Court of Appeal
Supreme Court

New South Wales

Case Name:	Sidoti v Hardy
Medium Neutral Citation:	[2021] NSWCA 105
Hearing Date(s):	25 November 2020
Date of Orders:	26 May 2021
Decision Date:	26 May 2021
Before:	Basten JA at [1]; Brereton JA at [45]; Simpson AJA at [179]
Decision:	(1) Leave to appeal be granted; and (2) The appeal be dismissed, with costs.
Catchwords:	LAND LAW – Adverse possession – Actual possession – Old system title – Conversion to Torrens title – Limited title – Indefeasibility of title – Exceptions to indefeasibility – Where successful claim at trial in respect of adverse possession of small portion of a 'dunny lane' commencing before creation of limited folio – Whether statutory possessory application over Torrens title land able to be made – Alternatively, whether adverse possession claims preserved at common law by reason of possession for any length of time commencing prior to creation of folio – Whether wrong description of parcel or boundaries in circumstances where adverse possessory claim inchoate but not crystallised at time of conversion – Appeal dismissed LIMITATION OF ACTIONS – Actions to recover land – Adverse possession – Interaction of Limitation Act 1969 (NSW), ss 27 and 65, with Real Property Act 1900 (NSW), s 45C

STATUTORY INTERPRETATION – Interpretation of Real Property Act 1900 (NSW) – Extrinsic materials – Explanatory memoranda and notes – Legislative history – Registrar-General's guidelines – Second reading speeches

MORTGAGES AND SECURITIES – Mortgages – Duties, rights and remedies of mortgagee – Right to notice of proceedings in which orders might be made affecting mortgagee's interest – Where no notice given and no application by mortgagee to set aside orders below – Where application may not succeed – Where if successful, ultimate result unlikely to be different – Where impact on value of mortgagee's security likely de minimis – Absence of notice not decisive of appeal

APPEALS – Leave to appeal – Whether leave required – Monetary threshold – Whether threshold denotes value of whole parcel of land or disputed portion only – Where questions of principle and public importance as to Torrens system also raised – Leave granted

Legislation Cited:

Conveyancing Act 1919 (NSW), s 89
Interpretation Act 1987 (NSW), s 33
Land Titles Legislation Amendment Act 2001 (NSW), Sch 2[1]
Limitation Act 1969 (NSW), ss 8(1)(a), 27(2), 28, 65, Sch 4
Local Government Act 1919 (NSW), s 327
Real Property Act 1900 (NSW), ss 12, 14, 14A, 28A, 28C, 28D, 28E, 28EA, 28J, 28M, 28P, 28S, 28T, 28U, 28V, 28Y, 28Z, 28ZA, 42, 43, 43A, 44, 45, 45C, 45D, 74F, 74K, 118, 124, 125A, 135, 136, pts 4A, 4B, 6A
Real Property (Amendment) Act 1976 (NSW)
Real Property (Caveats) Amendment Act 1986 (NSW)
Real Property (Conversion of Title) Amendment Act 1967 (NSW)
Real Property (Conversion of Title) Amendment Act 1984 (NSW)
Real Property (Possessory Titles) Amendment Act 1979 (NSW)
Supreme Court Act 1970 (NSW), s 101(2)(r)

	Survey Practice Regulation 1933 (NSW)
Cases Cited:	Ballas v Theophilos (No 1) (1957) 97 CLR 186; [1957] HCA 49 Braye v Tarnawskyj (2019) 19 BPR ¶39,213; [2019] NSWSC 277 Buckingham County Council v Moran [1990] 1 Ch 623 Clement v Jones (1909) 8 CLR 133; [1909] HCA 11 Deguisa v Lynn (2020) 94 ALJR 1020; [2020] HCA 39 Hamilton v Iredale (1903) 3 SR (NSW) 535 Hardie Rubber Co Pty Ltd v General Tire & Rubber Co (1973) 129 CLR 521; [1973] HCA 66 Hardy v Sidoti (2020) 19 BPR ¶40,535; [2020] NSWSC 1057 Jabulani Pty Ltd v Walkabout II Pty Ltd [2016] NSWCA 267 Michael v Onisiforou (1977) 1 BPR ¶9,356 Nanschild v Pratt [2011] NSWCA 85 Oertel v Crocker (1947) 75 CLR 261; [1947] HCA 40 Quach v Marrickville Municipal Council (No 1) (1990) 22 NSWLR 55 Refina Pty Ltd v Binnie (2010) 15 BPR ¶28,633; [2010] NSWCA 192. Sahab Holdings Pty Ltd v Registrar-General (2011) 15 BPR ¶29,627; [2011] NSWCA 395 South Maitland Railways Pty Ltd v Satellite Centres of Australia Pty Ltd (2009) 14 BPR ¶26,823; [2009] NSWSC 716 Sparks v Meers [1976] 2 NSWLR 1 Sze To Chun Keung v Kung Kwok Wai David [1997] 1 WLR 1232 Taylor v Taylor (1979) 143 CLR 1; [1979] HCA 38 Van den Bosch v Australian Provincial Assurance Association Ltd [1968] 2 NSWLR 550; (1968) 88 WN (Pt 1) (NSW) 357 Westfield Management Ltd v Perpetual Trustee Co Ltd (2007) 233 CLR 538; [2007] HCA 45
Texts Cited:	Explanatory Memorandum, Land Titles Legislation Amendment Bill 2001 (NSW) Explanatory Note, Real Property (Conversion of Titles) Amendment Bill 1984 (NSW) HW Ballantine, “Title by Adverse Possession” (1918) 32(2) Harvard Law Review 135

	K Gray & SF Gray, Elements of Land Law (5th ed, 2009, Oxford University Press) Land Registry Services, "Registrar-General's Guidelines – Deposited Plans – Conversion of Old System – Deposited Plans Redefining Old System Land – Limited Titles", https://rg-guidelines.nswlrs.com.au/deposited_plans/conversion_os/dps_redefining_os_land/limitedtitles, accessed 13 April 2021 Land Registry Services, "Registrar-General's Guidelines – Land Dealings – Dealings Involving – Notifications on the Register", https://rg-guidelines.nswlrs.com.au/land_dealings/dealings_involving/notifications, accessed 13 April 2021 Land Registry Services, "Registrar-General's Guidelines – Land Dealings – Dealing Requirements – Qualified Title – Cautions", https://rg-guidelines.nswlrs.com.au/land_dealings/dealing_requirements/qualified_title/cautions, accessed 13 April 2021 New South Wales Legislative Assembly, Parliamentary Debates (Hansard), Land Titles Legislation Amendment Bill 2001 (NSW) Second Reading Speech, 19 September 2001 New South Wales Legislative Council, Parliamentary Debates (Hansard), Real Property (Conversion of Titles) Amendment Bill 1984 (NSW) Second Reading Speech, 8 May 1984 RA Woodman & P Butt, "Possessory Title and the Torrens System in New South Wales" (1980) 54 Australian Law Journal 79 RA Woodman & PJ Grimes, Baalman's The Torrens System in New South Wales (2nd ed, 1974, Law Book Co)
Category:	Principal judgment
Parties:	Joseph Geoffrey Sidoti (First Appellant) Natalie Martinoski (Second Appellant) Christopher Luke Hardy (Respondent)
Representation:	Counsel: J Doyle, L-A Walsh (Appellants) J van Aalst (Respondent)

	Solicitors: Connor & Co Lawyers (Appellants) WWright Lawyer (Respondent)
File Number(s):	2020/248350
Decision under appeal:	
Court or Tribunal:	Supreme Court
Jurisdiction:	Equity Division
Citation:	[2020] NSWSC 1057
Date of Decision:	12 August 2020
Before:	Kunc J
File Number(s):	2019/342572

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

The appellants are the registered proprietors of a parcel of land in Redfern which comprises a limited folio of the register of land titles maintained under the *Real Property Act 1900* (NSW) ("*RP Act*"). The land's northern boundary abuts the southern boundary of another parcel of land, also a limited folio, of which the respondent is the registered proprietor. A narrow strip of land, 3.35 square metres in area, at the northern boundary of the appellants' property, and adjacent to the southern boundary of the respondent's property, is burdened by a right of way (the "Yellow Land", per the attached diagram) which was created for the purposes of enabling access for a nightsoil carter to collect waste from outhouses on the properties. In the proceedings below, the primary

judge held that the respondent had acquired title to the Yellow Land by reason of adverse possession, commencing in 2002, or at the latest, in early 2005. The appellants appealed, purportedly as of right, from that decision.

At all relevant times, the Yellow Land was within the surveyed and described boundaries of the appellants' property and outside those of the respondent. The appellants' property was conveyed to previous proprietors in 1958 and again in 1985 by deeds containing metes and bounds descriptions that included the Yellow Land. The respondent's property was conveyed to him in 1998 by way of deed containing a metes and bounds description which did not refer to the Yellow Land. By this time, the Yellow Land was no longer usable as a right of way, due to various fences, and the respondent used the western end of the strip to store garden tools.

In August 1998, the respondent's land was brought under the *RP Act*. The deposited plan did not refer to nor include the Yellow Land. In 2002, the respondent undertook renovations and removed the fence along the northern boundary of the strip. Between 2003 and early 2005, further works were carried out, fully incorporating the Yellow Land into the respondent's backyard and effectively closing off access from the appellants' property.

After these works had been performed, the appellants' property was brought under the *RP Act* in September 2005, by the creation of a qualified and limited folio. The appellants became registered proprietors in April 2018, by which time the qualified title cautions had been removed. However, the land remained limited title. The appellants commenced works to reclaim the Yellow Land, specifically as a barbecue area. The proceedings were then commenced by the respondent in October 2019.

Held (per Brereton JA, Simpson AJA agreeing; Basten JA dissenting), granting leave to appeal but dismissing the appeal: [178] (Brereton JA), [211] (Simpson AJA), [43] (Basten JA).

As to the relevant limitation periods

1. *Per Basten JA, Brereton JA, and Simpson AJA*: Apart from the *RP Act*, title to land may be acquired by possession for a period of twelve years. This is because the owner's cause of action to recover land becomes statute barred

after that period, and is thereupon extinguished: *Limitation Act 1969* (NSW) ("*Limitation Act*"), ss 27(2), 28, 65(1), Sch 4. However, s 8(1)(a) provides that nothing in the *Limitation Act* affects the operation of *RP Act*, s 45C, and s 45C(1) excludes the operation of any statute of limitations, subject to s 45C(2): [10] (Basten JA), [84]-[85] (Brereton JA), [180]-[183] (Simpson AJA).

As to an application under RP Act, s 45D

2. *Per Basten JA*: None of the permutations within *RP Act*, s 45D, allowing for the acquisition of title by possession, are applicable to the present case. The claim does not relate to possession commencing *after* the land was brought under the *RP Act*, as s 45D(1) requires, nor is the claim for the whole parcel of land, as s 45D(2) contemplates. Section 45D(2) also requires that ss 45D(1)(b)-(c) be complied with, which is not the case. Furthermore, s 45D(2)(b) is premised upon the presence of an "occupational boundary", as defined by s 45D(6)(a), yet this definition is not satisfied by the back fence of the appellants' land. Additionally, the land is not a residue lot, thus preventing reliance on s 45D(2A). Finally, s 45D merely allows an application to the Registrar-General to obtain title by registration, which, by reason of s 45D(4), cannot be made in this case, as the respondents obtained their title without fraud and for valuable consideration: [25]-[30].

3. *Per Brereton JA*: Section 45D(1) is not available as the Yellow Land is not a whole parcel of land, s 45D(2) is not available as the part of the whole parcel in dispute lies between the occupational boundary and the true legal boundary, and no other parts of s 45D applicable: [90].

4. *Per Simpson AJA*: The avenues provided by s 45D are inapplicable, as the claim is not for the whole parcel of land, as required by ss 45D(1)-(2), nor for a residue lot, as s 45D(2A) contemplates, because although the Yellow Land was part of a service lane, it was not contained on a separate title: [196]-[199].

As to the operation of RP Act, ss 28U(2) and 45C

5. *Per Brereton JA*: Section 45C(2) preserves the right of an adverse possessor to acquire title to land brought under the *RP Act* in a qualified or limited folio by reason of possession for any length of time commencing *before* the folio's creation. This requires only that adverse possession has

commenced by the time the qualified or limited folio is created, and not that the documentary titleholder's cause of action to recover possession has been extinguished by the expiry of the relevant limitation period at that time: [86]-[87].

> *Refina Pty Ltd v Binnie* (2010) 15 BPR ¶28,633; [2010] NSWCA 192, considered; *South Maitland Railways Pty Ltd v Satellite Centres of Australia Pty Ltd* (2009) 14 BPR ¶26,823; [2009] NSWSC 716, not applied.

6. However, s 45C(2) does not mean that in cases to which s 45C(2) applies, s 45C(1) does not prevent a possessory application under s 45D. Moreover, even if the correct construction *is* that a s 45D application is permitted in cases to which s 45C(2) applies, presently, s 45D is not satisfied for the reasons above: [88]-[91].

7. The *RP Act* does not contemplate a primary application based on adverse possession in respect of land which is included in a limited folio which is not also a qualified folio of which another person is the registered proprietor, other than in a case of wrong description of the parcel or its boundaries. The reference in s 45C(2) to limited title is restricted to pre-existing possessory claims to land included in a limited folio by wrong description of the land or its boundaries: [143]-[148].

8. The phrase "by any wrong description of parcels or of boundaries" in ss 28U(2), 42(1)(c), and 118(4)(b) should be regarded as bearing the same meaning. In the context of a limited folio created by the Registrar-General pursuant to a conversion action, there will be a wrong description if the description of the land in the limited folio does not reflect the occupational boundaries, with the result that it includes land in which a person other than the registered proprietor has an existing possessory interest, whether that claim is crystallised or inchoate: [149]-[161].

> *Michael v Onisiforou* (1977) 1 BPR ¶9,356; *Hamilton v Iredale* (1903) 3 SR (NSW) 535, applied; *Sahab Holdings Pty Ltd v Registrar-General* (2011) 15 BPR ¶29,627; [2011] NSWCA 395; *Quach v Marrickville Municipal Council (No 1)* (1990) 22 NSWLR 55, distinguished.

9. Presently, the respondent had been in possession of the Yellow Land to the exclusion of the previous owners of the appellants' property for a period commencing before the limited folio for the appellants' property was created.

The occupational boundary was the southern, not northern, side of the Yellow Land, and the respondent had an inchoate possessory interest in the Yellow Land, thus the Yellow Land was incorrectly included in the limited folio for the appellants' property by wrong description of parcels or boundaries. The exception to indefeasibility in s 28U(2) is therefore engaged, as is the exception to the protection of the registered proprietor against proceedings for the possession or recovery of land in s 118(4)(b), while the respondent's ability to enforce his inchoate interest is preserved by s 45C(2): [162]-[166].

10. *Per Simpson AJA*: The respondent had not acquired possessory title to the Yellow Land at the time of the creation of the limited folio, as the twelve year period necessary to enliven the relevant limitation periods had not yet passed. There was therefore no wrong description for the purposes of s 28U(2) when the limited title issued, hence that exception to indefeasibility did not apply: [200]-[202].

11. However, s 45C(2) has the effect of preserving common law claims to possessory title in respect of adverse possession for any length of time commencing before the creation of the folio, notwithstanding s 45C(1). The primary judge's finding that the respondent's possession commenced prior to the creation of the folio was not challenged on appeal, and therefore the conclusion that s 45C(2) preserved the respondent's common law adverse possession claim was correct: [203]-[210].

12. *Per Basten JA, contra*: Section 45C(2) appears to allow title to be acquired, despite s 45C(1), by possession commencing *before* the land was brought under the *RP Act*, and so the question is whether this provision presently applies. While s 45C(2) places a limit on the exclusive operation of *RP Act*, Pt 6A, with respect to possessory applications for qualified or limited folios, that provision does not affect the operation of any other provision of the Act. The principle of indefeasibility of title provided for by s 42 remains paramount, and exceptions to that principle should not be readily accepted in the absence of a clear intention to that effect: [34]-[37].

> *Deguisa v Lynn* (2020) 94 ALJR 1020; [2020] HCA 39; *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 538; [2007] HCA 45, considered.

13. Section 28U(2), which provides an exception to indefeasibility where "by any wrong description of parcels or of boundaries any land is incorrectly included in a limited folio", is the potentially relevant qualification in this dispute. However, the Registrar-General made no mistake when undertaking the September 2005 conversion action. At that time, the respondent had only an inchoate claim to, and no interest in, the Yellow Land, and thus the folio correctly described the appellants' property as including the Yellow Land, subject to the right of way. There is no evidence of any "wrong description" of any kind, nor that the Yellow Land was "incorrectly included" in the limited folio. The transfer to the appellants in 2018 was therefore not subject to any exceptions to indefeasibility, and the orders made by the primary judge must be set aside: [31]-[33], [38]-[40].

As to orders in the absence of the registered mortgagee

14. *Per Brereton JA, Simpson AJA agreeing*: While it might be open to the National Australia Bank ("the Bank"), as the registered mortgagee of the appellants' property, to apply to set aside orders made in its absence, any such application will not inevitably succeed, nor inevitably result in a different outcome, considering that a registered mortgagee's interest is subject to the same exceptions as apply to the registered proprietor. Additionally, given the size of the Yellow Land, the impact of this judgment upon the value of the Bank's security is likely to be *de minimis*. In such circumstances, and in the absence of any application by the Bank, the absence of notice does not require that the appeal be allowed: [167]-[171] (Brereton JA).

> *Taylor v Taylor* (1979) 143 CLR 1; [1979] HCA 38; *Hardie Rubber Co Pty Ltd v General Tire & Rubber Co* (1973) 129 CLR 521; [1973] HCA 66, considered.

As to leave to appeal

15. *Per Brereton JA, Simpson AJA agreeing*: Leave to appeal is required unless the appeal involves a "claim, demand or question to or respecting property of the value of $100,000 or more": *Supreme Court Act 1970* (NSW) ("*SCA*"), s 101(2)(r)(ii). The relevant value is that of the claim, not the whole property to which it relates, and there is nothing presently indicating that the Yellow Land, being only 3.35 square metres in area, exceeds $100,000 in value. However, leave should be granted as the appeal raises questions of

principle with importance to the operation of the Torrens system in New South Wales: [172]-[173] (Brereton JA).

> *Jabulani Pty Ltd v Walkabout II Pty Ltd* [2016] NSWCA 267; *Nanschild v Pratt* [2011] NSWCA 85; *Ballas v Theophilos (No 1)* (1957) 97 CLR 186; [1957] HCA 49; *Oertel v Crocker* (1947) 75 CLR 261; [1947] HCA 40, applied.

16. *Per Basten JA*: There was no evidence before the Court as to the value of the Yellow Land, and it is not entirely clear whether *SCA*, s 101(2)(r), relates to the value of the whole property or only to the amount in dispute. In any event, no objection was taken to the filing of an appeal rather than an application for leave to appeal, and because the appeal raises issues of general importance as to the operation of the *RP Act*, leave should be granted if required: [9].

JUDGMENT

1 **BASTEN JA**: The applicants are the owners of a terrace house in Redfern. Across the back of their land there is a right of way extending the length of the block between two streets. The right of way was recorded in a plan of subdivision created in 1953. On the other side of the right of way is a lot containing a house which extends along the length of the right of way. The owner of that house is the respondent, Luke Hardy.

2 Commencing in about 2002, Mr Hardy and his then partner sought to extend their back garden into the right of way. They did so by pulling down the fence along their side of the right of way, opposite the rear fence of the property later acquired by the applicants. The applicants are now the registered owners of the land which extends to the boundary of the respondent's land, including that part subject to the right of way. They have removed the back fence along the line of the right of way and rebuilt a more substantial fence against the respondent's boundary. The respondent was thereby deprived of access to the part of the right of way upon which he had undertaken some improvements by way of surfacing and paving. He claimed that the work he had undertaken resulted in him acquiring the section of the right of way on the applicants' land by adverse possession which was unchallenged for a period of 12 years. The applicants were therefore not entitled to recover possession in reliance on their registered title, because proceedings to enforce their documentary title had become statute-barred prior to them obtaining title.

3 The trial judge accepted that the respondent had obtained a title in fee simple to 3.4m2 of the right of way in accordance with general law principles. The correctness of that finding is the subject matter of the present appeal.

The applicants' title

4 The applicants' terrace house fronts onto Boronia Street, Redfern. The block runs in a north-south direction. It is one of seven houses constructed between Baptist Street in the west and Dalley Lane to the east. Along the northern border of the appellants' land (and of all the terraces in the Boronia Street block) is the respondent's home, which runs in an east-west direction, fronting onto Baptist Street in the west. Each of the Boronia Street terrace houses is shown on the 1953 survey plan as having an "outhouse" about one metre from the northern boundary, with the right of way running between the outhouses and the northern boundary. The original purpose for the reservation of the right of way, being to collect "night soil", has long since gone; however, the right of way has not been extinguished, although its use may well have been abandoned long ago.[1]

5 The applicants' land was identified as lot E in the subdivision of 1953. Their predecessors in title obtained the lot by a deed of conveyance executed in 1958. The right of way was identified on the deed as an encumbrance. The purchasers were Mr and Mrs Theodorou. Lot E was transferred to three of their children in 1985. In September 2005 the Theodorous were notified by the Registrar-General that it was intended to convert their old system title to Torrens Title. Although the title was originally issued as a qualified and limited title, 12 years later (in October 2017) the qualification was withdrawn and it became a "limited title" subject to Pt 4B of the *Real Property Act 1900* (NSW).

