

SUPREME COURT OF QUEENSLAND

CITATION: *Re: Browne* [2018] QSC 297

PARTIES: **FRANCIS CLAUDE BROWNE**
(applicant)

FILE NO: BS12029 of 2018

DIVISION: Trial Division

PROCEEDING: Originating application

DELIVERED ON: 18 December 2018

DELIVERED AT: Brisbane

HEARING DATE: 27 November 2018

JUDGE: Mullins J

ORDERS: **Pursuant to s 114 of the *Land Title Act 1994* (Qld):**
(a) Michael Browne be removed from the freehold land register as proprietor of an estate in fee simple of the property described as Lot 117 on Crown Plan CH311352 with Title Reference 10829239 (“the property”); and
(b) Francis Claude Browne be registered as the owner of the fee simple interest in the property, previously registered in the name of Michael Browne.

CATCHWORDS: REAL PROPERTY – TORRENS TITLE – TRANSMISSION AND VESTING ORDERS ON PROPRIETOR’S DEATH – TRANSMISSION – TO BENEFICIARIES AND OTHER INTERESTED PERSONS – where the registered proprietor (the deceased) of freehold land disappeared between 1898 and 1900 – where the deceased’s brother who is the applicant’s grandfather took over farming the deceased’s property in conjunction with his adjoining property – where on the applicant’s grandfather’s death the applicant’s father continued to possess and farm the deceased’s property – where the applicant succeeded to possessing and farming the deceased’s property on his father’s death – where since 1994 the applicant has paid the rates, insurance and outgoings for the maintenance of the property – where the applicant applies under s 114 of the *Land Title Act 1994* (Qld) as a person interested in a lot of a deceased registered proprietor for an order that he be registered as proprietor of a lot

Re Jackson (unreported, Sup Ct, Qld, Demack J, 27 August 1998), followed
Re Middleton [1974] Qd R 211, cited

COUNSEL: S K McLeod for the applicant

SOLICITORS: Kroesen & Co Lawyers for the applicant

- [1] The applicant Francis Claude Browne applies pursuant to s 114 of the *Land Title Act* 1994 (Qld) (the Act) as a person interested in a lot of a deceased registered proprietor for an order that he be registered as proprietor of the lot.
- [2] Mr Michael Browne was registered in 1892 as the registered proprietor of freehold land containing 160 acres which is now described as Lot 117 on Plan No CH311352 in the County of Churchill Parish of Clumber (the property). Michael Browne is still shown on the register as the owner of the property. Michael Browne disappeared between 1898 and 1900, without leaving a spouse or children. No will of Michael Browne has ever been located. The applicant is the great nephew of Michael Browne and claims to be the adverse possessor of the property and to have succeeded to the property through his father and grandfather.
- [3] The Registrar of Titles was notified of the application and did not seek to appear or be heard on the application.

Michael Browne's history

- [4] Michael Browne was born on 1 July 1868 to David Browne and Mary Maher who had married on 15 May 1867. Apart from Michael Browne, the children of the marriage were David Joseph, Catherine Browne and Joseph Browne. Joseph Browne is the grandfather of the applicant. There were another two children of the relationship between David Browne and Mary Maher who were older than Michael Browne. They were Mary Anne Browne and Patrick Browne. Mary Browne (nee Maher) died on 24 December 1908 and her death certificate shows the names of her six children.
- [5] On 1 April 1886 Michael Browne selected the subject property which was described as Agricultural Farm No 206. As he met the conditions of selection, he obtained the freehold title of the subject property. Michael Browne's father and siblings selected land adjacent to him and in the same area.
- [6] David Browne died on 1 December 1904 intestate. Although Michael Browne was referred to as having survived his father in the petition to the court in respect of the administration of his estate and on David Browne's death certificate, in May 1907 Mary Browne filed an affidavit of release with an exhibit sworn by four of the children (Patrick, David, Catherine and Joseph) who declared that Michael Browne could not be found and his whereabouts were unknown. In her affidavit of 30 January 1908, Mary Browne deposed to the fact that Michael Browne had not been heard of by his family for upwards of nine years. Mary Browne died on 24 December 1908.

