall, fence, hedge, ditch, or other means whatsoever of demarcating boundaries between lands erected or put on a line on the lands so encroached upon which is not

> the true boundary thereof as shown in the plan on the deed of grant or certificate of title therefor:
>
> And whereas it is not desirable that a person should obtain a title by possession to parts of land encroached upon by any building or part thereof or by enclosure as aforesaid:
>
> Now therefor be it hereby enacted that a person shall not obtain under this Act a title by possession to parts of parcels of lands under the Acts so encroached upon."

[15] No such provision was included in the *Land Titles Act*. Yet the Law Reform Commission's working paper on the reform and consolidation of the *Real Property Acts* (QLRC WP 32) recommended, in relation to the adverse possession mechanisms, that "no substantive changes be effected"; and the Commission's report (number 40) entitled "Consolidation of Real Property Acts", included a draft bill in which a version of the present s 98 is said to be based on s 47 of the 1952 amending Act, and a version of the present s 99 is said to have been based on s 50. I accept Mr Clarke's submission that "generally the report presents its work on the 1952 Act as simply one of consolidation. There is no indication either of intent to alter the law or not to re-enact the effect of the 1952 Act." As he additionally points out, "the Explanatory Notes which accompanied the 1994 Act are similarly silent on any such intent". One infers an expectation that division five of the 1994 Act would be construed as if the limitations confirmed by s 47 of the 1952 Act subsisted, or as Mr Clarke put it, had been "implicitly re-enacted". There is another legislative regime dealing with the possible adjustment of property rights in situations of encroachment.

[16] I need not deal with the alternative submission advanced on behalf of the first respondent, that the applicants have not yet obtained the benefit of 12 years operation of the statute of limitation.

[17] I agree in law with the approach taken by the first respondent: the applications did not fall within the scope of s 99(1) of the *Land Title Act* in that they concerned only part of "a lot" within the meaning of that provision.

[18] The applications are dismissed.