6 On 18 April 2018 lot E was transferred by the Theodorous to the applicants, who became purchasers for value.

7 In the course of January–October 2019 the applicants, pursuant to a development consent, removed the brick outhouse and the fence on the southern side of the right of way and constructed a new paling fence on the

[1] See Conveyancing Act 1919 (NSW), s 89.

northern side of the right of way, thus incorporating the 3.4m2 of the right of way into their back garden.

8 Some four weeks after completion of the works, the respondent commenced proceedings in the Equity Division seeking to recover the area of the right of way, claiming title by adverse possession for a period in excess of 12 years.

Issues on appeal

9 There is a question as to whether the applicants required leave to appeal. There was no evidence before the Court as to the value of the thin strip of land 4.1m long and about 0.8m wide. However, although s 101(2)(r) of the *Supreme Court Act 1970* (NSW) requires leave with respect to an appeal other than an appeal involving a question respecting any property of the value of $100,000, it is not entirely clear whether that qualification relates to the value of the whole property or the amount in dispute. There is no doubt that the respondent's claim was for adverse possession of only a part of the applicants' property, which, as a whole, was valued far above the threshold. In any event, as no objection was taken to the filing of an appeal rather than an application for leave to appeal, and because the issues raised involve matters of general importance as to the operation of various provisions of the *Real Property Act*, warranting the grant of leave if leave be required, there should be a grant of leave to the extent necessary.

10 The claim by the respondent for a title created by adverse possession invoked a general law concept ("adverse possession") in combination with the operation of the *Limitation Act 1969* (NSW), s 27(2) and s 65. Section 65 provides that ownership of land which has been the subject of adverse possession by another person for a period of at least 12 years no longer provides a basis for proceedings to recover the land and the title itself is "extinguished". However, the possibility that the purchaser of a property with registered title may be deprived of part of the land purchased by reason of an interest not recorded on the register is contrary to the fundamental rationale of a system of title by registration.[2] That being so, it is common ground that, to succeed, the respondent had to bring his case within a qualification of the general principle

[2] Deguisa v Lynn (2020) 94 ALJR 1020; [2020] HCA 39 at [3], [88] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ): see further below.

within the terms of the *Real Property Act*. That exercise required consideration of specific provisions within Pt 4B and Pt 6A of the *Real Property Act*, in terms identified below.

11 Before turning to those issues, it is convenient to note the basis upon which the trial judge upheld a claim of adverse possession for a period of not less than 12 years. The first step taken by the respondent, in May 2002, was to take down a paling fence dividing his back yard from the right of way. That act cannot have constituted an act of possession of the Theodorous' property. What then took place, and was completed by January 2005, involved the laying of a "weed mat" across the area of the right of way and the inclusion of some granite pavers and mondo grass on the right of way. That work, the judge found, had been undertaken prior to the Theodorous' land being brought under the *Real Property Act* in September 2005. If that activity had constituted "adverse possession" then the possession had commenced prior to the land coming under the *Real Property Act*, although over a period of less than a year.

12 Some activities undertaken by the respondent, such as the storage of garden equipment on the right of way, might have given rise to some form of easement. On the other hand, there was no submission that the activities undertaken were inconsistent with the use of the land as a right of way. How activities which were not inconsistent with the right of way could be a basis for depriving the owner of the servient tenement of a fee simple title was not explained. The activities undertaken were of the same kind as those which are commonly undertaken in suburban areas in order to render the "nature strip" outside people's homes more attractive. Similar activities are not uncommonly undertaken on rights of way running between properties but over land which belongs to one of two neighbouring owners.

13 Even with respect to title which is not obtained by registration, title by adverse possession is anomalous; unlike prescription, it depends not on an assumption of right, but on "possession as of wrong".[3] A century ago Professor Henry W

[3] Buckingham County Council v Moran [1990] 1 Ch 623 at 644D (Nourse LJ), a phrase adopted by the Privy Council in its last judgment on appeal from Hong Kong, delivered by Lord Hoffmann, Sze To Chun Keung v Kung Kwok Wai David [1997] 1 WLR 1232 at 1235 (PC); K Gray & SF Gray, Elements of Land Law (5th ed, 2009, Oxford University Press) at [9.1.5] ("Gray & Gray").

Ballentine suggested that "[t]itle by adverse possession sounds, at first blush, like title by theft or robbery, a primitive method of acquiring land without paying for it."[4] Possession which is "adverse" to the owner may be demonstrated by acts inconsistent with shared occupation, and may include locking a gate or door to prevent access to the land. The evidence in the present case indicated that there was at all times a door in the corrugated iron fence on the Theodorous' land where it adjoined the right of way. The evidence did not establish that the respondent took any step to block the door or otherwise prevent access to the right of way by the Theodorous. He made no attempt to exclude anyone; he merely sought passive enjoyment of the land as an adjunct to his back yard. He did not pay rates, nor fence the land against the owner. The actions relied on did not establish an intention to assert exclusive possession, as opposed to an opportunistic user.[5]

14 Although there must be real doubt as to whether the minor steps taken by the respondent to provide access to the land for himself and to improve its amenity could constitute adverse possession, there was no challenge to the finding of the trial judge in that respect. Rather, the applicants' case on appeal rested upon their entitlement under the *Real Property Act*, and the contention that the provisions relied upon by the respondent did not qualify that entitlement. It is necessary, therefore, to turn to the relevant statutory provisions.

Statutory scheme

15 The applicants relied primarily upon two provisions of the *Real Property Act*, which provide for the scheme of land ownership reflected in the phrase "title by registration". Section 42(1) relevantly provides:

> **42 Estate of registered proprietor paramount**
>
> (1) Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded except:

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[4] HW Ballantine, "Title by Adverse Possession" (1918) 32 Harvard Law Review 135 at 135 ("Ballantine"); Gray & Gray at [9.1.6].

[5] Compare Clement v Jones (1909) 8 CLR 133, 139-140 (Griffith CJ); [1909] HCA 11.

…

(c) as to any portion of land that may by wrong description of parcels or of boundaries be included in the folio of the Register or registered dealing evidencing the title of such registered proprietor, not being a purchaser or mortgagee thereof for value, or deriving from or through a purchaser or mortgagee thereof for value ….

16 There is no suggestion that the appellants' title was infected by fraud; nor was the exception in par (c) engaged, they being purchasers for value.

17 They also relied upon s 45 which, as reinserted in the Act in 2000, states:

45 Bona fide purchasers and mortgagees protected in relation to fraudulent and other transactions

(1) Except to the extent to which this Act otherwise expressly provides, nothing in this Act is to be construed so as to deprive any purchaser or mortgagee bona fide for valuable consideration of any estate or interest in land under the provisions of this Act in respect of which the person is the registered proprietor.

(2) Despite any other provision of this Act, proceedings for the recovery of damages, or for the possession or recovery of land, do not lie against a purchaser or mortgagee bona fide for valuable consideration of land under the provisions of this Act merely because the vendor or mortgagor of the land:

(a) may have been registered as proprietor through fraud or error, or by means of a void or voidable instrument, or

(b) may have procured the registration of the relevant transfer or mortgage to the purchaser or mortgagee through fraud or error, or by means of a void or voidable instrument, or

(c) may have derived his or her right to registration as proprietor from or through a person who has been registered as proprietor through fraud or error, or by means of a void or voidable instrument.

(3) Subsection (2) applies whether the fraud or error consists of a misdescription of the land or its boundaries or otherwise.

18 The applicants contended that they obtained title to the land, including the area of the right of way now in dispute, as a result of registration, pursuant to s 42(1). Whatever other provision of the Act might have permitted a claim against them based on adverse possession, absent an express provision qualifying their title, nothing in the Act deprived them of their estate or interest in the land: s 45(1). Even if the persons from whom they purchased, who had owned the land for some 40 years, had lost title to the strip subject to the right of way and had become registered proprietors through error in a failure to record the respondent's interest acquired by adverse possession, that would not, they submitted, diminish their title: s 45(2).

19 The respondent's case turned on a distinction as to the creation of folios in the register which record the details of land bought under the *Real Property Act*. The Act provides for three kinds of folio, namely a limited folio, a qualified folio and an ordinary folio, the last being those folios which are neither limited nor qualified. A qualified folio is commonly issued when land bought under the Act has been alienated from the Crown in fee, but has not previously been subject to registration. A qualified folio is accompanied by a caution warning persons dealing with the registered proprietor that the land may be subject to a subsisting interest which is not recorded: s 28J(1). The caution (and the qualification) will lapse, or be removed, in prescribed circumstances which need not be described. The Theodorous held a qualified title from September 2005 until October 2017, when the qualification was withdrawn, but it remained a limited folio.

20 Part 4B provides for the issue of a "limited folio" where the boundaries of the land are not sufficiently defined to enable the Registrar-General to create an ordinary folio: s 28T(3). The relevant elements of limitation are found s 28T(2) - (4) and (8), which provide:

> **28T Creation of limited folio**
>
> …
>
> (2) Where the boundaries of land are not sufficiently defined to enable the Registrar-General to cause a notice to be given under section 28E (1), the Registrar-General may cause such a notice to be given and, subject to subsection (4), may create a qualified folio of the Register for the estate or interest in any of that land of the person for whose estate or interest in the land the Registrar-General could have created a qualified folio of the Register under section 28E, if no further survey definition had been necessary adequately to define the boundaries of the land.
>
> (3) Where the boundaries of land are not sufficiently defined to enable the Registrar-General to create an ordinary folio of the Register under section 28EA, the Registrar-General may, subject to subsection (4), create a folio of the Register for the estate or interest in any of that land of the person for whose estate or interest in the land the Registrar-General could have created an ordinary folio of the Register under section 28EA, if no further survey definition had been necessary adequately to define the boundaries of the land.
>
> (4) When creating a folio of the Register under subsection (1A), (1), (2) or (3), the Registrar-General shall make in that folio a recording to the effect that the description of the land comprised therein has not been investigated by the Registrar-General and may therein or in any plan deposited in the Registrar-General's office illustrating the land so comprised record such other particulars as the Registrar-General considers appropriate.

…

(8) Except as otherwise provided by any other provision of this Part:

(a) land comprised in a limited folio of the Register is subject to the provisions of this Act,

(b) the provisions of this Act relating to ordinary folios of the Register, land comprised in ordinary folios of the Register and the registration of dealings affecting land comprised in ordinary folios of the Register shall apply to limited folios of the Register, land comprised in limited folios of the Register and the registration of dealings affecting land comprised in limited folios of the Register,

… and

(d) a limited folio of the Register shall be evidence as to title in all respects as if it were an ordinary folio of the Register, except that:

(i) the certification of title is not conclusive as regards the definition of the boundaries of the land comprised therein, and

(ii) where the folio of the Register is also a qualified folio of the Register, the operation of section 28P (1) (d), as applied by subsection (7), is not affected.

21 Importantly, qualified and limited folios have different operations. With respect to qualified folios, s 28P (referred to in s 28T(8)(d)(ii)) provides:

28P Application of provisions of this Act to qualified folio and land therein

(1) Except as otherwise provided by this Act:

(a) land comprised in a qualified folio of the Register is subject to the provisions of this Act,

…

(d) a qualified folio of the Register shall be evidence as to title in all respects as if it were an ordinary folio of the Register, except that it shall be subject to every subsisting interest in the land comprised therein, whether recorded in the Register or not.

22 Section 12 of the *Real Property Act* confers powers on the Registrar-General to correct errors and omissions in the register, but not so as to prejudice or affect a right which has accrued from the uncorrected recording: s 12(3)(b). With respect to limited title, the following provision applies:

28U Defeasibility of limited title

(1) Section 12 (3) (b) does not apply to or in respect of a correction made by the Registrar-General of any wrong description of parcels or of boundaries in relation to land included in a limited folio of the Register.

(2) Where by any wrong description of parcels or of boundaries any land is incorrectly included in a limited folio of the Register, section 42 (1) does not operate to defeat any estate or interest in that land adverse to or in derogation of the title of the registered proprietor and not recorded in the folio, whether or

not the registered proprietor is a purchaser or mortgagee of that land for value or derives title from such a purchaser or mortgagee.

23 The creation of a limited title is therefore a result of the "boundaries of land" being "not sufficiently defined", it being assumed that further definition would result from a survey. Section 28U prevents the registered proprietor obtaining an indefeasible title with respect to land "incorrectly included" in a limited folio, as a result of "any wrong description of parcels or of boundaries".

24 It is also necessary to note the operation of Pt 6A of the *Real Property Act*, which provides for applications to be made to obtain possessory title to land under the Act. For present purposes, it is sufficient to have regard to the following provisions:

> **45C Acquisition of possessory title to land under the Act**
>
> (1) Except to the extent that statutes of limitation are taken into consideration for the purposes of this Part, no title to any estate or interest in land adverse to or in derogation of the title of the registered proprietor shall be acquired by any length of possession by virtue of any statute of limitations relating to real estate, nor shall the title of any such registered proprietor be extinguished by the operation of any such statute.
>
> (2) Subsection (1) does not prevent the acquisition of a title, adverse to or in derogation of the title of the registered proprietor thereof, to an estate or interest in land brought under the provisions of this Act by the creation of a qualified or limited folio of the Register by reason of possession of the land for any length of time commencing before the creation of the folio.
>
> **45D Application for title by possession**
>
> (1) Where, at any time after the commencement of this Part, a person is in possession of land under the provisions of this Act and:
>
> (a) the land is a whole parcel of land,
>
> (b) the title of the registered proprietor of an estate or interest in the land would, at or before that time, have been extinguished as against the person so in possession had the statutes of limitation in force at that time and any earlier time applied, while in force, in respect of that land, and
>
> (c) the land is comprised in an ordinary folio of the Register or is comprised in a qualified or limited folio of the Register and the possession by virtue of which the title to that estate or interest would have been extinguished as provided in paragraph (b) commenced after the land was brought under the provisions of this Act by the creation of the qualified or limited folio of the Register,
>
> that person in possession may, subject to this section, apply to the Registrar-General to be recorded in the Register as the proprietor of that estate or interest in the land.
>
> (2) Where, at any time after the commencement of this Part:
>
> (a) a person is in possession of part only of a whole parcel of land, and

(b) any boundary that limits or defines the land in the person's possession is, to the extent that it is not a boundary of the whole parcel of land, an occupational boundary that represents or replaces a boundary of the whole parcel,

the person may, unless the part of the whole parcel of which the person is in possession lies between such an occupational boundary and the boundary of the whole parcel that it represents or replaces, apply to the Registrar-General to be recorded in the Register as the proprietor of the same estate or interest in that whole parcel of land as could have been the subject of an application by the person under subsection (1) if the land in the person's possession had been that whole parcel of land and subsection (1) (b) and (c) had been complied with in relation thereto.

…

(4) A possessory application may not be made in respect of an estate or interest in land if:

(a) the registered proprietor of that or any other estate or interest in the land became so registered without fraud and for valuable consideration, and

(b) the whole of the period of adverse possession that would be claimed in the application if it were lodged would not have occurred after that proprietor became so registered,

unless the application is made on the basis that the estate or interest applied for will be subject to the estate or interest of that registered proprietor if the application is granted.

…

(6) For the purposes of subsection (2), a reference to an occupational boundary that represents or replaces a boundary of a whole parcel of land is a reference to:

(a) a fence, wall or other structure intended to coincide with or represent that boundary of the whole parcel,

(b) a channel, ditch, creek, river or other natural or artificial feature that is itself land and is in close proximity to that boundary of the whole parcel, or

(c) a give and take fence with respect to that boundary of the whole parcel.

25 There was no opportunity for the respondent to make an application for title by possession under s 45D(1), because it relates only to possession which commenced *after* the land was brought under the provisions of the Act by the creation of a limited folio. (His claimed possession pre-dated the creation of the limited folio.) However, in the course of the hearing, counsel for the respondent sought to rely upon s 45D(2). That approach recognised that s 45D(1) deals only with "a whole of parcel of land": s 45(1)(a). Section 45D(2) applies where the person is in possession of "part only of a whole parcel of land": s 45D(2)(a). However, s 45D(2), if applicable, would have permitted an application to be made for the whole of the land: that was no part of his claim. Further, it

appears that subs (2) is only available if subs (1)(b) and (c) were complied with, which was not the case. Whatever the operation of that provision, it was of no assistance to the respondent in the present case.

26 There is a further point to be noted with respect to s 45D(2), namely that the section refers to "any boundary that limits or defines the land in the person's possession" as "an occupational boundary" which is said to represent or replace a boundary of the whole parcel: s 45D(2)(b). There is a qualification in relation to applications under that provision, namely that the part of which the person is in possession must not lie between the occupational boundary and the boundary that it represents or replaces. An "occupational boundary" is defined to mean, relevantly, "a fence … intended to coincide with or represent the boundary of the whole parcel": s 45D(6)(a). The back fence of the appellants' land was not so intended: rather, it was intended to separate that part of the property which was subject to a right of way from that which was not. There is no other reference to the concept of "occupational boundary" in the *Real Property Act*: it has no role to play in this case.

27 Three further points may be noted. First, as Woodman and Butt have noted, with respect to s 45D(2) and (6):[6]

"The result is that claims for possessory title to trifling areas of land cannot be made. For example, there cannot be a claim to a strip of land along a boundary occasioned by an incorrect placement of a fence ….Further, there will be no right to lodge a possessory application in respect of an area of, say, thirty hectares out of a "whole parcel" of one hundred hectares."This appears to be correct; but in 1980, when these observations were made, s 45D did not contain subs (2A) and (2B), which should also be referred to.

28 Secondly, it is necessary to note a new provision, found in subs (2A) and (2B), not introduced until 2001:[7]

45D Application for title by possession

…

[6] RA Woodman & P Butt, "Possessory Title and the Torrens System in New South Wales" (1980) 54 Australian Law Journal 79 at 85.

[7] Land Titles Legislation Amendment Act 2001 (NSW), Sch 2[1].

(2A) A person who:

(a) is in possession of part of a residue lot that could, if it had been a whole parcel of land, have been the subject of an application by the person under subsection (1), and

(b) is (or is entitled to be) the registered proprietor of an estate in fee simple in land that adjoins that lot,

may apply to the Registrar-General to be recorded in the Register as the proprietor of an estate in fee simple in land consisting of a consolidated lot comprising the part of the residue lot in the person's possession and the adjoining land.

(2B) In subsection (2A), ***residue lot*** means an allotment consisting of a strip of land that the Registrar-General is satisfied:

(a) was intended for use as a service lane, or

(b) was created to prevent access to a road, or

(c) was created in a manner, or for a purpose, prescribed by the regulations.

Quite correctly, no reliance was placed on subs (2A); the right of way was part of a lot the subject of a registered title now held by the applicants – it was not a "residue lot".

29 Thirdly, satisfaction of a provision in s 45D would not confer title on the respondent: it would merely allow him to apply to the Registrar-General to be recorded as the proprietor of the land, and thus obtain title by registration. No such record could be made in respect of the land held by the applicants who obtained their title without fraud and for valuable consideration: s 45D(4).

30 On no view was s 45D engaged. However, s 45C(2) appears to allow a title to be acquired, despite s 45C(1), by possession commencing *before* the creation of the folio. One question is whether that provision applies in the present case.

Application of s 45C(2)

31 In order to consider the operation of the Act in relation to limited folios, the starting point is to note that the creation of a limited folio only arises where "the boundaries of the land are not sufficiently defined". That provides the basis for the qualification of the principle of indefeasibility in s 42(1). As explained in s 28U(2), the principle of indefeasibility is not applicable where "by any wrong description of parcels or of boundaries any land is incorrectly included in a limited folio".

32 However, it is by no means clear in what sense the respondent can assert that the land subject to the right of way was "incorrectly included" in the limited folio issued to the predecessor in title of the applicants. There can be no contention that the Registrar-General, in undertaking conversion action in September 2005, made any mistake in the preparation of the title. As appears from the letter sent to the then owners, the title was to be issued on the basis the land was lot E in a deposited plan. That showed the land extending to the boundary with the respondent's land, and subject to a right of way of variable width as shown on the title diagram. That expressly identified the area the subject of the respondent's possessory claim. There was no "wrong description" of any parcel, nor of any boundary.

33 The misdescription which may have arisen would have been one which could have been resolved by a survey defining the boundaries with precision. (The Registrar-General was apparently not satisfied with the survey on which the deposited plan was based.) There may have been imprecision in the boundaries, but that was irrelevant to the respondent's claim. His case was that in 2005 he had an "inchoate claim" for a possessory title over the land subject to the right of way. In fact, he was at that stage no more than a trespasser. He had no interest in the applicants' land.

34 When the applicants obtained a transfer of the limited title on 18 April 2018, it remained subject to misdescription of the kind referred to. Otherwise the effect of s 42(1) of the *Real Property Act* was to confer on them a title absolutely free from all other estates and interests not recorded on the folio in the register.