- [7] Michael Browne was listed on the electoral roll in Queensland in the electoral district of Fassifern as living at Clumber until the annual electoral roll dated 6 December 1904. He was not listed in the electoral roll of 1905.
- [8] As Michael Browne was born 150 years ago, it is reasonable to proceed in this application on the basis that he is dead.

Other family history

- [9] Mary Anne Browne died on 18 May 1906 leaving a spouse and five living children. Patrick Browne died intestate on 9 February 1929 without spouse or issue. Catherine O'Malley (nee Browne) died on 10 August 1947 leaving one son Cyril O'Malley. David Joseph Browne died on 19 February 1937 leaving a will dated 14 February 1937 which left all his real estate to his daughter Mary Surawski and all his personal property to his daughter Ursula Watkins. Joseph Browne died on 1 October 1962 leaving a will dated 6 September 1955 which left the residue of his personal property and all his real property to John Patrick Browne who is the father of the applicant. John Patrick Browne died on 15 May 1994, leaving the applicant and four other children.
- [10] Although Ms McLeod of counsel for the applicant analysed the application of the intestacy rules to the real property of Michael Browne, depending on whether he died before or after his father, ultimately what is relevant for the purpose of this application is that the applicant's grandfather would have on either alternative succeeded to a share of the property.

Use of the subject property

- [11] The applicant resides on the family farm known as "Moojirah" which comprises a number of parcels of land including the property. Moojirah has been exclusively owned and operated by the applicant's family for more than 120 years. The applicant was told by his father that his grandfather and Michael Browne had selected nearby properties and farmed the properties together and, after the disappearance of Michael Browne, Joseph Browne maintained exclusive possession of the farm which included the property. The applicant can recall his grandfather Joseph Browne farming the property before his father John Patrick Browne took over the farming of Moojirah, including the property. In about 1990 the applicant and his father improved the property by constructing a dam for the purpose of watering stock. Under the will of John Patrick Browne, the applicant and his brother Peter Browne succeeded to the real property, but a settlement of a potential claim by their sisters, eventually resulted in their sister Bronwyn Venzke becoming the registered proprietor of two of the parcels. As to the remaining parcels comprising Moojirah, Peter Browne and the applicant decided between them which each of them would retain and they agreed that one of the parcels retained by the applicant would be the property.
- [12] Although some of the parcels comprising Moojirah are owned by Peter Browne and Bronwyn Venzke, they allow the applicant to use them in exchange for the payment of land rates. The applicant has resided on Moojirah all his life. Adjoining owners to Moojirah, Mr Stephen Freiberg and Mr Wayne Ramm, confirm they are familiar with

the property and have only known the applicant and his father as being the “owner” of the property. Peter Browne and Bronwyn Venzke also confirm that their grandfather Joseph Browne occupied the property as part of Moojirah, followed by their father, and then followed by the applicant.

- [13] The property is used for grazing cattle and the applicant intermittently cultivates up to 25 acres of the property for growing soybeans. The applicant has paid the rates, insurance, and outgoings and for the maintenance of the subject property since 1994 and the rates notices are sent in his name.

Advertising prior to the application

- [14] The applicant advertised in the Queensland Times newspaper on 19 May 2018 of his intention to apply to be registered as the proprietor of the subject property and requested any person having information on the death of Michael Browne who was last known in the Boonah, Beaudesert area sometime prior to 1899 or holding or knowing the whereabouts of any will or codicil of Michael Browne to contact the applicant’s solicitors within six weeks of the notice. There was no response to the advertisement.

Section 114 of the Act

- [15] Section 114 of the Act had its genesis in s 89 of the *Real Property Act* 1861 (Qld) (RPA) and s 46 of the *Real Property Act* 1877 (Qld).