35 Although it is not entirely easy to establish an harmonious operation of the various provisions of the *Real Property Act*, qualifications to the principle of indefeasibility which forms the bedrock of a system of title by registration should not readily be accepted as a matter of statutory construction, in the absence of a clear intention to that effect. As counsel for the applicants correctly noted, so much was recently confirmed by the High Court in *Deguisa*

v Lynn,[8] quoting the earlier decision of *Westfield Management Ltd v Perpetual Trustee Co Ltd*:[9]

> "Together with the information appearing on the relevant folio, the registration of dealings manifests the scheme of the Torrens system to provide third parties with information necessary to comprehend the extent or state of the registered title to the land in question."

Further, it was stated in *Westfield*:[10]

> "The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee."

36 The Court concluded in *Deguisa*:

> "[70] In *Westfield*, this Court indicated a distinct preference for the firm clarity of the approach of Barwick CJ in *Bursill* over the more equivocal statements of Windeyer J. The approach of Barwick CJ is a better fit with the understanding of the Torrens system as a system of title by registration, affirmed in *Breskvar v Wall*. Within that system, the State's guarantee of the state of the title of the registered proprietor shown by the certificate of title encompasses any qualification to that title by virtue of the interest in the land of a person other than a registered proprietor."

37 Section 45C(1) operates to deny that a title in derogation of that of a registered proprietor may be acquired "[e]xcept to the extent that statutes of limitation are taken into consideration for the purposes of this Part", being Pt 6A. The apparent purpose of that provision is to make Pt 6A an exclusive statement of the circumstances in which a possessory title may derogate from the title of the registered proprietor. The effect of s 45C(2) is to place a limit on the exclusive operation of Pt 6A with respect to qualified or limited folios. It does not, however, affect the operation of any other provision of the Act.

38 As has been noted, s 28T(8) and s 28U(2) provide a confined exception to the protection given by an ordinary folio for the title of the registered proprietor, as applied to a limited folio. Thus, that which is not protected by a limited title is the consequence of a wrong description of parcels or boundaries of land. When created in 2005 the folio correctly described the parcel of land as including the area the subject of the right of way; that area was not "incorrectly

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[8] Deguisa at [66].
[9] (2007) 233 CLR 528; [2007] HCA 45 at [5].
[10] Westfield at [39]; Deguisa at [69].

included", within the meaning of that phrase in s 28U(2). For example, the respondent then had no caveatable interest in the land; nor if it be relevant, did he then have a "subsisting interest", for the purposes of s 28J(1), relating to cautions applicable to qualified title.

39 No explanation was provided as to how a title which involved no wrong description of parcels or boundaries when created could fall within that description after it was created by maintaining unlawful possession for 12 years. (As has been explained, if his possession had commenced after the title was issued, he could not have made an application under s 45D.)

40 Immediately one acknowledges a limitation with respect to the identification of boundaries, the possibility of a claim for adverse possession arises. Thus, where a title reflects the position of a fence or wall constructed many decades earlier, but extending on to land of an adjoining registered proprietor, the former owner may have a claim for adverse possession against the latter. If valid, that example does not assist the respondent. No claim for a possessory title was made before the applicants obtained their title for valuable consideration. No application under s 45D could have succeeded.

Conclusions

41 In my view, the transfer to the applicants, for valuable consideration, of land contained in a limited folio, conveyed an estate and interest, on registration of the transfer, free of the respondent's claim for a possessory title over that part of the land subject to a right of way.

42 That requires orders setting aside the orders made by the trial judge, including that dismissing the cross-claim brought by the applicants. In their notice of appeal, the applicants sought the orders which were sought in the notice of cross-claim. One order, requiring the withdrawal of the respondent's caveat, follows from upholding the appeal. However, no submissions were addressed to the other orders: it is not clear if they are still apposite, nor the evidential basis on which they were sought. As the cross-claim remains on foot, the appropriate course is to remit it to the Equity Division, where, if thought necessary, the applicants can reagitate any aspects they wish to pursue.

43 Accordingly, the Court should make the following orders:

(1) To the extent necessary, grant the applicants leave to appeal from the judgment and orders in the Equity Division.

(2) Allow the appeal and –

(a) set aside orders (1)-(5) and (7) entered on 21 August 2020;

(b) dismiss the amended summons filed in the Equity Division on 30 July 2020.

(c) order that the respondent pay the applicants' costs in the Division.

(3) With respect to the undetermined amended first cross-claim,

(a) order that the respondent withdraw caveat AP918431B;

(b) to the extent that the cross-claimants wish to pursue the further orders sought in the cross-claim, remit the cross-claim to the Equity Division.

(4) Order that the respondent pay the applicants' costs in this Court.

44 This, however, is a minority view. Dismissal of the appeal gives effect to a mechanism of the acquisition of land which, as noted above, has been described as "possession as of wrong".[11] Ballentine's description of obtaining title by adverse possession as "a primitive method of acquiring land without paying for it"[12] is not inapt in the present case. If one accepts that the acts of the respondent amounted to a taking of possession adverse to the owner (which must be doubtful), it was not a case of mistake, the identity of the holder of title was not in doubt, nor could the acts of the respondent have affected any person other than his neighbour. Whether he acquired title by this action turned not so much on the general law, devised in another age, but on a statute providing for title by registration. As explained above, I do not think that the *Real Property Act* permits the acquisition of title by adverse possession in this case. However, if the correct construction of the statute were uncertain, a construction which furthers the purposes of the *Real Property Act* should be preferred.[13] An interpretation which deprives a bona fide purchase for value of land identified in the register as vested in the vendor should not be frustrated absent clear words to that effect. No such language is found in the *Real Property Act*.

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[11] Above at [13].

[12] Ballantine at 135; Gray & Gray at [9.1.6].

[13] Interpretation Act 1987 (NSW), s 33.

45 **BRERETON JA:** The appellants Mr Sidoti and Ms Martinoski are the registered proprietors of land situate in Boronia Street, Redfern, and comprised in Lot E/928XXX, which is a limited folio of the register of land titles maintained under the *Real Property Act 1900* (NSW) ("*RP Act*"). On it stands a terrace house. Its southern boundary fronts Boronia Street; and its northern (rear) boundary abuts the southern (side) boundary of the backyard of a terrace house in Baptist Street, Redfern, which is comprised in Lot 1/986ZZZ, also a limited folio, of which the respondent Mr Hardy is the registered proprietor. It is convenient to refer to these properties respectively as "Lot E" or "the Sidoti Property", and "Lot 1" or "the Hardy Property".

46 The geographical relationship of the properties, and some of the key features referred to below, are depicted in the (not to scale) sketch plan attached to the primary judgment,[14] which is reproduced as an attachment to this judgment. Boronia Street runs east-west, there being four other terrace house properties (Lots A, B, C and D) between the Sidoti Property and its intersection, to the west, with Baptist Street, which runs north-south; and two other terrace house properties (Lots F and G) between the Sidoti Property and its intersection, to the east, with Dalley Lane. Dalley Lane provides the rear boundary of the Hardy property. The rear boundaries of all seven Boronia Street properties abut the southern boundary of the Hardy Property.

47 A narrow strip of land at the rear of each of the seven Boronia Street properties, adjacent to the southern boundary of the Hardy Property and running between Baptist Street in the west and Dalley Lane in the east, is burdened by a right of way, created when those lots were originally subdivided at the end of the nineteenth century. Originally, this formed a narrow lane, running east-west, leading to Dalley Lane, the purpose of which was to enable access for the nightsoil carter to collect waste from the brick outhouses at the rear of the Boronia Street properties; in the vernacular, a "dunny lane". In the proceedings below, Kunc J held that Mr Hardy had acquired title to that part of the lane – a strip approximately 3.81 metres long and 88cm wide, and thus comprising 3.35 square metres in all – that passes over the rear of the Sidoti Property ("the Yellow Land", because it was so coloured in the attached sketch

[14] Hardy v Sidoti (2020) 19 BPR ¶40,535; [2020] NSWSC 1057 ("Primary judgment").

plan), by adverse possession for a period in excess of twelve years running from 2002 or, at the latest, from early 2005. Mr Sidoti and Ms Martinoski appeal to this Court, purportedly as of right, from that decision.

The facts

48 The following account is based on the facts found by the primary judge, which were largely and are now entirely uncontroversial, and the documentary evidence.

49 The Sidoti Property, and the other Boronia Street properties, were created by FP928XXX, entitled "Plan of Subdivision of Lots 4, 5, 6 and 7 Section A of Baptist's Bourke Street Subdivision"; as its title indicates, that plan was a subdivision of an earlier subdivision. It bore a certificate that the boundaries of the Sidoti Property were accurately surveyed, in accordance with the Survey Practice Regulation 1933 (NSW), on 24 April 1956, and an endorsement that it had been approved by the City of Sydney Council under *Local Government Act 1919* (NSW), s 327.

50 By deed of conveyance dated 29 October 1958, the Perpetual Trustee Company (as administrator of the estate of William Aitcheson Haswell, who had died in 1925) as vendor conveyed the Sidoti Property to George and Despina Theodorou as purchasers. The deed contained a metes and bounds description of Lot E, including the Yellow Land which was expressed to be subject to the right of way. It also referred to the deed of conveyance by which Mr Haswell had acquired title in 1890, a subsequent mortgage by him, and a memorandum of its discharge in 1924.

51 Four years later, by deed of conveyance dated 21 September 1962, the Perpetual Trustee Company as vendor also conveyed the neighbouring property to the east, Lot F, to George and Despina Theodorou as purchasers. This property, which as described below remains in the ownership of the Theodorou family, is referred to as "the Remaining Theodorou Property". The strip at its rear affected by the right of way is referred to as "the Green Land", again because it was so coloured in the attached sketch plan. In 1969, the Theodorou family vacated both Lot E and Lot F and let them to tenants, and tenants remained in occupation of the Sidoti Property until it was sold, as

described below, to the appellants in 2018. Tenants continue to occupy the Remaining Theodorou Property.

52 By deed of conveyance dated 18 March 1985, George and Despina Theodorou conveyed Lot E to their children Androula, Theodorou, Christopher and Jenny. This deed contained the same metes and bounds description as the deed of 1958, so that it included the Yellow Land. By another deed of conveyance of the same date, George and Despina Theodorou also conveyed Lot F to Androula, Theodorou, Christopher and Jenny.

53 Mr Hardy and his then partner purchased the Hardy property at public auction in November 1997. A survey of the Hardy Property dated 16 December 1997, presumably obtained in connection with the purchase, states:

> "The southern boundary is correctly fenced and built-to; along part chimney coping overhangs the adjoining land 0.1 metres.
>
> There are no other apparent encroachments by or upon subject property."

The survey contains no reference to the Yellow Land or the right of way.

54 By deed of conveyance dated 9 January 1998 and registered on 19 January 1998, the Hardy Property was conveyed to Mr Hardy and his then partner as joint tenants. The deed contained a metes and bounds description of the property, which did not include the Yellow Land.

55 When Mr Hardy subsequently moved into his property, there was an old timber paling fence on the northern boundary of the Yellow Land and the Green Land (marked "B" on the sketch plan). This fence coincided with the boundary of the Hardy Property with, respectively, the Sidoti Property and the Remaining Theodorou Property. Gates in it provided access from the Hardy Property to the Yellow Land and the Green Land, indicating that, although the right of way does not legally benefit the Hardy Property, earlier occupants of the Hardy Property had accessed the lane. Along the southern boundary of the Yellow Land and the Green Land (that is, 88cm into the Sidoti Property), and aligned with the rear of the old brick outhouse on the Sidoti Property (marked "A" on the sketch plan), there was an old corrugated iron fence (marked "D" on the sketch plan). Gates in this corrugated iron fence provided access from the

Sidoti Property and the Remaining Theodorou Property to the Yellow Land and the Green Land respectively.

56 By January 1998, the lane, including the Yellow Land, was no longer used or usable as a right of way. It had been occluded at various points, including relevantly by paling fences across the western end of the Yellow Land and the eastern end of the Green Land (marked "C" on the sketch plan).[15] Previous owners of the Hardy Property appeared to have used the western end of the Yellow Land for storing garden tools, and Mr Hardy continued to do so in the area marked "G" on the sketch plan, and for that purpose entering the Yellow Land through the gate in the old paling fence. The water meter for the Hardy Property was also located on the Yellow Land.

57 DP986532, which comprises only Lot 1, was registered on 7 August 1998, for the purpose of bringing the Hardy Property under the *RP Act*. It did not refer to or include the Yellow Land (or for that matter the Green Land). Pursuant to conversion action CA73069, qualified and limited folio 1/986532 was issued on the same date. The second schedule of the folio included notifications coded QG ("Qualified Title. Caution Pursuant To s28J *Real Property Act 1900*"),[16] and QL ("Limited Title. Limitation Pursuant To Section 28T(4) Of The Real Property Act, 1900. The Boundaries Of The Land Comprised Herein Have Not Been Investigated By The Registrar-General").[17]

58 Mr Hardy did not seek to enter the Green Land until about 2001, when he observed that the Green Land was so filled with rubbish and domestic waste from the tenants in the Remaining Theodorou Property that the old paling fence was leaning from the Green Land into the Hardy Property.

59 Between October 2001 and June 2002, Mr Hardy and his then partner renovated their property and in the meantime resided elsewhere. In early to

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[15] It was unclear whether there was also a fence separating the Yellow Land from the Green Land; as the primary judge observed (Primary judgment at [23]), this seems unlikely, given that both were in the common documentary ownership of the Theodorou family for many years, but nothing turns on it.

[16] Land Registry Services, "Registrar-General's Guidelines – Land Dealings – Dealings Involving – Notifications on the Register", https://rg-guidelines.nswlrs.com.au/land_dealings/dealings_involving/notifications, accessed 13 April 2021 ("Registrar-General's Guidelines – Dealing involving Notifications on the Register").

[17] Land Registry Services, "Registrar-General's Guidelines – Deposited Plans – Conversion of Old System – Deposited Plans Redefining Old System Land – Limited Titles", https://rg-guidelines.nswlrs.com.au/deposited_plans/conversion_os/dps_redefining_os_land/limitedtitles, accessed 13 April 2021 ("Registrar-General's Guidelines – Limited Titles").

mid-May 2002, their builder removed the old paling fence on the northern boundary of the Yellow and Green Land, cleared out the rubbish from the Green Land, and levelled and tidied both so that they appeared to be part of the Hardy Property's back garden. They continued to use the western portion of the Yellow Land (marked "G" on the sketch plan) to store garden equipment. Around this time, the water meter was also relocated from the Yellow Land to the front courtyard of the Hardy property.

60 Between 2003 and early 2005, Mr Hardy and his then partner made further improvements to their backyard, landscaping it so that it incorporated the Yellow Land and the Green Land. By 31 December 2004, these improvements included:[18]

(1) in or about August and September 2004, installing underground irrigation pipes for a watering system, including across the Yellow Land and the Green Land;

(2) in or about September 2004, laying a weed mat across the entire backyard area up to the various boundaries, including across the Yellow Land and the Green Land up to the old corrugated iron fence on the southern side of the lane;

(3) commencing in about September 2004, laying approximately five granite "railway sleeper" type slabs along the base of the old corrugated iron fence along the southern boundary of the Yellow Land and the Green Land, which then served as a footing for a reed matting screen that was installed alongside the length of the old corrugated iron fence to conceal it. This effectively closed off the access from the Sidoti Property and the Remaining Theodorou Property to the Yellow Land and the Green Land, which had been provided by the gates in the old corrugated iron fence; and

(4) by early 2005, laying granite pavers to pave the garden. Although well-advanced by 31 December 2004 in the main backyard area, this was not completed in the Yellow Land until January 2005, when twelve granite pavers were laid in the Yellow Land and some mondo grass planted, up to the point where garden equipment continued to be stored at the western end of the Yellow Land (marked "G" on the sketch plan). The Green Land was not paved, but was landscaped with mondo grass and pine mulch.

61 Meanwhile, on 14 March 2004, departmental dealing AA472866 was registered in respect of the Hardy property. That dealing was not in evidence and it has

[18] See Primary judgment at [31].

not been possible to ascertain its effect, but as it is not the title to the Hardy property that is in issue, it does not matter.

62 On 21 September 2005, by conversion actions CA96563 and CA96565 respectively, the Sidoti Property and the Remaining Theodorou Property were brought under the provisions of the *RP Act* and qualified and limited folios E/928928 and F/928928 were created for them respectively. In each case, the second schedule of the folio contained notifications coded QS ("Qualified Title. Caution Pursuant to Section 28J *Real Property Act 1900*. This Title Was Created Using NSW Land Registry Services Records In Accordance With Section 28D *Real Property Act 1900*. Delivery Of The Title And/Or Registration Of Any Dealing Will Require Lodgment Of A Statement Of Title Particulars Supplying Complete Ownership Details");[19] QG ("Qualified Title. Caution Pursuant to s28J *Real Property Act 1900*");[20] and QL ("Limited Title. Limitation Pursuant To s.28T(4) *Real Property Act 1900*. The Boundaries Of The Land Comprised Herein Have Not Been Investigated By The Registrar-General").[21] Following lodgement of a statement of title particulars, the QS qualification was removed, by departmental dealing AB800206, on 27 September 2005, but the QG Qualified Title caution and the QL Limited Title notification remained.

63 In late 2006, Mr Hardy planted a magnolia tree in the middle of the Green Land (marked "I" on the sketch).

64 In January 2007, following the termination of his relationship with his former partner, Mr Hardy became the sole registered proprietor of the Hardy Property by transfer.

65 On 14 September 2015, departmental dealing AJ811575 was registered, removing the QG caution from the title of the Hardy Property, apparently on the basis that it had expired, presumably pursuant to *RP Act*, s 28M(3).[22]

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[19] Land Registry Services, "Registrar-General's Guidelines – Land Dealings – Dealing Requirements – Qualified Title – Cautions", https://rg-guidelines.nswlrs.com.au/land_dealings/dealing_requirements/qualified_title/cautions, accessed 13 April 2021.

[20] Registrar-General's Guidelines – Dealing Involving Notifications on the Register.

[21] Registrar-General's Guidelines – Limited Titles.

[22] For RP Act, s 28M(3), see [98] below.

66 On 9 October 2017, by departmental dealing AM785629, the QG cautions were removed from the title to the Sidoti Property and the Remaining Theodorou Property, because they had expired after twelve years, again presumably pursuant to *RP Act*, s 28M(3).

67 By contract for sale in April 2018, the appellants purchased the Sidoti Property from the Theodorous, for value. They did not obtain a survey, but had they done so it would have been apparent that while the Yellow Land was within the legal boundaries of the Sidoti property, it had been physically incorporated into the backyard of the Hardy Property. Transfer AN267888 was registered on 18 April 2018. Edition 2 of the folio, issued on 18 April 2018, contains the following notification:

> "LIMITED TITLE. LIMITATION PURSUANT TO SECTION 28T(4) OF THE REAL PROPERTY ACT, 1900. THE BOUNDARIES OF THE LAND COMPRISED HEREIN HAVE NOT BEEN INVESTIGATED BY THE REGISTRAR-GENERAL."

68 On 7 May 2018, Mr Sidoti lodged a Development Application with the Council of the City of Sydney, which relevantly stated, in respect of proposed alterations and additions to the Sidoti Property, that:

> "The application also includes the relocation of the rear boundary fence to the rear of the site along the true norther (sic) boundary. This land currently sits vacant between 2 fences"

69 As part of the renovation of the Sidoti Property, in accordance with the development consent which they obtained, the appellants demolished the old brick outhouse and old corrugated iron fence on the southern side of the Yellow Land and erected a new paling fence at the location of the former old paling fence on the northern side of the Yellow Land, and built a barbecue area on the Yellow Land, which was thereby "reclaimed" into the backyard of the Sidoti Property. Although the primary judge chronicled the subsequent dealings between the parties in 2018 and 2019 in connection with the renovations to the Sidoti Property, culminating in the commencement of the proceedings by Mr Hardy on 31 October 2019, it is not necessary to rehearse them for the purposes of the appeal.

70 There are three important conclusions from this chronology. The *first* is that the Yellow Land has always been within the surveyed and described boundaries of

the Sidoti Property, and outside those of the Hardy Property. The *second* is that both the Hardy Property and the Sidoti Property (and for that matter the Remaining Theodorou Property) were, when converted from old system to *RP Act* land, initially both qualified title and limited title. The Hardy Property appears to have ceased to be qualified title on 14 September 2015, and the Sidoti Property (and the Remaining Theodorou Property) on 9 October 2017 – before it was purchased by the appellants. All three properties, however, remain limited title. The *third* is that, on the facts found by the primary judge, the adverse possession by Mr Hardy of the Yellow Land commenced, on any view, before the Sidoti Property was brought under the *RP Act* by issue of a qualified and limited folio on 21 September 2005.

The primary judgment

71 In the proceedings below, Mr Hardy claimed, in substance, a declaration that he was entitled to the Yellow Land by adverse possession, and orders restoring possession of it to him. On 28 February 2020, Mr Hardy lodged a caveat in respect of the Sidoti Property, claiming an "estate in possession in part of the land shown in DP1258823 and as further shown in the plan annexed to the Summons annexed hereto", by virtue of "that part of the land described above has been in adverse possession by the caveator for about 21 years". The relevant plan depicted the Yellow Land as the subject of the claim. The appellants filed a cross-claim, claiming removal of the caveat.

72 The primary judge concluded as follows:[23]

(1) the Sidoti Property is land under the *RP Act*;

(2) possessory title to land under the *RP Act* can generally only be acquired in accordance with the provisions of Part 6A of the Act. If Part 6A applies, Mr Hardy's case must fail;

(3) part 6A does not apply, because Mr Hardy's adverse possession of the Yellow Land commenced, if not by May 2002 (with the removal of the old paling fence as the commencement of the extension and landscaping of Mr Hardy's backyard garden), then at the latest January 2005 (by which time landscaping was well advanced, including the laying of a weed mat covering the whole area including the Yellow Land and the Green Land, and the installation of granite pavers and mondo grass on the Yellow Land), and was extant as such when the Sidoti

[23] Primary judgment at [11].

Property was brought under the Act in September 2005. By reason of ss 28U(2) and 45C(2) of the *RP Act*, Part 6A does not prevent Mr Hardy's acquisition of a possessory title of the Yellow Land by adverse possession at common law;

(4) pursuant to *Limitation Act 1969* (NSW) ("*Limitation Act*"), s 27(2), the relevant limitation period for an action by the Theodorou family as then documentary title holders to recover the Yellow Land had expired no later than January 2017. At that time, their title to the Yellow Land was extinguished pursuant to *Limitation Act*, s 65(1). It followed that the appellants did not acquire title to the Yellow Land when they purchased the Sidoti Property in April 2018; and

(5) Mr Hardy had therefore acquired possessory title at common law to the Yellow Land and was entitled to orders to recognise that ownership, including that the appellants cease to trespass upon the Yellow Land, and remove structures they had erected on it and relocate the fence they have built.

73 His Honour made the following orders:

> "1. Declare that the plaintiff is the sole legal and beneficial owner of the land marked in yellow on the survey attached to these orders and marked "A" (the "Land"), such ownership having commenced no earlier than May 2002 and no later than January 2005.
>
> 2. Within three months from the date of the stay of these orders being lifted, the first and second defendants are to have at their expense:
>
> (a) Removed all structures erected on the Land;
>
> (b) Reinstated the granite pavers (or their equivalent as approved by the plaintiff) on the Land; and
>
> (c) Constructed a wooden paling fence of at least 2 metres in height on the boundary between their property and the Land.
>
> 3. Dismiss the amended first cross-claim.
>
> 4. The Plaintiff is to pay the First and Second Defendants' costs thrown away by each of the amendments to the Summons.
>
> 5. The First and Second Defendants are to pay 80% of the Plaintiff's agreed or assessed party/party costs of the proceedings.
>
> 6. If the Defendants file their Notice of Appeal on or before 26 August 2020, then with effect from the date that Notice of Appeal is filed, Orders 1-5 (inclusive) above are stayed until further order of this Court or of the Court of Appeal.
>
> 7. Reserve further consideration in relation to any third party rights in respect of:
>
> (a) the right of way referred to in paragraph 5 of the Court's judgment dated 12 August 2020 (the "Judgment'); or
>
> (b) any other existing encumbrances said to affect the Sidoti Property (as defined in the Judgment)."

74 The notice of appeal does not challenge his Honour's factual finding that the Yellow Land had been in the adverse possession of Mr Hardy for the requisite twelve year period. It is therefore not necessary to consider what is required to sustain a claim to title by adverse possession of land which is subject to a right of way, which remains in existence for the benefit of others. In *Braye v Tarnawskyj*,[24] Darke J upheld a claim to have acquired land subject to a right of way by adverse possession, but the claimant was the dominant owner. The answer may be that while land subject to an easement can be acquired by adverse possession, including by a person other than the dominant owner, it would remain subject to the easement unless and until it is extinguished.

75 However, the appellants dispute that, even accepting that factual finding, their title was able to be impugned. In substance, they say that they acquired an indefeasible title, subject only to the exceptions provided for by the *RP Act*, none of which were applicable. In particular, they dispute that their title could be displaced, in whole or in part, by adverse possession, except by a possessory application under Part 6A of the *RP Act*, which was neither invoked nor available.

Indefeasibility of a registered proprietor's title

76 *RP Act,* s 42, relevantly provides (emphasis added):

> **42 Estate of registered proprietor paramount**
>
> (1) Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, *the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall*, except in case of fraud, *hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded* except:
>
> …
>
> (c) as to any portion of land that may by wrong description of parcels or of boundaries be included in the folio of the Register or registered dealing evidencing the title of such registered proprietor, *not being a purchaser or mortgagee thereof for value*, or deriving from or through a purchaser or mortgagee thereof for value, …"
>
> …

[24] (2019) 19 BPR ¶39,213; [2019] NSWSC 277.

> (3) This section prevails over any inconsistent provision of any other Act or law unless the inconsistent provision expressly provides that it is to have effect despite anything contained in this section.

77 At least at first sight, this well-known provision, which is a cornerstone of the Torrens system, would apparently mean that, absent any suggestion of fraud against them, the appellants, as registered proprietors of the Sidoti Property, hold it subject only to such other estates and interests and such entries, if any, as are recorded in that folio, and absolutely free from all other estates and interests that are not so recorded.[25] Because they were purchasers for value, even the exception in par (c) would not affect the indefeasibility of their title. The interest of Mr Hardy by way of adverse possession is not recorded in the relevant folio, and accordingly the appellants would hold the Sidoti Property "absolutely free" of it. However, that assumes that s 42 applies, without qualification, to land in a limited folio.

78 Section 45 provides (emphasis added):

> **45 Bona fide purchasers and mortgagees protected in relation to fraudulent and other transactions**
>
> (1) Except to the extent to which this Act otherwise expressly provides, *nothing in this Act is to be construed so as to deprive any purchaser or mortgagee bona fide for valuable consideration of any estate or interest in land under the provisions of this Act in respect of which the person is the registered proprietor***.**
>
> (2) *Despite any other provision of this Act, proceedings* for the recovery of damages, or *for the possession* or recovery *of land, do not lie against a purchaser* or mortgagee *bona fide for valuable consideration of land under the provisions of this Act* merely because the vendor or mortgagor of the land:
>
> > (a) may have been registered as proprietor through fraud or error, or by means of a void or voidable instrument, or
> >
> > (b) may have procured the registration of the relevant transfer or mortgage to the purchaser or mortgagee through fraud or error, or by means of a void or voidable instrument, or
> >
> > (c) may have derived his or her right to registration as proprietor from or through a person who has been registered as proprietor through fraud or error, or by means of a void or voidable instrument.
>
> (3) Subsection (2) applies whether the fraud or error consists of a misdescription of the land or its boundaries or otherwise.

79 This provision protects bona fide purchasers for value from being deprived of their estate or interest in *RP Act* land in respect of which that purchaser is the

[25] There is no suggestion in this case of any personal obligation or equity.

registered proprietor, "[e]xcept to the extent to which th(e) Act otherwise expressly provides". Cases in respect of which the Act "otherwise expressly provides", in exception to s 45, for a bona fide purchaser for value to be deprived of their estate or interest, include:

(1) where any of the exceptions provided in s 42(1)(a)-(d) apply (but noting that the exception in s 42(1)(c) in respect of a portion of land included in the folio by wrong description of parcels or boundaries does not apply where the registered proprietor is a purchaser for value);

(2) where the registered proprietor's title is a qualified title, in which case the title is subject to any subsisting interest in existence when the qualified folio was created, whether or not it was recorded on the folio (ss 28J(1) and 28P(1)(d)); and

(3) where possessory title is acquired in accordance with the provisions of Part 6A of the Act (noting that, by s 45D(4), a possessory application cannot be made adverse to a registered proprietor who became registered without fraud and for valuable consideration, unless the whole of the period of adverse possession claimed occurred after that proprietor became registered).

80 Section 45(1) therefore means that, unless the case can be brought within some express exception to be found in the Act, nothing in the Act is to be construed so as to deprive the appellants, being purchasers bona fide for valuable consideration, of their estate in the Sidoti Property in respect of which they are registered, which is the whole of the land. Section 45(2) means that proceedings for the possession or recovery of land, such as Mr Hardy's claim in these proceedings, do not lie against the appellants, being purchasers bona fide for valuable consideration, *merely* because of fraud or error affecting the title of their predecessors the Theodorous, or because their predecessors may have procured the registration of the relevant transfer to the appellants by means of a void or voidable instrument (such as if they could not convey title to the Yellow Land because it was no longer in their ownership by reason of Mr Hardy's adverse possession).

81 Reference should also be made to s 118 which, subject to some exceptions, bars proceedings against a registered proprietor for the possession or recovery of land:

> **118 Registered proprietor protected except in certain cases**
>
> (1) Proceedings for the possession or recovery of land do not lie against the registered proprietor of the land, except as follows:

(a) proceedings brought by a mortgagee against a mortgagor in default,

(b) proceedings brought by a chargee or covenant chargee against a charger or covenant charger in default,

(c) proceedings brought by a lessor against a lessee in default,

(d) proceedings brought by a person deprived of land by fraud against:

(i) a person who has been registered as proprietor of the land through fraud, or

(ii) a person deriving (otherwise than as a transferee bona fide for valuable consideration) from or through a person registered as proprietor of the land through fraud,

(e) proceedings brought by a person deprived of, or claiming, land that (by reason of the misdescription of other land or its boundaries) has been included in a folio of the Register for the other land against a person who has been registered as proprietor of the other land (otherwise than as a transferee bona fide for valuable consideration),

(f) proceedings brought by a registered proprietor under an earlier folio of the Register against a registered proprietor under a later folio of the Register where the two folios have been created for the same land.

(2) Despite any rule of law or equity to the contrary:

(a) the production of a manual folio is an absolute bar and estoppel to any such proceedings commenced before the production of the folio against the person named in the folio as a registered proprietor or lessee of the land, and

(b) the production of a computer folio certificate for a computer folio is an absolute bar and estoppel to any such proceedings commenced before the time specified in the certificate against the person named in the certificate as a registered proprietor or lessee of the land.

(3) Subsection (2) does not apply to proceedings of the kind referred to in subsection (1)(a)–(f).

(4) This section does not affect:

(a) any proceedings in relation to land for which a qualified folio of the Register has been created, being proceedings based on a subsisting interest within the meaning of Part 4A, or

(b) any proceedings brought by a person deprived of, or claiming, land that (by reason of the misdescription of other land or its boundaries) has been included in a limited folio of the Register for the other land, whether or not the registered proprietor of the other land is a transferee of the land bona fide for valuable consideration.

82 The appellants submitted that the effect of the above provisions is that the appellants hold the Sidoti Property "absolutely free" of any unregistered interest of Mr Hardy by way of adverse possession (s 42(1)), all the more so as they were purchasers of the Sidoti Property (including the Yellow Land) for value (s

42(1)(c)); that in the absence of any relevant express exception, nothing in the *RP Act* is to be construed so as to deprive them of their registered estate in the whole of the Sidoti Property (s 45(1)); that even if the Theodorous' title was affected by fraud or error, or the transfer by them to the appellants was void or voidable, that would be insufficient to sustain a proceeding against the appellants by Mr Hardy to recover the land (s 45(2)); and that proceedings did not lie against them as registered proprietors for recovery of the Yellow Land (s 118).

83 In order to uphold Mr Hardy's claim, the primary judge relied on s 28U(2) and s 45C(2). Those provisions are not unrelated, and to comprehend their operation in this context it is necessary to examine in some detail the legislative history, which encompasses the introduction of qualified title, limited title, and possessory title. However, before doing so, it is necessary to say something about possessory title in the context of the *RP Act*.

Possessory title and the RP Act

84 Apart from the *RP Act*, title to land may be acquired by adverse possession for a period of twelve years. That is because the owner's cause of action to recover land becomes statute-barred after that period, and the owner's right is thereupon extinguished. *Limitation Act*, s 27(2), provides that (subject to an exception for the Crown or a person claiming through the Crown), "an action on a cause of action to recover land is not maintainable by a person … if brought after the expiration of a limitation period of twelve years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom the plaintiff claims". By s 28, "[w]here the plaintiff in an action on a cause of action to recover land or a person through whom the plaintiff claims (a) has been in possession of the land, and (b) while entitled to the land, is dispossessed or discontinues his or her possession, the cause of action accrues on the date of dispossession or discontinuance." By s 65(1) and Schedule 4, on the expiration of the applicable limitation period for a cause of action to recover land, "the title of a person formerly having the cause of action to the [relevant land] … is, as against the person against whom the cause of action formerly lay and as against the person's successors, extinguished."

85 Section 8(1)(a) provides that nothing in the *Limitation Act* affects the operation of s 45C of the *RP Act*. Section 45C resides in Part 6A ("Possessory titles to land under the Act"), which commenced operation on 1 June 1979. Prior to its insertion, former s 45 prevented title to *RP Act* land being acquired by possession:

> No title to land adverse to or in derogation of the title of the registered proprietor shall be acquired by any length of possession by virtue of any statute of limitations relating to real estate, nor shall the title of any such registered proprietor be extinguished by the operation of any such statute.

86 Part 6A now makes provision for the acquisition of title to *RP Act* land by adverse possession. In place of the prohibition in former s 45, Part 6A now relevantly provides (emphasis added):

> **45C Acquisition of possessory title to land under the Act**
>
> (1) Except to the extent that statutes of limitation are taken into consideration for the purposes of this Part, no title to any estate or interest in land adverse to or in derogation of the title of the registered proprietor shall be acquired by any length of possession by virtue of any statute of limitations relating to real estate, nor shall the title of any such registered proprietor be extinguished by the operation of any such statute.
>
> (2) Subsection (1) does not prevent the acquisition of a title, adverse to or in derogation of the title of the registered proprietor thereof, to an estate or interest in land brought under the provisions of this Act by the creation of a qualified or limited folio of the Register by reason of possession of the land for any length of time commencing before the creation of the folio.
>
> **45D Application for title by possession**
>
> (1) Where, at any time after the commencement of this Part, a person is in possession of land under the provisions of this Act and:
>
> (a) the land is a whole parcel of land,
>
> (b) the title of the registered proprietor of an estate or interest in the land would, at or before that time, have been extinguished as against the person so in possession had the statutes of limitation in force at that time and any earlier time applied, while in force, in respect of that land, and
>
> (c) the land is comprised in an ordinary folio of the Register or is comprised in a qualified or limited folio of the Register *and the possession by virtue of which the title to that estate or interest would have been extinguished as provided in paragraph (b) commenced after the land was brought under the provisions of this Act by the creation of the qualified or limited folio of the Register*,
>
> that person in possession may, subject to this section, apply to the Registrar-General to be recorded in the Register as the proprietor of that estate or interest in the land.

(2) Where, at any time after the commencement of this Part:

(a) a person is in possession of part only of a whole parcel of land, and

(b) any boundary that limits or defines the land in the person's possession is, to the extent that it is not a boundary of the whole parcel of land, an occupational boundary that represents or replaces a boundary of the whole parcel,

the person may, *unless the part of the whole parcel of which the person is in possession lies between such an occupational boundary and the boundary of the whole parcel that it represents or replaces*, apply to the Registrar-General to be recorded in the Register as the proprietor of the same estate or interest in that whole parcel of land as could have been the subject of an application by the person under subsection (1) if the land in the person's possession had been that whole parcel of land and subsection (1) (b) and (c) had been complied with in relation thereto.

(2A) A person who:

(a) is in possession of part of a residue lot that could, if it had been a whole parcel of land, have been the subject of an application by the person under subsection (1), and

(b) is (or is entitled to be) the registered proprietor of an estate in fee simple in land that adjoins that lot,

may apply to the Registrar-General to be recorded in the Register as the proprietor of an estate in fee simple in land consisting of a consolidated lot comprising the part of the residue lot in the person's possession and the adjoining land.

(2B) In subsection (2A), ***residue lot*** means an allotment consisting of a strip of land that the Registrar-General is satisfied:

(a) was intended for use as a service lane, or

(b) was created to prevent access to a road, or

(c) was created in a manner, or for a purpose, prescribed by the regulations.

…

(4) A possessory application may not be made in respect of an estate or interest in land if:

(a) the registered proprietor of that or any other estate or interest in the land became so registered without fraud and for valuable consideration, and

(b) the whole of the period of adverse possession that would be claimed in the application if it were lodged *would not have occurred after that proprietor became so registered*,

unless the application is made on the basis that the estate or interest applied for will be subject to the estate or interest of that registered proprietor if the application is granted.

…

> (6) For the purposes of subsection (2), a reference to an occupational boundary that represents or replaces a boundary of a whole parcel of land is a reference to:
>
> > (a) a fence, wall or other structure intended to coincide with or represent that boundary of the whole parcel,
> >
> > (b) a channel, ditch, creek, river or other natural or artificial feature that is itself land and is in close proximity to that boundary of the whole parcel, or
> >
> > (c) a give and take fence with respect to that boundary of the whole parcel.

87 Whereas former s 45 meant that title to *RP Act* land could not be acquired by adverse possession, s 45C(1) now means that title to *RP Act* land cannot be acquired by adverse possession, *except pursuant to an application under s 45D*.[26] However, s 45C(2) preserves the right of an adverse possessor to acquire possessory title to land which is brought under the Act in a qualified or limited folio "by reason of possession of the land for any length of time commencing before the creation of the folio". In doing so, it does not revive a right which had previously been abolished by (former) s 45, because the land to which it applies, being limited title land, was until brought under the Act in a qualified or limited folio, always amenable to a claim for title by adverse possession. Although, in *South Maitland Railways Pty Ltd v Satellite Centres of Australia Pty Ltd*,[27] Tamberlin AJ appears to have construed the words "by reason of possession of the land for any length of time commencing before the creation of the folio" as qualifying the preceding phrase "land brought under the provisions of this Act by the creation of a qualified or limited folio of the Register", I respectfully disagree, and consider that they relate back to the words "the acquisition of a title". This view is supported by comparison with sub-s (1), which provides that (emphasis added) "*no title* to any estate or interest in land *adverse to* or in derogation of *the title* of the registered proprietor *shall be acquired by any length of possession*", and by contrast with s 45D(1)(c), which stipulates that in the case of a qualified or limited folio, a possessory application can be made only where the possession relied on commenced after the land was brought under the provisions of the Act by the creation of the qualified or limited folio of the Register. In s 45C(2), the

[26] Refina Pty Ltd v Binnie (2010) 15 BPR ¶28,633; [2010] NSWCA 192.
[27] (2009) 14 BPR ¶26,823; [2009] NSWSC 716 at [29] (Tamberlin AJ).

words “any length of time” mean that the exception in s 45C(2) is engaged if the adverse possession has commenced when the qualified or limited folio is created; it does not require that the documentary titleholder’s cause of action to recover possession has been extinguished by expiry of the limitation period at that time. In other words, the exception applies both to crystallised possessory claims, and to inchoate claims in respect of which time has commenced to run but has not yet expired. However, if the adverse possession had not commenced before conversion of the land to a qualified or limited folio, then any claim could be brought only under s 45D, as contemplated by s 45D(1)(c).

88 In the present case, the essential issue is whether s 45C(2) has the effect of providing an exception to the indefeasibility of the appellants’ title. Although the Court encouraged counsel for both parties to focus their submissions on the effect of s 45C(2), which appeared to be central to the appeal, it is not easy to summarise their submissions in that respect. I have not been able to identify, in Mr Doyle’s written or oral submissions for the appellants, any clear articulation of what is supposed to be the effect of s 45C(2), beyond the contention that it could not have been intended to undermine the indefeasibility of the registered proprietor’s title, and that it does not remove the application of Part 6A of the Act, but is to be read sensibly to operate in conjunction with that Part. At one point, he toyed with a submission that it meant no more than that “s 45C(1) does not prevent the acquisition of a title under Part 6A”, but rightly recognised that if so construed, s 45D(1)(c) would deprive it of any work. For the respondent, Mr Van Aalst at first appeared also to submit that s 45C(2) meant that his case could be brought within s 45D – and thus, at least implicitly, that s 45C(2) meant that in cases to which it applied, an application for a possessory title could be made under s 45D.

89 In my view, a construction of s 45C(2) to the effect that, in cases to which it applies (that is, cases of adverse possession of land brought under the provisions of the *RP Act* by the creation of a qualified or limited folio of the Register, where the possession relied on commenced before the creation of the qualified or limited folio), s 45C(1) does not prevent an application for possessory title under s 45D, is not tenable. Section 45D(1)(c) has the effect that a possessory application cannot be made in respect of land comprised in a

qualified or limited folio unless the possession relied upon commenced *after* the land was brought under the provisions of the Act by the creation of the qualified or limited folio. That necessarily excludes the class of cases to which s 45C(2) applies, because they are cases where the possession commences *before* the creation of the qualified or limited folio. Compliance with s 45D(1)(c) is also required in the case of an application under s 45D(2), as the concluding words of sub-s (2) expressly state.