- [16] Section 114 of the Act provides:

“(1) This section applies to—

- (a) the Attorney-General; or
- (b) a trustee or beneficiary under a trust; or
- (c) a personal representative, a devisee or anyone else interested in—
 - (i) lot of a deceased registered proprietor; or
 - (ii) a trust involving a lot of a deceased registered proprietor.

(2) A person to whom this section applies may apply to the Supreme Court for an order that a named person be registered as proprietor of a lot.

(3) The Supreme Court may make 1 or more of the following orders—

- (a) that a person be registered as proprietor of the lot;
- (b) that a person be removed from the freehold land register as proprietor of the lot;
- (c) that a caveat be lodged to protect a person’s interest in the lot;
- (d) that a person advertise in a specified form, content or way;
- (e) that costs be paid by any person or out of any property.

- (4) The Registrar must register particulars of an order if a request to register the order is lodged and an office copy of the order is deposited.
- (5) An order does not vest an interest in the lot until it is registered.”

[17] On the basis of the applicant’s interest in his father’s real property under his father’s will which includes his father’s interest in the property by virtue of his father’s entitlement to succeed to Joseph Browne’s share of the property on an intestacy, the applicant has an interest in the property. Although on this analysis the applicant would not have succeeded strictly to the entire interest in the fee simple of the property, he has a sufficient interest to qualify him to apply under s 114(1)(c)(i) of the Act. Coupled with that interest is the fact that it was the Joseph Browne branch of Michael Browne’s family, rather than any branch associated with Michael Browne’s other siblings who maintained the use and exclusive possession of the property for more than 100 years. The nature and extent of this possession is a relevant matter for considering the appropriate relief that should be given to the applicant under s 114 of the Act.

[18] In *Re Jackson* (unreported, Sup Ct, Qld, Demack J, 27 August 1998), Demack J approved an application under s 114 of the Act to remove Mr C W Jackson’s mother’s name as the registered proprietor of certain land and to insert Mr C W Jackson’s name as proprietor of the land, as he had acted as the owner of the land for over 50 years, and reliance on s 114 would avoid the need for a succession of vesting orders. When Mr C W Jackson’s mother died, Mr C W Jackson as one of her children had an interest in her estate on intestacy. When he turned 21 years old in 1938, his father gave him the title deed for the land, saying that his mother had expressed the wish that Mr C W Jackson be given the land upon his 21st birthday. From that time Mr C W Jackson treated the land as his own. Demack J noted at [9]:

“It seems that the legislative intention behind s114 was to provide a summary method for dealing with cases like this present one where there have been no contemporary dealings with the register to reflect changes of ownership through death. There may be other uses for s114 as well, but its appropriateness in the present case is obvious.”

[19] The view had been expressed in relation to the application of s 89 of the RPA that use should not be made of the provisions “lightly” and that it was “in the nature of an extraordinary remedy”: *Re Middleton* [1974] Qd R 211, 214. I am not convinced that approach necessarily remains apposite, when there is no such restriction in the plain meaning of s 114 of the Act. Where the title to real property upon the death of a person has not been addressed for decades, consistent with the approach in *Re Jackson*, I consider s 114 provides for a summary means of achieving the same outcome that may be achieved through other applications. The court retains a discretion as to whether or not to exercise the power to make an order under s 114 of the Act. In the circumstances in which the applicant has applied to alter the register to reflect the reality of his exclusive possession and control and exercise of the ownership of the property, I am satisfied that the jurisdiction conferred on the court should be exercised in the applicant’s favour.

Orders

[20] It is therefore appropriate to make the following orders:

Pursuant to section 114 of the *Land Title Act* 1994 (Qld):

- (a) Michael Browne be removed from the freehold land register as proprietor of an estate in fee simple of the property described as Lot 117 on Crown Plan CH311352 with Title Reference 10829239 (“the property”); and
- (b) Francis Claude Browne be registered as proprietor of the estate in fee simple in the property, previously registered in in the name of Michael Browne.