90 Moreover, even if, contrary to my opinion, s 45C(2) permits an application under s 45D in cases to which s 45C(2) applies, that would not avail Mr Hardy in this case. Section 45D(1) is not available, because the subject land – the Yellow Land – is not a "whole parcel of land", as required by s 45D(1)(a). Section 45D(2) is not available, because even if one regards the corrugated iron fence along the southern side of the lane as an occupational boundary that represents or replaces a boundary of the whole parcel (Lot E), the part of Lot E of which Mr Hardy is in possession lies between that occupational boundary and the (true legal) boundary of the whole of Lot E – and so the "unless …" clause in sub-s (2) is engaged. No attention was paid to sub-s (2A), although it was enacted with the facilitation of the acquisition of possessory title to parts of service lanes similar to the lane in question here at the forefront of the mischief to be remedied.[28] However, sub-s (2A) refers to land which is "part of a residue lot", where "residue lot", by sub-s (2B), means (emphasis added) "*an allotment* consisting of a strip of land" that "was intended for use as a service lane". As the second reading speech and explanatory memorandum confirm, it is engaged where a subdivider has created separate lots for the purpose of being service lanes. It would have been engaged here, had the lane been created not as a right of way over other allotments, but as a separate allotment in its own right. But here, the Yellow Land is not part of *an allotment* consisting of a strip of land that was intended for use as a service lane; rather, it is part of Lot E.

91 Ultimately, Mr Van Aalst's submission appeared to be that s 45C(2) has the effect that notwithstanding s 45C(1), a title can be acquired, adverse to that of

[28] See Explanatory Memorandum, Land Titles Legislation Amendment Bill 2001; New South Wales Legislative Assembly (NSW), Parliamentary Debates (Hansard), Land Titles Legislation Amendment Bill 2001 Second Reading Speech, 19 September 2001 (NSW).

a registered proprietor, of land in a qualified or limited folio, by adverse possession commencing before the issue of the qualified or limited folio; and that title can be acquired in those circumstances by lodgement of a delimitation plan under s 28V.

The legislative history

92 The legislative history which informs an understanding of s 45C(2) commences with the *Real Property (Conversion of Title) Amendment Act 1967* (NSW), which introduced Part 4A (originally "Qualified Certificates of Title", now "Qualified folios of the Register"). Although concerned with qualified as distinct from limited title, it provides crucial background to and context for provisions, including s 45C(2), which were later expanded to apply to limited title in addition to qualified title.

1967 – Qualified title

93 Essentially, a qualified folio permits old system land to be brought under the *RP Act*, but so as not to obliterate or postpone any subsisting interests in the land. The original Part 4A included, in s 28A, the following definition of "subsisting interest":

> "Subsisting interest", in relation to land comprised in a qualified certificate of title, means -
>
> …
>
> (b) any estate or interest in that land, arising by prescription or under any statute of limitations, that was in existence or in the course of being acquired at the date on which the qualified folio of the Register was created.

94 That definition has since been slightly amended, but is to the same effect:

> ***Subsisting interest***, in relation to land for which a qualified folio of the Register has been created, means:
>
> …
>
> (b) any estate or interest in that land, arising by prescription or under any statute of limitations, that was in existence or in the course of being acquired at the date on which the qualified folio of the Register was created.

95 Section 28J requires the recording of a caution on a qualified folio, to the effect that the land comprised in it is held subject to any subsisting interest, whether or not it is recorded in the folio:

> **28J Cautions**

> (1) When creating a qualified folio of the Register for any land, the Registrar-General shall record in that folio a caution warning persons dealing with the registered proprietor that the land comprised therein is held subject to any subsisting interest, whether recorded therein or not.

96 Section 28M(1), as originally enacted, prohibited the registration of an instrument dealing with land in a qualified folio of the Register unless the instrument was made subject to subsisting interests. In practice, instruments were made subject to subsisting interests by an appropriate note in the memorandum of prior encumbrances. The chief purpose of this provision was to guard against persons taking interests in the land without realising that it was not a conventional Torrens title. In reality, however, persons acquiring, or otherwise dealing with, land in a qualified folio have no option but to take subject to "subsisting interests". For this and other reasons, former s 28M(1) and (2) (a consequential provision) were omitted in 1979.

97 In its original form, s 28M also included the following provisions for lapsing and cancellation of the caution:

> (3) In favour of any person who is the registered proprietor of any estate or interest in land comprised in a qualified certificate of title and who, for valuable consideration and without fraud to which he was a party, acquired that estate or interest from a person who at the time of the acquisition was the registered proprietor of that land, the caution entered on that qualified certificate of title shall, as regards his estate or interest, lapse upon his becoming registered as proprietor of that estate or interest or at the expiration of six years from the date on which the land was brought under the provisions of this Act by the issue of the qualified certificate of title, whichever is the later, and thereupon that registered proprietor shall hold that estate or interest free from any interests affecting it at the date on which the land was brought under the provisions of this Act by the issue of the qualified certificate of title, other than those referred to in subsection five of this section.
>
> (4) The registered proprietor of land comprised in a qualified certificate of title may apply to the Registrar-General for cancellation of the caution entered on that qualified certificate of title, and the Registrar-General may cancel the caution if he is satisfied that by virtue of subsection three of this section all estates and interests in that land are held free from any subsisting interests, other than those referred to in subsection six of this section and free from any estate or interest which, after the date on which the land was brought under the provisions of this Act by the issue of the qualified certificate of title, arose by prescription or under any statute of limitations.

98 In its current form, s 28M sets out two ways in which a caution may lapse:

> **28M Lapsing of caution on qualified folio created after registered deed for value (section 28J(1))**

> (1) This section sets out the 2 ways in which a caution recorded on a qualified folio of the Register under section 28J(1) that does not include a notation under section 28J(1A) or (1B) may lapse.
>
> (2) Firstly, if after the creation of the qualified folio, a person for valuable consideration and without fraud to which the person is a party becomes registered or, pursuant to section 36(8), is deemed to have become registered, as proprietor of an estate or interest in the land comprised in the folio, the caution recorded on the folio lapses as regards the estate or interest:
>
> > (a) on the expiration of 6 years after the creation of the folio, or
> >
> > (b) when the person becomes, or is deemed to have become, registered,
>
> whichever is the later.
>
> (3) Secondly, if immediately before the expiration of 12 years after the creation of the qualified folio, the caution affecting the folio has not lapsed as regards all estates and interests in the land comprised in the folio or been cancelled, the caution lapses on the expiration of that period.

99 Section 28M(3) thus provides for a caution to lapse automatically twelve years from the date the qualified folio of the Register was created. That period of twelve years corresponds with the period specified in the *Limitation Act*, s 27(2), after the expiration of which a cause of action to recover land is not maintainable.

100 Section 28P(1) originally provided that “except as otherwise provided by sub-s (2) of this section and any other provisions of this Part”, land in a qualified folio was subject to the provisions of the *RP Act*, that the provisions of the Act relating to ordinary folios and land comprised in them related to qualified folios and land comprised in them, and that (emphasis added):

> (d) a qualified certificate of title shall be evidence as to title in all respects as if it were an ordinary certificate of title, *except that it shall be subject to every subsisting interest in the land comprised therein, whether notified thereon or not.*

101 To substantially the same effect, in its current form, s 28P(1)(d) provides that a qualified folio of the Register, so long as it remains qualified, is "subject to every subsisting interest in the land comprised therein, whether recorded in the Register or not".

102 Subsection (2) originally provided that “for the purposes only of subsection one” the provisions of the Act were deemed to be modified in various respects. These deemed modifications were called “unincorporable provisions”, because they were not actual but deemed amendments to the other provisions of the

Act, and applied only in the context of a qualified folio. Relevantly, s 28P(2)(a) provided that the following provisions were deemed to be inserted in s 14, with the consequence that the existence of a qualified folio was no bar to a primary application in respect of the land comprised in it:

> (5) In this section, "Land not subject to the provisions of this Act" includes land in a qualified certificate of title, and an application for an ordinary certificate of title in respect of any such land may be made—
>
> > (a) by the registered proprietor of the land;
> >
> > (b) by any other person referred to in subsection two of this section; or
> >
> > (c) where a legal estate in any such land is vested in a mortgagee, by that mortgagee in the name of the mortgagor as if the mortgagor were the person in whom that estate was vested, had authorised the application to be made by the mortgagee and had directed the issue of a certificate of title in respect of the land to the mortgagee.
>
> (6) Any such application may be made and dealt with in accordance with the provisions of this Part subject to such modifications as to the Registrar-General may seem appropriate.
>
> (7) The Registrar-General may, pursuant to any such application,—
>
> > (a) issue an ordinary certificate of title for the land and cancel the qualified certificate of title for the land; or
> >
> > (b) cancel the caution recorded on the relevant folio of the Register.

103 Section 28P(2)(e) was to the effect that nothing in ss 43, 43A(2)-(3), or 44 should operate to defeat any claim based on a subsisting interest. Section 28P(2)(i) deemed the following provision to have been inserted, having the effect of modifying (then) s 124 (cf now s 118(4)(a), which has been set out above):

> 125A. Nothing in section one hundred and twenty-four of this Act shall defeat any action referred to in that section for the recovery of land comprised in a qualified certificate of title where that action is based on a subsisting interest.

104 However, of utmost importance for present purposes, is former s 28P(2)(f), which provided that the provisions of the Act were deemed to be modified:

> (f) by inserting at the end of section forty-five the following new subsection: —
>
> > (2) This section does not apply to land comprised in a qualified certificate of title.

105 As has been noted, s 45 was the predecessor of current s 45C(1), so the effect of s 28P(2)(f) was that in its application to qualified title land, it was to be read as follows:

> No title to land adverse to or in derogation of the title of the registered proprietor shall be acquired by any length of possession by virtue of any statute of limitations relating to real estate, nor shall the title of any such registered proprietor be extinguished by the operation of any such statute.
>
> (2) This section does not apply to land comprised in a qualified certificate of title.

106 In the 1974 edition of *Baalman's The Torrens System in New South Wales* ("*Baalman*"), Woodman & Grimes observed, in commentary on s 28M:[29]

> "Paragraph (b) of the definition of "subsisting interest" in s. 28A extends that phrase to comprehend, in respect of land comprised in a qualified certificate of title, "any estate or interest in that land, arising by prescription or under any statute of limitations, that was in existence or in the course of being acquired at the date of the issue of the qualified certificate of title".
>
> It must be emphasised at the outset that entry into possession after issue of a qualified certificate of title, although it may have statutory consequences, cannot create a subsisting interest. It should also be noted that, although the following comments are directed primarily towards possessory titles acquired under legislation concerned with limitation of actions, they are equally applicable to interests acquired by prescription.
>
> Then there are to be found in s. 28P a series of provisions relating to land in qualified certificates of title which, in that context, largely negative the general rule that ownership of Torrens title land cannot be acquired by virtue of adverse possession. The effect of s. 28P(1)(d) is that land in a qualified certificate of title is held subject to, inter alia, possessory rights; the combined effect of s. 28P(2)(a) and s 14(2) is to enable an adverse occupier to make a primary application in respect of land in a qualified certificate of title even though he is not named as registered proprietor; s. 28P(2)(e) deprives a purchaser of land in a qualified certificate of title of the exoneration, afforded a purchaser of land in an ordinary certificate of title, from notice of subsisting interests, which can include interests acquired by possession; s. 28P(2)(f) removes the bar to acquisition of ownership by virtue of adverse possession of Torrens title land in cases where the Torrens title is in the form of a qualified certificate of title; s. 28P(2)(g) recognised the right of any person holing a subsisting interest, which includes interest acquired by possession, to lodge a caveat to prevent registration of any dealing inimical to his interest in land in a qualified certificate of title and, incidentally, to prevent cancellation of the caution recorded on that certificate."

107 The authors explained that possessory claims may arise by virtue of adverse occupation which had matured into an estate or interest prior to issue of the qualified certificate of title; by virtue of adverse occupation by which an estate or interest was in the course of being acquired when the qualified certificate of title issued; and by virtue of adverse occupation which both commenced and crystallised after the issue of the qualified certificate of title. The interests in the

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[29] RA Woodman & PJ Grimes, Baalman's The Torrens System in New South Wales (2nd ed, 1974, Law Book Co), 113-114 ("Baalman").

first two classes are subsisting interests, while those in the third class are not. Then, in commentary on s 28P, they wrote:[30]

> "In the earlier comment on s. 28M it was pointed out that ownership evidenced by a qualified certificate of title is vulnerable to claims based on adverse possession, whether that possession commenced before or after issue of the qualified certificate of title. On the other hand, in the case of ordinary Torrens titles, s. 45 prevents ownership being acquired by adverse possession. Any potential conflict has been resolved by the insertion, for the purposes of Pt IVA, of s.45(2) which provides that s. 45 "does not apply to land comprised in a qualified certificate of title": s. 28P(2)(f)."

108 Thus an estate or interest arising from adverse possession which has matured prior to the creation of a qualified folio in respect of the subject land, and also an estate or interest which as at the issue of the qualified folio is in the course of being acquired – that is, where the adverse possession has commenced but not run the entire limitation period – are subsisting interests, which prevail against the registered proprietor of a qualified folio. This means that if, when a qualified folio of the Register is created in respect of Whiteacre with White as registered proprietor, Black has already been in adverse possession of Whiteacre (or part of it) long enough to have acquired a possessory title, then Black's right prevails against White's title, and that of anyone taking from White. Similarly, if when the qualified folio was created with White as registered proprietor, Black was in possession but had not yet been for long enough to have acquired a possessory title, the creation of the qualified folio would not prevent time continuing to run in Black's favour; so that if Black's adverse possession were to continue for the limitation period, Black's possessory title would then crystallise as effectively as if no qualified folio had been created.

109 It is quite clear from the context that the purpose of the unincorporable provisions in s 28P(2), including the predecessor of s 45C(2), was to ensure that subsisting interests, including possessory claims, which existed when the subject land was converted to qualified title, prevailed against the title of the registered proprietor. In particular, the predecessor of s 45C(2) had nothing to do with potential claims under Part 6A, which did not then exist. Its purpose was to make clear that, notwithstanding that s 45 had formerly absolutely precluded a claim to acquire title to *RP Act* land by adverse possession, it was

[30] Baalman, 125.

not to do so in the case of land comprised in a qualified title. The view expressed in *Baalman* that the exception extended to claims that were inchoate and had not yet matured by the passage of twelve years would later be expressly reflected in the statute, as will be seen below.

1976 – Limited Title

110 The next significant development was the introduction, in 1976, of the notion of limited title.[31] Essentially, a limited folio permits old system land to be brought under the *RP Act* notwithstanding that the location of its boundaries has not been confirmed. The 1976 provisions, as originally enacted, were never implemented, for reasons which will be explained later.[32] The circumstances in which they authorised the issue of a limited title were broadly similar to those under the present legislation.[33] However, rather than requiring endorsement of a notification on the folio (as the current regime does), s 28T then required (emphasis added):

> (4) When issuing a certificate of title under subsection (1), (2) or (3) the Registrar-General shall record on the relevant folio of the Register a caveat that—
>
> (a) specifies the conditions, being conditions relating to definition of boundaries, subject to compliance with which he will withdraw the caveat;
>
> (b) *specifies any occupational boundary of the land that has been adopted* under section 28U; and
>
> (c) forbids the registration of any transfer for valuable consideration of the land comprised in the certificate of title unless—
>
> (i) the conditions referred to in paragraph (a) are complied with; or
>
> (ii) the transfer is accompanied by an appropriate exemption certificate.

111 Section 28U provided for the adoption, for the purpose of issuing a limited certificate of title, of an occupational boundary as the boundary between the land comprised in that certificate of title and adjacent land:

> (1) This section has effect notwithstanding—
>
> (a) section 9 (2) of the Dividing Fences Act, 1951; or

[31] Real Property (Amendment) Act 1976 (NSW).
[32] See [119] below.
[33] See [122] below.

(b) anything in the Local Government Act, 1919, or any other Act, with respect to the subdivision of land.

(2) Subject to subsections (3), (4) and (5), on and after the second anniversary of the date of assent to the Real Property (Amendment) Act, 1976, the Registrar-General may, for the purpose of issuing a limited certificate of title, adopt an occupational boundary as the boundary between the land comprised in that certificate of title and any conterminous land that is—

(a) under common law title; or

(b) comprised in a limited certificate of title in respect of which the limitation caveat specifies that boundary as an occupational boundary.

(3) Where, under subsection (2), the Registrar-General, for the purpose of issuing a limited certificate of title, intends to adopt an occupational boundary as the boundary between the land to be comprised in that certificate of title and conterminous land under common law title, he shall cause notice of that intention to be given—

(a) to the person to whom he intends to issue the limited certificate of title; and

(b) to the person to whom, if no further survey definition were necessary adequately to define the boundaries of the conterminous land, he could issue a qualified certificate of title for that land under Part IVA.

(4) A notice referred to in subsection (3) shall—

(a) specify a period (being not less than one month after the date of the notice) before the expiration of which the limited certificate of title will not be issued; and

(b) require the person to whom it is given to show cause to the Registrar-General within the period so specified why the certificate of title should not be issued.

(5) Unless within the period specified in a notice given under subsection (3) cause is so shown to his satisfaction, the Registrar-General may proceed with the issue of the limited certificate of title.

(6) Where an occupational boundary of land has been adopted under subsection (2) and that boundary is defined by a fence the position of which has been determined by an order under section 9(1) of the Dividing Fences Act, 1951, that order ceases upon the recording of the limitation caveat affecting the land, to have any further force or effect in so far as it relates also to the payment of compensation.

(7) Where, under subsection (2), the Registrar-General adopts an occupational boundary of any land and, by reason only of the adoption of that boundary there is included in the limited certificate of title any land that, immediately before the issue of the certificate of title—

(a) was under common law title and was owned by a person other than the registered proprietor named in the limited certificate of title; and

(b) would not have been included in the limited certificate of title had that boundary been defined by survey,

the land so included shall be deemed to have been duly and effectually assured to the owner for the time being of the balance of the land comprised in the limited certificate of title.

112 Section 28V provided for the cancellation of a delimitation condition (defined, by s 28S(1), as a condition referred to in s 28T(4)(a), which refers to conditions relating to the definition of boundaries) or the withdrawal of a limitation caveat, upon compliance with the conditions, or upon agreement between adjoining landowners to ratify the definition of a common boundary and evidence that there was no person who had an unregistered proprietary interest in the subject land, with safeguards to avoid prejudicial effects on persons with unregistered proprietary interests:

> (1) The Registrar-General may—
>
> > (a) where he is satisfied that a delimitation condition has been complied with—cancel the reference in the limitation caveat to that condition; and
> >
> > (b) where he is satisfied that all delimitation conditions in a limitation caveat have been complied with—withdraw the caveat.
>
> (2) Where land comprised in a limited certificate of title is conterminous with other land comprised in a limited certificate of title and there is lodged with the Registrar-General a memorandum in the approved form that—
>
> > (a) evidences an agreement, made between the respective registered proprietors of the lands comprised in those certificates of title, to ratify the definition of a common boundary of those lands (being a boundary the subject of a delimitation condition) shown in the relevant folios of the Register;
> >
> > (b) incorporates, or is accompanied by, a statutory declaration by each of those registered proprietors with respect to the land comprised in his limited certificate of title that—
> >
> > > (i) specifies that there is no person who has an unregistered proprietary interest in that land; or
> > >
> > > (ii) identifies all persons who have such an interest; and
> >
> > (c) incorporates, or is accompanied by, the written consent of—
> >
> > > (i) all persons (other than the parties to the agreement and any person whose consent is dispensed with under subsection (3)) who have registered interests in those lands; and
> > >
> > > (ii) the persons identified in accordance with paragraph (b) (ii) (other than the parties to the agreement and any person whose consent is dispensed with under subsection (3)),
>
> the Registrar-General may, in his discretion, cancel a delimitation condition in so far as it relates to that boundary.

> (3) Where the Registrar-General is satisfied that, in relation to any land, the exercise by him of his powers under subsection (2) would not prejudicially affect the proprietary interest in that land of a person whose consent would, but for this subsection, be required under subsection (2)(c), he may dispense with that consent.

113 These provisions, which predate any notion of possessory title in respect of *RP Act* land, bespeak a recognition that, in the context of limited title where the boundaries have not been fully investigated, occupational boundaries may not accord with the legal boundaries, and that occupational boundaries may reflect possessory rights. They provided for the adoption of an occupational boundary, after due notice to those affected, the result of which would be to give effect to possessory rights.

1979 – Possessory title

114 Then came the introduction, by *Real Property (Possessory Titles) Amendment Act 1979* (NSW), of Part 6A ("Possessory Titles to Land under the Act"). The work formerly done by s 45 (as set out above) was given to s 45C which, as originally enacted, was as follows:

> Except to the extent that statutes of limitation are taken into consideration for the purposes of this Part, no title to any estate or interest in land adverse to or in derogation of the title of the registered proprietor shall be acquired by any length of possession by virtue of any statute of limitations relating to real estate, nor shall the title of any such registered proprietor be extinguished by the operation of any such statute.

115 While there was then no express sub-s (2), the reference in s 28P(2)(f) to s 45 was amended so as to refer to s 45C, and the words "in respect of which possession commenced before the land was brought under the provisions of this Act" were inserted, so that s 28P(2)(f) now deemed the following new subsection to be inserted at the end of s 45C:

> (2) This section does not apply to land comprised in a qualified certificate of title in respect of which possession commenced before the land was brought under the provisions of this Act.

116 This made clear that, as had been explained in *Baalman*, the exception was not confined to cases in which the possessory title had matured when the land was brought under the Act, but extended to cases where there was an inchoate claim in the sense that adverse possession had commenced as at that date.

117 In its original form, s 45D(1) was as follows:

> (1) Where, at any time after the commencement of this Part, a person is in possession of land under the provisions of this Act and—
>
> > (a) the land is a whole parcel of land;
> >
> > (b) the title of the registered proprietor of an estate or interest in the land would, at or before that time, have been extinguished as against the person so in possession had the statutes of limitation in force at that time and any earlier time applied, while in force, in respect of that land; and
> >
> > (c) the land is comprised in a Crown grant or an ordinary certificate of title or is comprised in a qualified certificate of title and the possession by virtue of which the title to that estate or interest would have been extinguished as provided in paragraph (b) commenced after the land was brought under the provisions of this Act by the issue of the qualified certificate of title,
> >
> > that person in possession may, subject to this section, apply to the Registrar-General to be recorded in the Register as the proprietor of that estate or interest in the land.

118 It will be observed that, unlike the current version, s 45D(1)(c) did not refer to limited title, but it did refer to qualified title. In respect of land under qualified title, there is a clear dichotomy between cases where "the possession by virtue of which the title to that estate or interest would have been extinguished as provided in paragraph (b) commenced after the land was brought under the provisions of this Act by the issue of the qualified certificate of title", as referred to in s 45D(1)(c), and those where "possession commenced before the land was brought under the provisions of this Act", as referred to in s 45C as modified by s 28P(2)(f) as amended. The former could be the subject of a possessory application under Part 6A. The latter could not, but s 45C, as so modified, did not operate to preclude the acquisition of title based on such a claim *dehors* Part 6A. It is clear that the intention was to preserve the position that had obtained since the introduction of the concept of qualified title, namely that qualified title was subject to possessory interests arising before the qualified title issued, including both possessory claims which had matured, and inchoate claims which were being acquired through an adverse possession which had commenced, and that such claims were to be excluded from the operation of Part 6A.

1984 – Limited title revisited

119 The references to limited title were introduced into s 45D(1)(c), and s 45C, in 1984, when extensive amendments were made to the earlier limited title

legislation in order to facilitate its use, by *Real Property (Conversion of Title) Amendment Act 1984* (NSW) ("1984 Amendment Act"). The second reading speech, by the Hon BJ Unsworth MLC, explained why the earlier version of the limited legislation had not been implemented:[34]

> "The major obstacle to the implementation of the limited title legislation was the requirement that, in most cases, the owner was required to furnish a plan of survey or other survey information necessary to remove the limitation from the folio. As well, the requirements that the Registrar-General specify the limitation conditions, investigate applications for occupation boundaries and consider applications for exemption certificates would have imposed a heavy administrative burden. The present legislation is intended to provide a more functional limited title system and remove the burdens which would have been imposed on landowners and the State."

120 The Minister proceeded to explain the 1984 amendments (emphasis added):[35]

> "Section 28T(4) is amended to provide that a limitation recording shall be entered in the folio of the register and any plan deposited in the Registrar-General's office. Section 28V provides the means for removing the limitation recording from the folio of the register. This will be done upon the registration of a de-limitation plan which must be a plan of survey, *and, if necessary, evidence that no part of the land is held in occupation adverse to the registered proprietor.* Unless the land is subdivided or consolidated with other land in an ordinary or qualified folio, the title may remain limited indefinitely at the option of the owner.
>
> Provision is made in section 28Y that a person claiming an estate or interest in land comprised in a limited folio may lodge a caveat forbidding the registration of a de-limitation plan. The effect of the lodgement of such a caveat is, by virtue of sections 28ZA and 28ZB, to prevent the cancellation of the limitation recording for up to three months to allow the caveator to take steps to protect the interest claimed and resolve the question of title by court action. … Schedule 3 of the bill contains amendments of a consequential nature and amendments by way of statute law revision only."

121 Relevantly, as the emphasised passage above shows, it was contemplated that removal of a limitation would, in an appropriate case, require evidence negating adverse possession. According to the Explanatory Note, the amendments concerning limited title had the object (emphasis added):[36]

> "(e) to enable land comprised in a limited folio of the Register to be dealt with notwithstanding the inconclusive definition of its boundaries *and to provide, in the case of any such dealings, for appropriate protection of unregistered interests*"

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[34] New South Wales Legislative Council, Parliamentary Debates (Hansard), Real Property (Conversion of Titles) Amendment Bill 1984 (NSW) Second Reading Speech, 8 May 1984, 269 ("1984 Bill Second Reading Speech").
[35] 1984 Bill Second Reading Speech, 269-270.
[36] Explanatory Note, Real Property (Conversion of Titles) Amendment Bill 1984 (NSW) ("1984 Bill Explanatory Note").

122 Provision for and in respect of the creation of limited folios of the register is made by Part 4B of the *RP Act*. Section 28T provides for the creation of limited folios in four cases:

> **28T Creation of limited folio**
>
> (1A) Where the boundaries of land to which Part 3 applies are not sufficiently defined to enable the Registrar-General to create an ordinary folio of the Register under that Part, the Registrar-General may, subject to subsection (4), create a folio of the Register:
>
> > (a) in the case of land to which section 13A or 13B applies, being a folio for the estate or interest in any of that land of the person for whose estate or interest the Registrar-General could otherwise have created an ordinary folio of the Register under that section,
> >
> > (b) in the case of land to which section 13D(1) applies, being a folio in which "The State of New South Wales" is recorded as the proprietor of that land, or
> >
> > (c) in the case of a lease described in section 13D(3) of land to which section 13D(1) applies, being a folio in the name of the person who, in the Registrar-General's opinion, is entitled to be registered proprietor of the lease.
>
> (1) Where the boundaries of land described in a registered deed are not sufficiently defined to enable the Registrar-General to create a qualified folio of the Register under section 28C or 28D, the Registrar-General may, subject to subsection (4):
>
> > (a) create a qualified folio of the Register for the estate or interest in any of that land of the person for whose estate or interest in the land the Registrar-General could have created a qualified folio of the Register under section 28C or 28D, as the case may be, if no further survey definition had been necessary adequately to define the boundaries of the land, and
> >
> > (b) for the purpose of creating a folio of the Register for that land under paragraph (a), retain any relevant deed in the Registrar-General's custody.
>
> (2) Where the boundaries of land are not sufficiently defined to enable the Registrar-General to cause a notice to be given under section 28E(1), the Registrar-General may cause such a notice to be given and, subject to subsection (4), may create a qualified folio of the Register for the estate or interest in any of that land of the person for whose estate or interest in the land the Registrar-General could have created a qualified folio of the Register under section 28E, if no further survey definition had been necessary adequately to define the boundaries of the land.
>
> (3) Where the boundaries of land are not sufficiently defined to enable the Registrar-General to create an ordinary folio of the Register under section 28EA, the Registrar-General may, subject to subsection (4), create a folio of the Register for the estate or interest in any of that land of the person for whose estate or interest in the land the Registrar-General could have created an ordinary folio of the Register under section 28EA, if no further survey definition had been necessary adequately to define the boundaries of the land.

123 Subsection (1A) makes provision concerning land to which Part 3 applies, which is Crown land, in respect of which, but for uncertainty as to the boundaries, the Registrar-General might otherwise have created an ordinary folio. Subsection (1) makes provision in respect of land described in a registered deed – that is to say, old system land – which but for uncertainty as to the boundaries, the Registrar-General might otherwise have been created a qualified folio under s 28C ("Qualified folio may be created on subdivision") or s 28D ("Qualified folio may be based on registered deed"). Subsection (2) makes provision for land in respect of which, but for uncertainty as to the boundaries, the Registrar-General might otherwise have created a qualified folio pursuant to a notice under s 28E(1) ("Qualified folio may be created upon investigation by Registrar-General"). Subsection (3) makes provision for land in respect of which, but for uncertainty as to the boundaries, s 28EA ("Ordinary folio may be created in certain cases") would have authorised the creation of an ordinary folio in lieu of a qualified folio under ss 28C, 28D, or 28E.[37]

124 In each case, the Registrar-General is authorised to create a folio of the type which could have been created but for the uncertainty as to the boundaries. The lack of sufficient certainty as to the boundaries is addressed by sub-s (4), which requires that the limitation be recorded in the folio:

> When creating a folio of the Register under subsection (1A), (1), (2) or (3), the Registrar-General shall make in that folio a recording to the effect that the description of the land comprised therein has not been investigated by the Registrar-General and may therein or in any plan deposited in the Registrar-General's office illustrating the land so comprised record such other particulars as the Registrar-General considers appropriate.

125 Section 28T(8) provides that, except as otherwise provided in the Act, a limited folio is equivalent to an ordinary folio, with the exception that the certification of title is not conclusive as regards the definition of the boundaries of the land comprised in it:

> (8) Except as otherwise provided by any other provision of this Part:
>
> (a) land comprised in a limited folio of the Register is subject to the provisions of this Act,
>
> (b) the provisions of this Act relating to ordinary folios of the Register, land comprised in ordinary folios of the Register and the registration of

[37] In this case, it appears that the limited folio for the Sidoti Property was created pursuant to s 28T(2).

dealings affecting land comprised in ordinary folios of the Register shall apply to limited folios of the Register, land comprised in limited folios of the Register and the registration of dealings affecting land comprised in limited folios of the Register,

(c) a reference in this and in any other Act (other than the Strata Schemes Development Act 2015) to a folio of the Register includes a reference to a limited folio of the Register, and

(d) a limited folio of the Register shall be evidence as to title in all respects as if it were an ordinary folio of the Register, except that:

(i) the certification of title is not conclusive as regards the definition of the boundaries of the land comprised therein, and

(ii) where the folio of the Register is also a qualified folio of the Register, the operation of section 28P(1)(d), as applied by subsection (7), is not affected.

126 Relevant exceptions are provided by s 28U, as follows:

28U Defeasibility of limited title

(1) Section 12(3)(b) does not apply to or in respect of a correction made by the Registrar-General of any wrong description of parcels or of boundaries in relation to land included in a limited folio of the Register.

(2) Where by any wrong description of parcels or of boundaries any land is incorrectly included in a limited folio of the Register, section 42(1) does not operate to defeat any estate or interest in that land adverse to or in derogation of the title of the registered proprietor and not recorded in the folio, whether or not the registered proprietor is a purchaser or mortgagee of that land for value or derives title from such a purchaser or mortgagee.

127 Section 28U(2) means that, notwithstanding s 42(1), the estate of a registered proprietor in limited title land – even one who was a purchaser for value – is subject to an adverse interest in land which has been incorrectly included in a limited folio, *by any wrong description of parcels or of boundaries*. That exception reflects that limited title admits of uncertainty about the boundaries of the subject land, so that if land has been incorrectly included in the limited folio, *by any wrong description of parcels or of boundaries*, then the person with an interest in the land wrongly included does not lose that interest to the registered proprietor by reason of the indefeasibility provisions. It will be necessary to return to the notion of *wrong description of parcels or of boundaries.*

128 Part 4B does not exclude the application of Part 6A to land comprised in a limited folio, so that by operation of s 28T(8)(a), Part 6A, including s 45C, applies in respect of land comprised in a limited folio.[38]

129 The 1984 Amendment Act made amendments to Part 4A (in respect of qualified title), as well as to Part 4B (in respect of limited title), and other parts of the Act that required modification to accommodate the new concepts. Among other things, the former unincorporable provisions in s 28P(2) were replaced by direct amendments to the Act. Thus, in place of former s 28P(2)(a),[39] s 14 (which makes provision for primary applications to bring land under the *RP Act*) was amended, by inserting:

> (8) In this section, "land not subject to the provisions of this Act" shall be deemed to include land comprised in a qualified folio of the Register, and an application for the creation of an ordinary folio of the Register in respect of any such land may be made—
>
> (a) by the registered proprietor of the land;
>
> (b) by any other person referred to in subsection (2); or
>
> (c) where a mortgage or charge is recorded in the qualified folio of the Register, by the mortgagee or chargee thereunder.
>
> (9) An application under subsection (8) may be made and dealt with in accordance with the provisions of this Part subject to such modifications as to the Registrar-General may seem appropriate.
>
> (10) Without prejudice to the operation of subsection (9), an application made under subsection (8) in respect of land comprised in a qualified folio of the Register shall, where that folio is a limited folio, be accompanied by—
>
> (a) a plan of survey complying with the regulations and adequately defining the boundaries of the land; and
>
> (b) such evidence as the Registrar-General may require relating to any adverse possession of the whole or any part of the land.
>
> (11) The Registrar-General may, pursuant to an application under subsection (8)—
>
> (a) cancel the qualified folio of the Register for the land and create an ordinary folio of the Register for the land; or
>
> (b) cancel the caution recorded under section 28J(1) in the qualified folio and any recording made therein under section 28T(4).

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[38] See paragraph [125] above; cf South Maitland Railways Pty Ltd v Satellite Centres of Australia Pty Ltd (2009) 14 BPR ¶26,823; [2009] NSWSC 716 at [28]-[32] (Tamberlin AJ), holding that Part 6A applies to qualified title land.

[39] See [102] above.

130 The potential classes of applicants referred to in sub-s (2) include possessory applicants; they are:

> (a) a person claiming to be the person in whom is vested an estate in fee simple either at law or in equity in the land to which the application relates,
>
> (b) a person claiming, in the land to which the application relates, an estate in possession, or in reversion, or in remainder, or a leasehold for a life or for lives or a leasehold having a term of not less than twenty-five years current at the time of making the application, or
>
> (c) a person having the power to appoint an estate or interest referred to in paragraph (a) or (b) in the land to which the application relates, if the person obtains the consent of any other person whose consent to the exercise of the power is required and directs that the object of the power be named as proprietor in the folio of the Register to be created for that land.

131 Subsection (10) was novel; it made specific provision for a primary application in respect of qualified title land which was also limited title, and in that situation required evidence relating to any adverse possession "of the whole or any part of the land". In addition, s 14A was inserted, as follows:

> **Consolidation with adjoining land in certain cases**.
>
> 14A. (1) Where application is made under section 14 by the registered proprietor of an estate in fee simple in any land claiming, by reason of possession and by virtue of any statute of limitations, title to the like estate in the whole or part of any adjoining land comprised in a limited folio of the Register adverse to or in derogation of the title of the registered proprietor thereof, the Registrar-General may require the application to be accompanied by a plan of survey comprising the land the subject of the claim and the applicant's adjoining land.
>
> (2) Such an application may be granted by recording the applicant in the Register as the proprietor in fee simple of the whole of the land comprised in the plan of survey.
>
> (3) Upon the granting of the application, the land to which title was therein claimed shall cease to be subject to any registered encumbrances, liens, interests and burdens previously affecting it and shall cease to have the benefit of any rights, privileges, benefits or easements previously attached thereto, but shall become subject to the same encumbrances, liens, interests and burdens and shall have attached thereto the same rights, privileges, benefits and easements as the applicant's adjoining land.
>
> (4) Section 114(2) applies to and in respect of a requirement made by the Registrar-General under subsection (1) in the same way as it applies to and in respect of a requirement under section 114(1).

132 According to the Explanatory Note, the purpose of s 14A was:[40]

> "(d) to enable the Registrar-General to require, as a condition precedent to the registration of a person as the proprietor of a parcel of land in which the

[40] 1984 Bill Explanatory Note.

person claims a possessory title, consolidation of that parcel with any adjoining parcel of which the person is already the registered proprietor".

133 This means that on a primary application by the owner of Whiteacre for title by adverse possession to a strip of the adjoining property Blackacre (being limited title land), White could be required to consolidate the claimed strip of Blackacre with his own property Whiteacre. However, it applies only to an application under s 14, relevantly s 14(8), and an application under s 14(8) can be made in respect of land under limited title only if it is also held under qualified title. Reading ss 14 and 14A together, there is no authority for a primary application in respect of land held under limited title which is not also under qualified title. In particular, there is nothing which deems land comprised in a limited folio which is not also a qualified folio to be "land not subject to the provisions of this Act" for the purposes of s 14.

134 In place of the former provisions for withdrawal of a limitation caveat, removal of the limitation notification was, and is, provided for in Part 4B, Div 2, by registration of a "delimitation plan":[41]

> **28V Removal of limitation**
>
> (1) Upon lodgment of:
>
> (a) a plan of survey complying with the regulations or the lodgment rules and adequately defining the boundaries of the land comprised in a limited folio of the Register,
>
> (b) such evidence as the Registrar-General may require relating to any adverse possession of the whole or any part of the land comprised in the folio, and
>
> (c) such other evidence as the Registrar-General may in any case require,
>
> the Registrar-General may, subject to this Act, register the plan of survey and cancel the limitation recorded in the folio.
>
> (2) Where the Registrar-General intends to register a plan lodged for the purposes of this section and, pursuant to section 12 (1) (h) or 12 (1A), gives notice of that intention the Registrar-General shall, in the notice, specify a period (expiring not earlier than one month after the date of the notice) before the expiration of which the plan will not be registered.

135 Nothing in s 28V, or its context, appears to require that only the registered proprietor can lodge a delimitation plan. Nothing appears to preclude, for example, an adjacent owner doing so.

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[41] In s 28S, "delimitation plan" is defined to mean "a plan of survey lodged for the purposes of section 28V."

136 Significantly, under s 28V(1)(b), registration of a delimitation plan requires not only a plan of survey that adequately defines the boundaries of the land in the limited folio, but also evidence relating to any adverse possession of *the whole or any part of the land comprised in the folio.* This is indicative that, as mentioned in the second reading speech, negativing an adverse possessory title was intended to be an element of removing a limitation notification.

137 The 1984 amendments introduced provisions for the lodgement of caveats against delimitation plans, and proceedings to substantiate claims in them:

> **Interested person may lodge caveat**.
>
> 28Y. (1) A person claiming an estate or interest in land the subject of a delimitation plan may, at any time before the plan is registered, lodge with the Registrar-Genera! a caveat in the approved form forbidding the registration of the plan.
>
> …
>
> **Lapse of caveats**.
>
> 28Z. A caveat lodged under section 28Y(1) forbidding the registration of a delimitation plan lapses 3 months after it is lodged unless the caveator has, within that time—
>
> > (a) taken proceedings in any court of competent jurisdiction to establish his or her title to the estate or interest therein specified and given written notice of the proceedings to the Registrar-General; or
> >
> > (b) obtained from the Supreme Court an order or injunction restraining the Registrar-General from registering the plan, either absolutely or until the further order of the Court, and served the order or injunction on or given written notice thereof to the Registrar-General,
> >
> > and those proceedings have not been determined (otherwise than in favour of the caveator) or, as the case may be, that order or injunction is still in force.
>
> **Stated case**.
>
> 28ZA. (1) Where a caveat against the registration of a delimitation plan has been lodged by a caveator claiming the land the subject of the plan or a portion thereof or an interest therein adversely to the registered proprietor of the land comprised in the limited folio to which the delimitation plan relates, the registered proprietor may state a case for the opinion and direction of the Supreme Court upon the matter, and the caveator may apply for an injunction until the further order of the Court, and the Court may direct the caveator to lodge with the Court, on or before a certain day, a case on the caveator's own behalf, together with such other particulars (if any) as the Court thinks fit to order.
>
> (2) The Court shall determine any facts in contest and may add to or alter the stated case in accordance with any such determination.

> (3) The Court shall decide the stated case or, if the stated case has been added to or altered in accordance with subsection (2), the stated case as added to or altered, and the decision of the Court finally upon the matter shall be conclusive on the parties and on the Registrar-General.

138 It seems that under those provisions, a person claiming a possessory title to land in a limited folio of which another person was the registered proprietor could have lodged a caveat claiming that interest, and brought proceedings under s 28Z(a) to establish that interest. Those provisions were repealed, by *Real Property (Caveats) Amendment Act 1986* (NSW), but s 28Y was replaced by s 74F(4), which provides:

> (4) Any person who claims to be entitled to a legal or equitable estate or interest in land that is the subject of a delimitation plan lodged for registration under section 28V may, at any time before the plan is registered, lodge with the Registrar-General a caveat prohibiting the registration of the delimitation plan.

139 The work formerly done by s 28Z was assumed by s 74K, by which the Supreme Court on application for an order extending the operation of a caveat may, if satisfied that the caveator's claim has or may have substance, make an order extending the operation of the caveat concerned, and when making such an order may make such ancillary orders as it thinks fit.

140 Section 45D(1)(c) was amended by inserting references to limited title in addition to qualified title, and s 45C was amended to its current form, by the insertion of sub-s (2):

> (2) Subsection (1) does not prevent the acquisition of a title, adverse to or in derogation of the title of the registered proprietor thereof, to an estate or interest in land brought under the provisions of this Act by the creation of a qualified or limited folio of the Register by reason of possession of the land for any length of time commencing before the creation of the folio.

141 Notably, this amended its predecessor unincorporable provision by adding the reference to a limited folio. The then s 124 was also amended, by inserting:

> (2) Subsection (1) does not operate to defeat—
>
> > (a) any proceedings or action for the recovery of land for which a qualified folio of the Register has been created, being proceedings or an action based on a subsisting interest within the meaning of Part IVA; or
> >
> > (b) any proceedings or action brought by a person deprived of, or claiming, any land included in a limited folio of the Register for other land by misdescription of that other land or of its boundaries, whether

> or not the registered proprietor of that other land is a transferee thereof bona fide for value.

142 These provisions are now contained in sub-s (4) of current s 118, which has been set out above.[42] Both the original s 124(2)(b), and the current s 118(4)(b), mean that a limited title does not bar a claim to recover land that has been included in a limited folio *by reason of misdescription of other land or its boundaries*.

Review

143 As it seems to me, the position can be summarised as follows:

(1) under ss 14 and 14A, a primary application based on adverse possession can be made in respect of qualified title land. Such an application can be made in respect of limited title land only if and so long as it is also qualified title land;

(2) under s 28P(1)(d), qualified title is subject to subsisting interests, which include both crystallised and inchoate adverse possessory claims existing at the date of conversion to qualified title. Under ss 28T(8)(d) and 28U(2), limited title (when it is not also qualified title) is subject only to any estate or interest that has been included in the limited folio by "wrong description of parcels or of boundaries";

(3) under s 118(4), the bar on proceedings for the possession or recovery of land against the registered proprietor does not apply, in the case of qualified title, to proceedings based on a subsisting interest, which includes crystallised and inchoate adverse possessory claims existing at the date of conversion to qualified title. In the case of limited title, the bar does not apply to proceedings brought by a person deprived of, or claiming, land that has been included in a limited folio by reason of the misdescription of the land in the limited folio or its boundaries; and

(4) by s 45D(1)(c), a possessory application under Part 6A cannot be made in respect of land in a qualified or limited folio, if it depends to any extent on possession commencing before the qualified or limited folio was created. However, in those circumstances, under s 45C(2), acquisition of title by adverse possession to both qualified title and limited title land is not precluded by s 45C(1).

144 Prima facie, the 1984 amendments placed land in a limited folio in an analogous position to land in a qualified folio in respect of vulnerability to possessory claims which predated the creation of the relevant folio. That this was the intention is supported by the circumstance that s 45D permits possessory applications under Part 6A in respect of ordinary title, qualified title,

[42] See [81] above.

and limited title land, but in respect of both limited title and qualified title land only if the possession relied on commenced after the creation of the limited or qualified folio. If s 45C(2) did not preserve a pre-existing general law possessory claim to limited title land, that would mean that while there was a way to make a possessory claim, by one means or another, in every other situation – as to ordinary title land, by possessory application under s 45D, whether in respect of a period of possession commencing before or after the land was brought under the Act; as to qualified title land, by possessory application under s 45D if the possession commenced after the land was brought under the Act, and by primary application under s 14 if the possession commenced before the land was brought under the Act; and as to limited title land, by possessory application under s 45D if the possession commenced after the land was brought under the Act – yet in the unique case of limited title where the possession commenced before the land was brought under the Act, there would be no provision. The reason why s 45D provides that possessory applications cannot be made in respect of qualified title and limited title land where the possession relied on commenced before the relevant title issued, whereas such applications are not precluded in the case of ordinary title land, is that in respect of qualified and limited title, the effect of the *Limitation Act* is not excluded in those circumstances, because of s 45C(2).

145 However, the analogy with qualified title is not perfect. As it seems to me, a person (White) claiming to be entitled, by way of adverse possession, to land included in a limited folio of which another (Black) is the registered proprietor, can lodge a caveat under s 74F(4) claiming an estate in Blackacre, and if a delimitation plan is lodged or a lapsing notice served, approach the Court for an order extending the operation of the caveat and ancillary orders. It may well be that White could lodge a delimitation plan propounding boundaries that reflect the adverse possession. If Black lodged a delimitation plan, evidence negating adverse possession of all or any part of Blackacre would be required.

146 However, White could not make a primary application, because the *RP Act* does not contemplate a primary application in respect of land which is in a limited but not qualified folio. Moreover, by s 42(1), Black's title would be paramount, except in respect of land incorrectly included in Blackacre by any

wrong description of parcels or of boundaries (s 28U(2)); and proceedings against Black for recovery of the land would be barred by s 118, except as to land that by reason of the misdescription of Blackacre or its boundaries had been included in the limited folio for Blackacre. These obstacles could be overcome, *other than in a case of misdescription of the parcel or its boundaries*, only by construing s 14A as implicitly authorising a primary application in respect of land which was in a limited but not qualified folio; by importing a concept of a subsisting possessory interest into s 28U(2); and by disregarding the precise and limited nature of the exception that was introduced to s 124, now s 118. Such a construction would be so strained as not to be tenable.

147 However, no such difficulty arises in a case where the land the subject of the claim has been incorrectly included in a limited folio by wrong description of the land or its boundaries. It follows that what must have been contemplated by the reference in s 45C(2) to limited title was pre-existing possessory claims to land which had been included in a limited folio by wrong description of the land in the folio or its boundaries. That would be consistent with the circumstance that whereas qualified title is concerned with uncertainty as to the registered proprietor's title to the subject land which may be affected by subsisting interests, limited title is concerned with uncertainty as to the description and boundaries of the land. It would be consistent with the qualifications that are inherent in limited title, including the terms of the limitation notification.

148 That then directs attention to the concept of a *wrong description of parcels or of boundaries*.

Misdescription

149 The phrase which appears in s 28U(2), "by any wrong description of parcels or of boundaries", reflects the phrase "by wrong description of parcels or of boundaries" in s 42(1)(c), to which it is addressed by way of exception, and it should therefore be understood to have the same meaning as in s 42(1)(c). Moreover, given the relationship between these provisions, the phrase in s 118(4)(b), "by reason of the misdescription of other land or its boundaries" should be regarded as bearing the same meaning.

150 In *Hamilton v Iredale* ("*Hamilton*"),[43] the defendant had obtained a certificate of title to the subject land in 1868. There was no other evidence of his title. The plaintiffs, on the other hand, showed a complete documentary title from the time of the Crown grant in 1799, had admittedly been in possession since 1878, and had erected houses on the land. They had received notice of the defendant's certificate of title in 1901, and immediately commenced proceedings for rectification of the certificate of title, arguing that in the circumstances the defendant's certificate of title was no bar to their claim. At first instance, the plaintiffs succeeded. AH Simpson CJ in Eq said:[44]

> "What evidence the examiners of title or the Registrar-General may have obtained on their own account as to the title of the defendant Iredale, I do not of course know, but, so far as the evidence before me is concerned, I am satisfied that the defendant Iredale showed no title to the triangular piece of land included in his application, and that the certificate in respect of that piece was issued to him in error.
>
> The second and more difficult question remains whether the plaintiffs' title is barred by the issue of the certificate. No doubt, it sounds startling to ask the Court to cancel or alter a certificate issued thirty-five years ago, but the startlingness is diminished when it is borne in mind that the defendant Iredale admits that he has never been in possession of the land claimed by the plaintiffs, or exercised any act of ownership over it, or set up any claim to it till November, 1901 (see paragraph 48 of the statement of claim which is admitted). While the plaintiffs or their predecessors in title have been in undisturbed possession for between twenty and thirty years, and have erected houses and other improvements on the property.
>
> However, if an Act of Parliament gives to the defendant land which, in my opinion, never belonged to him, he is of course entitled to keep it, so far as this Court is concerned
>
> …
>
> The description taken by itself is vague, but taken with the accompanying plan it is sufficiently clear. I am also of opinion that the land described in the application is the land described in the certificate, that is the triangular piece depicted on the certificate containing three roods twenty-three perches. It was strongly pressed on me by Mr. Street that this was not a case of wrong description of parcels or of boundaries: that the examiners of titles may have made an error in thinking the applicant had proved his title when he had not, but that he had sufficiently described the land he applied for, and the certificate was issued for the land so described: that, in short, there can only be said to be misdescription of parcels or boundaries where the certificate includes land not within the description in the application. If the matter were *res integra* I should have thought there was great force in this argument, but it appears to me to have been urged and disregarded in *Marsden v. McAlister* (8 N.S.W. R. 300). In that case by an error of a surveyor the land described in the certificate

[43] (1903) 3 SR (NSW) 535 ("Hamilton").
[44] Hamilton at 538-542 (AH Simpson CJ in Eq).

was put fourteen chains too far to the south, so that it took in land belonging to the defendants, but it appears from Dr. Donovan's argument, and his answers to questions put by the Chief Justice; that the description in the application was by metes and bounds and included the land in dispute. He pressed on the Full Court the same arguments that Mr. Street has urged before me, but the Court held that the defendants were not barred from setting up their title. The Chief Justice says, "Where there is a misdescription, although the certificate may be granted, nevertheless the certificate has not taken the legal estate; and, therefore, where land is erroneously included in a certificate of title, the legal estate still remains in the original owner of the land, who is entitled to bring an action of ejectment, founded upon such legal estate, to recover such land from the person who so holds it erroneously under the certificate of title. Under these circumstances, it appears to me that the 33rd and 40th sections of the Act must be read together. It follows, therefore, that the original proprietor having the legal estate can recover from the holder of the certificate so long as the land remains in his possession; but if it be parted with to a bona fide transferee, then the land cannot be recovered, the remedy then being under the 117th section to recover damages against the person upon whose application such land was brought under the provisions of the Act."

In *Rourke v. Schweikert* (9 N.S.W. R. Eq. 152), the defendant obtained a certificate of title for land described as bounded on the north-east by the Field of Mars Common. It was afterwards discovered that the common did not extend so far to the south-west, and that there was a strip of land between the defendant's north-east boundary and the common. The defendant then applied for this strip, and an amended certificate was issued to the defendant including it. It is obvious that the defendant applied for a particular piece of land and got it. Owen, CJ in Eq., held that the plaintiff was entitled to have the certificate declared void so far as it included the strip. He says, p. 157, "In the recent case of *Marsden v. McAlister* (8 N.S.W. R. 300) following a long line of cases in this Court from *Mate v. Nugent* (7 S.C.R. 302), the Full Court decided that the 33rd section must be read with the 40th and 115th, and that the two latter sections must be taken to be exceptions to the 33rd; and they held that land wrongly included in the parcels of a certificate did not deprive the rightful owner of his legal interest in such lands. It is clear, therefore, that the certificate is not conclusive evidence that the land described in the certificate is justly included in it. In the reported cases the Court has determined that the parcels were not rightly included in the certificate by evidence of a better title to the land in some other person." The Full Court agreed with this view of the law, but held that there was no sufficient reason for the plaintiff coming into equity as he had a good defence at law to the defendants' action of ejectment.

Lastly, in *Hay v. Solling* (16 N.S.W. L.R. 60), the facts were as follows: Mrs. French had a certificate of title which did not include the land in dispute. She applied to have the old certificate cancelled and a new one issued including the land in dispute. This was done, and the land was transferred to the defendant. The main question was whether he was a bona fide transferee, so that he could rely on s. 115, sub-s. (5), and other sections in favour of transferees. It seems obvious that Mrs. French applied for the land in dispute and had it included in her certificate, but the argument that this was not a case of "misdescription" of parcels or boundaries was apparently regarded as untenable and not urged.

This seems to show that if the land belonging to B is erroneously included in A's certificate, the certificate may be amended by the Court as stated by the Chief Justice in *Rourke v. Schweikert* (9 N.S.W. Eq. 152, 164)."

151 His Honour's judgment was overturned on appeal to the Full Court, which held that "wrong description" is where an applicant, intending to describe Blackacre, describes Whiteacre, *or so describes Blackacre as to make it include Whiteacre*; and that it is not "wrong description" where the applicant correctly describes the land he is applying for, though the land is not his. It is then a case of no title, and the efficacy of the certificate of title depends upon the bona fides of the applicant. Stephen ACJ said (emphasis added):[45]

> "It seems to me that the whole course of argument on behalf of the respondents was that the examiners were mistaken and had not sufficient evidence before them in issuing the certificate of title. But to begin with we do not know what evidence was before the Department, and even if we could see that a mistake has been made, and that the examiners were wrong, the law does not allow us to go behind the certificate. It is a perfectly possible case that there may have been a mistake here, and so far as I can judge it is highly probable that the defendant was really not entitled to this land, in other words that this certificate ought not to have been granted, but I do not decide that point, though at the same time I think that there is a great deal of force in the arguments of Mr. Knox to show that the certificate ought not to have been granted. So far I am speaking for myself, and what the opinions of my colleagues may be on that point I do not know. I cannot see, however, that this is a case of misdescription. *A particular piece of land has been applied for, and that particular piece has been granted by that certificate, and I cannot conceive how in a case of that kind it can be said to be a misdescription of parcels*. It is quite true that this Act may not contain provisions ensuring that justice will be done in all cases; but it does contain a number of precautions, and perhaps further precautions should have been taken to prevent injustice being done, as in this matter. We must, however, take it for granted that the provisions of the Act were complied with. I can quite see, and this case may afford an instance of it, that an isolated act of injustice may sometimes he brought about. But this Court cannot be looked upon as a Court of Appeal. The cases already decided upon the point were simply those in which there had manifestly been a misdescription of parcels. *Marsden v. McAlister* (8 N.S.W. R. 300), upon which other cases here have proceeded, was decided entirely upon the fact that some surveyor had made a mistake. It was not a question of title at all, but the simple question was as to the mistake of a surveyor, and the subsequent cases were founded upon the decision in that case. That was really the sum and substance of the cases, namely, that where a pure mistake of that kind has been made the owner of the land cannot be deprived of it through that mistake."

152 Owen J said (emphasis added):[46]

> "The cases of *Marsden v. McAlister (supra)*, *Bourke v. Schweikert* (9 N.S.W. Eq. 152), and *Hay v. Solling* (16 N.S.W. R. 60), have been cited as showing that this certificate of title may be impeached, but *in all those cases the certificate was impeached on the ground that there was a wrong description of parcels or boundaries*. In the case of *Marsden v. McAlister* a surveyor had

[45] Hamilton at 546-547 (Stephen ACJ).
[46] Hamilton at 549-550 (Owen J).

> apparently taken a wrong starting point, and the consequence was that the position of the land that was applied for was somewhat to the south of where it ought to have been, and if there had been a proper point of commencement the northern line would have been slightly more to the north. The Court there held that it came within the exception as a wrong description of parcels and boundaries, and that so far as the certificate included land that did not belong to the defendant it was void as to that land, and the legal estate of that portion was never out of the person who was able to prove ownership. But here there is no misdescription of parcels or boundaries at all, and the defendant got a certificate of title to a piece of land correctly described by metes and bounds, and the Registrar-General was satisfied on the evidence before him that the defendant had made out a good title to the land so described, and granted him a certificate. That does not come within the exceptions contained in section 42 of the Act. As to the case of *Marsden v. McAlister*, I do not think we ought to extend that case. Although I think it was rightly decided on the facts, I do not think we ought to extend the principle there laid down."

153 Walker J said (emphasis added):[47]

> "As I understand it the law is to this effect. *If I apply to bring Blackacre (to which I am entitled) under the Act, and in my application, or in the certificate, Blackacre is misdescribed, so that a certificate is issued to me of the adjoining Whiteacre, or of Blackacre plus a strip of Whiteacre, there is plainly a misdescription of parcels or boundaries, which can be rectified as against me or any volunteer claiming under me.* If, however, I apply to have land to which, in fact, I have no title, brought under the Act, and a certificate is issued to me of that land, it is not a case of misdescription of parcels or boundaries. Misdescription is where, intending to describe A, I describe B, *or so describe A as to make it include B*; but it is no misdescription if I describe correctly the land I am applying for, though the land is not mine. It is then a case, not of misdescription, but of no title, and the position depends on my conduct in the matter. If I tried to get a certificate of land to which I knew I had no title, that would be fraud on my part, and in such case, under the express terms of the Act, neither myself, nor volunteers claiming under me, can claim to be protected by the certificate. If, however, I acted bona fide, believing, however mistakenly, that I had a title to the land applied for, then the case does not fall within any of the exceptions to the efficacy of the certificate, and ss. 40 and 42 give me an absolute title, which no Court can take away or review, I see nothing in the cases which is opposed to this view of the law. … I agree with Mr. Justice Owen in thinking that the decision in the case of *Marsden v. McAlister (supra)*, and other cases should not be extended, for, in my opinion they have gone quite far enough in introducing exceptions to, and qualifications of, the plain words of the Real Property Act, and, having regard to the obvious policy and intention of the Act, I think the object of the Court should be to support and strengthen, not weaken, the indefeasibility of certificates of title."

154 In *Michael v Onisiforou* ("*Onisiforou*"),[48] Rath J held that "wrong description of boundaries" under then s 42(c) of the *RP Act* occurred, where a certificate of title has been issued on a primary application, if and only if by reason of the

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[47] Hamilton at 550-551 (Walker J).

[48] (1977) 1 BPR ¶9,356 ("Onisiforou").

description a portion of land is included in the certificate of title which the applicant did not intend to have included; and that in cases of certificates of title issued after transfer, s 42(c) applied only if neither transferor nor transferee intended the portion in question to be included in a particular certificate of title, proof of which required evidence to the standard that would be expected in a rectification suit. His Honour referred to *Hamilton*, and in particular to Walker J's statement that:[49]

> "Misdescription is where, intending to describe A, I describe B, or so describe A as to make it include B; but it is no misdescription if I describe correctly the land I am applying for, though the land is not mine."

155 Upholding the plaintiffs' claim to a declaration that they were entitled to be registered as proprietors of the land in question, Rath J said (emphasis added):[50]

> "The first question arising under s 42(c) is whether there has been a "wrong description of parcels or of boundaries". In the case of a certificate of title issued upon a primary application there is such a wrong description if, and only if, by reason of the description a portion of land is included in the certificate which the applicant did not intend to have included. This I take to be the effect of *Marsden v McAlister* (1887) 8 LR (NSW) 300 , as explained and limited by the decision of the Full Court in *Hamilton v Iredale* (1903) 3 SR (NSW) 535. In the latter case Walker J expressed the modern view of the Real Property Act when he said at 551: "I agree with Mr Justice Owen in thinking that the decision in the case of *Marsden v McAlister* , *supra*, and other cases should not be extended, for, in my opinion they have gone quite far enough in introducing exceptions to, and qualifications of, the plain words of the Real Property Act, and, having regard to the obvious policy and intention of the Act, I think the object of the court should be to support and strengthen, not weaken, the indefeasibility of certificates of title: cp *Frazer v Walker* [1967] AC 569 at 585. Earlier he said, at 550: "Misdescription is where, intending to describe A, I describe B, or so describe A as to make it include B; but it is no misdescription if I describe correctly the land I am applying for, though the land is not mine". Stephen ACJ said at 547: "The cases already decided upon the point were simply those in which there had manifestly been a misdescription of parcels. *Marsden v McAlister* , upon which other cases here have proceeded, was decided entirely upon the fact that some surveyor had made a mistake. It was not a question of title at all, but the simple question was as to the mistake of a surveyor, and the subsequent cases were founded on the decision in that case. That was really the sum and substance of the cases, namely, that where a pure mistake of that kind has been made the owner of the land cannot be deprived of it through that mistake". Owen J said at 549: "In the case of *Marsden v McAlister* a surveyor had apparently taken a wrong starting point, and the consequence was that the position of the land that was applied for was somewhat to the south of where it ought to have been, and if there had been a proper point of commencement the northern line would have been

[49] Onisiforou at 9,364 (Rath J).
[50] Onisiforou at 9,364-9,366 (Rath J).

slightly more to the north. The court there held that it came within the exception as a wrong description of parcels and boundaries".

It appears (though not with conspicuous clarity) from the decision of the Full Court in *Rourke v Schweikert* (1888) 9 LR (NSW) 15 that s 42(c) applies not only to primary applications but to all cases where land is included in a certificate of title by wrong description of parcels or boundaries: see esp at 163. Such a decision would not in the relevant sense be an extension of the principle of *Marsden v McAlister* contrary to the opinion of Owen and Walker JJ in *Hamilton v Iredale*, *above*, at 550, 551. There was in fact no submission to the contrary; but if s 42(c) is so construed, then the criterion of "wrong description" should be the same in all cases. That criterion is whether, by reason of the wrong description, land has been included in the certificate which it was not intended to include; and it may be observed in passing that that criterion appears not to have been satisfied in *Rourke v Schweikert*: cp *Pleasance v Allen* (1889) 15 VLR 601; (1892) 25 SASR 34; *Symes v Pitt* [1952] VLR 412.

Where, as here, inclusion by wrong description is said to have occurred upon transfer of part of the land in a prior certificate of title, the principle of *Hamilton v Iredale* would appear to require that neither the transferor nor the transferee intended that the portion of land in question should be included in the certificate of title. In my opinion the evidence should be such as would entitle the transferor (if the wrong description was in the transfer) to have the memorandum of transfer rectified in a suit for that purpose. In *Crane v Hegeman-Harris Co Inc* [1971] 1 WLR 1390 Simonds J, speaking of the requirements for rectification, said at 1391: "The assumption is very strong in such a case that the instrument does represent their real intention and it must be only upon proof, which Lord Eldon I think in a somewhat picturesque phrase described as 'irrefragable', that the court can act. I would rather, I think, say that the court can only act if satisfied beyond all reasonable doubt that the instrument does not represent their common intention and is further satisfied what their common intention was: for let this be clear that it is not sufficient to show that the written instrument does not represent their common intention unless positively also you can show what was their common intention". The judgment of Simonds J (which was given in 1939) appears to have the approval of the House of Lords: *Prenn v Simmonds* [1971] 1 WLR 1381 at 1389. Simonds J appears to have taken the view that he should "examine fully into the minds and intentions of the parties at the time when the agreement was being negotiated and executed": at 1397.

The evidence in this case does in my opinion satisfy the standard of proof that Simonds J said in *Crane's* case was applicable. The subject matter of the sale that resulted in the issue of certificate of title volume 8186 folio 224 was "the premises known as No 17 Clovelly Road Randwick as now occupied by the tenant of those premises", and the contract provided for a survey for the purpose of the subdivision of an existing lot 30 into two lots "in accordance with the present occupations". There was then, and there remained for years afterwards, a paling fence defining the relevant boundary of the separate occupations, and survey marks had been placed, apparently by 12 May 1960, indicating the intersection of this fence and the wall of the garage block. Even if the first defendant's evidence as to his conversation with Mr Paridis were to be accepted, and even if Mr Paridis was the vendor's agent, that conversation could not prevail over the evidence that establishes that the existing occupation was definitive of the subject matter of the sale. If the first defendant had looked at the plan referred to in his transfer (and I think it must be taken

> that he knew of it) he would have seen that the common boundary was not a straight line between party walls. Other evidence establishes that the common boundary defined by the existing occupation is that shown in Mr Whelan's plan of redefinition.
>
> For these reasons I am of the opinion that a portion of land was included in the first defendant's certificate of title by wrong description of parcels or boundaries."

156 In the present matter, counsel for the appellant referred to *Quach v Marrickville Municipal Council (No 1)* ("*Quach*"), in which Young J (as he then was) considered the meaning of "error" in the more restrictive context of (then) s 135 of the Act (see now s 45), as follows (emphasis added):[51]

> "The only other matter raised was whether I took too narrow a view of the word "error" in s 135 of the *Real Property Act* in my earlier judgment. I there said that the word "error" in s 135 should mean much the same as it does in s 12 and s 126, viz, *some type of administrative error in the Registry*. Mr Maston has submitted that in view of the words "whether such fraud or error shall consist in wrong description of the boundaries or of the parcels of any land or otherwise howsoever" show that the word "error" in s 135 has a much wider meaning than in other parts of the statute. I think there is some real merit in this argument. *When one thinks of error in terms of wrong description of boundaries, one is moving out of the field where there is merely something lacking from the register book which would be expected to be in it*: see *Trieste Investments Pty Ltd v Watson* (1963) 64 SR (NSW) 98 at 104, 109; 81 WN (Pt 2) (NSW) 136 at 140-141. However, it is again difficult to move far away from the position I took in my interlocutory judgment. *Throughout the history of the Torrens statute, the word "error" has been closely associated with an error made in the registration process rather than something mistakenly happening further along the line*."

157 Counsel also referred to the consideration of *Quach*, and of the meaning of "error" in the context of the *RP Act* as some defect in the registration process itself, by the Court of Appeal in *Sahab Holdings Pty Ltd v Registrar-General* ("*Sahab Holdings*"):[52]

> "[173] In *Quach v Marrickville Municipal Council (No 2)* (1990) 22 NSWLR 65 at 71 Young J noted that in *Quach (No 1)* he had said that the word "*error*" in the then s 135 should mean much the same as it does in s 12(1)(d), namely, some type of administrative error in the Registry. It was submitted in *Quach (No 2)* that that was too narrow a view of the word and it should apply to situations other than administrative or departmental errors. His Honour declined "*to move far away*" from the position he took in *Quach (No 1)* observing (at 71):

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[51] (1990) 22 NSWLR 55 at 71 (Young J).

[52] (2011) 15 BPR ¶29,627; [2011] NSWCA 395 at [173]-[178], [180] (Campbell JA and Tobias AJA; McColl JA agreeing).

> "Throughout the history of the Torrens statute, the word 'error' has been closely associated with an error made in the registration process rather than something mistakenly happening further along the line."

[174] At 71F his Honour confirmed that the word "*error*" in the then s 135 had the more restricted meaning which it had in other sections of the Act such as s 12(1)(d).

[175] *Quach* is not directly applicable in the present case. The 1990 version of s 135 with which *Quach* was concerned (which Young J set out at 60) is not an analogue of the present s 136(1)(b). Importantly, the then s 135 was a section that identified circumstances in which a registered proprietor could not have his title questioned. Such circumstances included that his vendor or mortgagor was registered as proprietor, or procured the registration of the transfer to the registered proprietor, through error, or may have derived [presumably, his title] from or through a person registered as proprietor through error, "*and this whether such … error shall consist in wrong description of the boundaries or of the parcels of any land or otherwise howsoever*".

[176] As well, the factual situation with which *Quach* was concerned was not closely analogous to the present. In *Quach*, a 1908 plan identified a strip of land 4 feet wide as a drainage reserve. The Council had acquired the fee simple in the strip of land through the operation of a provision of the *Local Government Act 1919* that came into operation in 1920. The certificate of title concerning the land had never shown the Council as having any rights concerning the drainage reserve. The plaintiffs acquired the land in 1956, and were issued a fresh certificate of title concerning it. They occupied the whole of the land in their certificate of title, including the site of the drainage reserve, and paid rates on it, continually thereafter.

[177] The question at issue concerned whether the Council was entitled to become registered proprietor of the drainage reserve, and to an order that the plaintiffs deliver up their certificate of title to the Registrar-General to enable registration of the Council's title. Young J held that the Council had lost its title by prescription. The question of the scope of "*error*" in s 135 arose because the section contemplated that error might arise through "*wrong description of the boundaries or of the parcels of any land*". Young J recognised, at 71B, that

> "When one thinks of error in terms of wrong description of boundaries, one is moving out of the field where there is merely something lacking from the register book which would be expected to be in it."

[178] His Honour's reason why, in the case before him, there was no "*error*" was because:

> "... there was no error made in the registry office with respect to the noting of the estate of the Council because it never applied to be registered. There was an error in including in the certificate of title issued to the plaintiffs the 4 foot strip of land without realising that it had vested in the Council because of the 1908 drainage reservation. Again, this is not an error whereby the registration process was at fault; it was merely a matter of the Registrar-General registering documents which prima facie were in order."
>
> …..

[180] At [20 113] Professor Butt observes that an "*error*" assumes some disconformity between the recording in the Register and the instrument on

> which it is based. In particular, he advances the proposition that there is no power to correct an entry in the Register which the Registrar-General has accurately made on the basis of information provided to him or her but which later proves to be false since in such a case there is no clerical or administrative error: Professor Butt cites *Quach (No 2)* at 71 in support of this proposition."

158 However, while the word "error" appeared in (former) s 135 (considered in *Quach*) and now in s 45, and also in s 136(b) considered in *Sahab Holdings*, it does not appear in ss 28U(2), 42(1)(c), or 118(4)(d). The engagement of those sections, unlike ss 45 and 136(b), does not depend on "error". The authorities on "error" do not assist, and the attempt to invoke them to colour ss 28U(2), 42(1)(c) and 118(4)(d) as requiring something in the nature of "administrative error in the Registry" are a distraction.

159 The authorities which are relevant – *Hamilton* and *Onisiforou* — support the following propositions:

(1) there is "wrong description" if, where it is intended to describe Blackacre, Blackacre is so described as to make it include Whiteacre, or part of Whiteacre;

(2) in the context of a folio created pursuant to a primary application, it is not "wrong description" where the applicant correctly describes the land applied for, though the land is not the applicant's. There is a "wrong description of boundaries" if and only if by reason of the description a portion of land is included in the certificate of title which the applicant did not intend to have included; and

(3) in the context of a certificate of title issued after transfer, there is a ""wrong description"" only if neither transferor nor transferee intended the portion in question to be included in a particular certificate of title.

160 These cases do not deal directly with the context of a folio created by the Registrar-General pursuant to conversion action, and in particular one that is a limited folio. It is significant that uncertainty as to boundaries is inherent in limited title, and that in both iterations of the limited title legislation concern at resolving uncertain boundaries was evident. In the 1976 version this was dealt with by providing for the adoption of "occupational boundaries", which would necessarily reflect possessory interests. In the 1984 version (which post-dated the introduction of Part 6A), it was dealt with by preserving pre-existing possessory claims. Sections 28U(2) and 118(4)(b) clearly enough contemplate claims in respect of land wrongly included in a limited folio. The provision for possessory claims in respect of such land makes sense if these provisions are

understood as contemplating that a description in a limited folio which, though it might accord with the legal metes and bounds description, does not reflect the occupational boundaries, may have the effect of incorrectly including in the limited folio land which should not be included in it because of an adverse possessory interest. The intention was that because the description of the parcel and boundaries in a limited folio might not accord with the actual occupational boundaries, a purchaser of limited title land would take subject to crystallised or inchoate adverse possessory claims existing when the limited folio was issued.

161 In my view, in the context of a limited folio created by the Registrar-General pursuant to conversion action, there will be a "wrong description" if the description of the land in the limited folio does not reflect the occupational boundaries with the result that it includes land in which a person other than the registered proprietor has an existing possessory interest – whether that claim is crystallised or inchoate. In such a case, Blackacre is described in such a way as to include Whiteacre (or part of it), which is a "wrong description" as explained in *Hamilton.* If land subject to an existing adverse possessory interest is included in a limited folio for other land, then it is included in that limited folio "by wrong description of parcels or of boundaries".

Was the Yellow Land included in the Sidoti Property by "wrong description"?

162 If – as the primary judge found, which is unchallenged on appeal – Mr Hardy had been in possession of the Yellow Land, to the exclusion of the owners of Lot E, for in excess of twelve years commencing before the limited folio was created for the Sidoti property in late 2005, then, when the limited folio was created:

(1) regardless of the metes and bounds description, according to which the boundary was the northern edge of the Yellow Land, the occupational boundary was provided by the old corrugated iron fence on the southern side of the Yellow Land; and

(2) Mr Hardy had an inchoate possessory interest in the Yellow Land.

163 In those circumstances, the Yellow Land was incorrectly included in the limited folio for the Sidoti property, by "wrong description of parcels or of boundaries".

164 For the appellants, it was submitted that the northern boundary of the Sidoti Property as recorded in the registered plan was not and could not have been a relevant misdescription because, even if Mr Hardy had acquired a possessory interest in the Yellow Land, there was no "wrong description of boundaries", as the true boundary was still the boundary between that land and the Hardy property; it aligned with the straight east-west southern boundary of the Hardy property and with the northern boundary of each of the adjoining terrace houses along Boronia Street, being Lots A, B, C, D, F, and G; and it delineated the northern side of the right of way, which ran east to west through the rear of the properties along Boronia Street, being Lots A, B, C, D, F, and G, on the titles of each which the right of way remains recorded. However, these submissions overlook that the *occupational boundary* was the southern edge of the Yellow Land, in which Mr Hardy already had an inchoate possessory interest. The description of the Sidoti Property in the limited folio was wrong insofar as it included the Yellow Land: in the formula used in *Hamilton*, the Sidoti Property was so described as to wrongly include the Yellow Land. Although it was submitted, for the appellants, that there could have been no "wrong description" as the limited folio was created long before any possessory title could possibly have vested in Mr Hardy, this overlooks that at the time of creation of the limited folio, the adverse possession had commenced, giving rise to an inchoate interest, the enforceability of which was preserved by s 45C(2). The Yellow Land, subject as it was to Mr Hardy's inchoate possessory claim, was included "by wrong description of parcels or of boundaries" in the limited folio for the Sidoti property.

165 Mr Doyle emphasised the well-established approach to the *RP Act* concerning indefeasibility and the conclusiveness of the register, and to the statement of the High Court in *Deguisa v Lynn* that:[53]

> "A person who seeks to deal with the registered proprietor in reliance on the State's guarantee of the title of the registered proprietor disclosed by the certificate of title in the Register Book (or its electronic equivalent) is not to be put on inquiry as to anything beyond that which is so notified."

166 Those principles are not in doubt. But they are not contravened to the extent that the Act makes exceptions to infeasibility in the case of limited title, in

[53] (2020) 94 ALJR 1020; [2020] HCA 39 at [88] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

circumstances where the fact that the folio was a limited one was notated in the second schedule, of which the appellants must be taken to have been on notice (a matter which they did not seek to dispute). Section 42(1)(c) does not avail the appellants, because, just as for qualified title land the operation of s 42 is modified by s 28P(1)(d) which, as has been noted, provides that "a qualified folio of the Register shall be evidence as to title in all respects as if it were an ordinary folio of the Register, except that it shall be subject to every subsisting interest in the land comprised therein, whether recorded in the Register or not", so for limited title land such as the Sidoti Property, its operation is modified by s 28U(2), which provides that their limited title is, notwithstanding s 42(1), subject to an adverse interest in land which has been incorrectly included in a limited folio by any wrong description of parcels or of boundaries. For the same reason, it does not avail them that their title is derived from the register, rather than from their predecessors: because it is limited title, it is still subject to an adverse interest in land which has been incorrectly included in the folio by wrong description of parcels or of boundaries. Nor does s 45(1) assist them, because ss 28U(2) and 45C(2) "otherwise expressly provide". As to s 45(2), this is not a case in which it is sought to deprive the appellants of their title to the Yellow Land "merely" because the vendor to them (the Theodorous) became registered, or may have derived their right to registration as proprietor, from or through a person who had been registered as proprietor through fraud or error, or by means of a void or voidable instrument: rather, it is sought to deprive them of that title because their title is a limited one, of which they were on notice, and thus subject to an adverse interest in land which has been incorrectly included in it by any wrong description of parcels or of boundaries. Section 118 does not protect them, because Mr Hardy's claim is one brought by a person claiming land (the Yellow Land) that by reason of the misdescription of the Sidoti property or its boundaries has been included in a limited folio of the Register for the Sidoti property, within the exception in s 118(4)(b).

Notice to mortgagee

167 The appellants submitted that the summons should have been dismissed because the National Australia Bank ("the Bank"), as registered mortgagee of

the Sidoti Property, was a necessary party to any proceedings in which orders might be made affecting its interest in its mortgage over any part of the Sidoti Property, including the Yellow Land.

168 This issue was not raised below, until after judgment when orders were made. When it was raised, the primary judge reserved "for further consideration" the rights of existing encumbrancees. That has not been pursued.

169 It may well be open to the Bank, if so advised, to apply to set aside the orders made in its absence.[54] However, that does not mean that the application would inevitably succeed, nor if it did that the ultimate result would be any different. It would be relevant that, although a registered mortgagee obtains the benefits of indefeasibility (as is specifically provided for by s 42(2)), in the case of land in a limited folio its interest is subject to the same exceptions as those of the registered proprietor, including in particular to an adverse interest in land which has been incorrectly included in the folio by wrong description of parcels or of boundaries. On that basis, the intervention of the mortgagee would not appear likely to result in a different outcome.

170 It would also be relevant that, given the size of the Yellow Land (3.35 square metres) relative to the Sidoti Property as a whole (86.3 square metres), its location at the very rear of the property, and the absence of substantial improvements on it, its impact on the value of the mortgagee's security would appear to be *de minimis*.

171 In those circumstances, where no application has been made by the Bank, and where there has been a reservation of further consideration but no application has been made in pursuance of it, absence of notice to the Bank does not require that the appeal be allowed.

Leave to appeal

172 An appeal to this Court from a final judgment requires leave unless, relevantly, the appeal involves (directly or indirectly) a claim, demand or question to or respecting property of the value of $100,000 or more.[55] In this context, the

[54] See, eg, Hardie Rubber Co Pty Ltd v General Tire & Rubber Co (1973) 129 CLR 521; [1973] HCA 66; Taylor v Taylor (1979) 143 CLR 1; [1979] HCA 38.
[55] Supreme Court Act 1970 (NSW), s 101(2)(r)(ii).

relevant value is that of the claim, rather than of the property to which it relates.[56] There is nothing to indicate that the claim to title of the 3.35 square metres that comprises the Yellow Land is worth $100,000 or more. Leave to appeal is required.

173 However, the issues raised are questions of principle, and not without importance to the operation of the Torrens system in this State. In circumstances where they have been fully argued, I would not refuse leave to appeal.

Conclusion

174 My conclusions may be summarised as follows:

(1) the title of the registered proprietor of a limited folio is subject to an adverse interest in land which has been incorrectly included in the folio by wrong description of parcels or of boundaries (s 28U(2));

(2) in the context of a limited folio, a portion of land will have been incorrectly included in the folio by wrong description of parcels or of boundaries if, at the time when the folio was created, that portion was subject to a crystallised or inchoate possessory interest of a person other than the registered proprietor of the limited folio; and

(3) in such circumstances, the person with the possessory interest is not precluded from enforcing it, *dehors* Part 6A (s 45C(2)).

175 Applied to this case, the limited folio for the Sidoti Property incorrectly included the Yellow Land, in which Mr Hardy had an inchoate possessory interest, by wrongly describing the Sidoti Property as including the Yellow Land. In those circumstances, the Sidoti title was subject to the adverse interest of Mr Hardy, who was entitled to enforce it, as he has, in these proceedings.

176 In circumstances where no application has been made by the mortgagee Bank to set aside the orders, where it is far from clear that such an application must succeed, or if it did that it would ultimately result in a different outcome, and where there has been a reservation of further consideration but no application has been made in pursuance of it, absence of notice of the proceedings to the mortgagee does not require that the appeal be allowed.

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[56] Oertel v Crocker (1947) 75 CLR 261 at 265-267 (Latham CJ); [1947] HCA 40; Ballas v Theophilos (No 1) (1957) 97 CLR 186 at 193-196 (Dixon CJ, Webb and Fullagar JJ); [1957] HCA 49; Nanschild v Pratt [2011] NSWCA 85 at [26]-[34] (McColl JA; Campbell JA agreeing); Jabulani Pty Ltd v Walkabout II Pty Ltd [2016] NSWCA 267 at [80] (Bathurst CJ, Leeming and Payne JJA).

177 Leave to appeal should be granted, but the appeal should be dismissed with costs.

178 I propose orders that:

(1) Leave to appeal be granted; and

(2) The appeal be dismissed, with costs.

179 **SIMPSON AJA:** This appeal and cross appeal involve consideration of provisions of the *Limitation Act 1969* (NSW) and the *Real Property Act 1900* (NSW). Since these provisions have been reproduced, and the relevant facts stated, in the judgments of Basten JA and Brereton JA I will confine my references to the minimum necessary to permit an understanding of my reasons for the conclusions I have reached.

Relevant legislative provisions

Limitation Act 1969 (NSW)

180 Section 27(2) creates a limitation period of 12 years for actions to recover land: it provides that an action to recover land is not maintainable after the expiration of 12 years from the date on which the cause of action arose. By s 65(2) and Schedule 4, on the expiration of that limitation period, the title to the land of a person who would formerly have had a cause of action to recover land is extinguished as against the person against whom the cause of action formerly lay.

181 However, while those provisions permit the acquisition of title to land under common law, or Old System title, and, from the expiration of the 12 year limitation period, effect the extinguishment of the title of the owner of such land, they do not have the same effect in relation to land under the provisions of the *Real Property Act*: *Van den Bosch v Australian Provincial Assurance Association Ltd* [1968] 2 NSWR 550; (1968) 88 WN (Pt 1) (NSW) 357, at 363-365; *Spark v Meers* [1971] 2 NSWLR 1, at p 13.

182 That was the effect of s 45 of the *Real Property Act* as it then stood, the terms of which are set out at p 3 of *Spark,* and which, subject to a qualification to which I will come, are essentially re-enacted in s 45C(1). Section 45C(1) provides:

45C Acquisition of possessory title to land under the Act

(1) Except to the extent that statutes of limitation are taken into consideration for the purposes of this Part, no title to any estate or interest in land adverse to or in derogation of the title of the registered proprietor shall be acquired by any length of possession by virtue of any statute of limitations relating to real estate, nor shall the title of any such registered proprietor be extinguished by the operation of any such statute.

183 However, s 45C(2) provides:

(2) Subsection (1) does not prevent the acquisition of a title, adverse to or in derogation of the title of the registered proprietor thereof, to an estate or interest in land brought under the provisions of this Act by the creation of a qualified or limited folio of the Register by reason of possession of the land for any length of time commencing before the creation of the folio.

The Real Property Act 1900 (NSW) (hereafter "the Act")

184 Part 4 of the Act provides for applications to bring Old System land under its provisions. The essential feature (at least for present purposes) of land under the Act is that, on the inclusion of land in the Register, the registered owner has the advantage of the indefeasibility of title conferred by s 42 and s 45. The relevant provisions of s 42 and the whole of s 45 in its current form are set out at [15] and [17] of the judgment of Basten JA (see also [76] and [78] of the judgment of Brereton JA). The qualification to which I referred above is that statutes of limitation may be taken into consideration for the purposes of Pt 6A.

185 Part 4A (ss 28A-28R) provides for the creation of qualified folios of the Register. By s 28E the Registrar-General may initiate the process and, by subs (2) thereof, may create a qualified folio. The qualification (as expressed in s 28J(1) appears to be that the title is held subject to any subsisting interests, whether or not recorded in the Register. Part 4B (ss 28S-28ZD) provides for the creation of "limited folios" where the boundaries of the land in a registered deed are not sufficiently defined to enable the creation of a qualified folio. By subs (4) of s 28T, when creating a limited folio of the Register, the Registrar-General is required to make in the folio a recording to the effect that the description of the land comprised therein has not been investigated by the Registrar-General. Subsection 8 of s 28T relevantly provides as follows:

8 Except as otherwise provided by any other provision of this Part:

(a) land comprised in a limited folio of the Register is subject to the provisions of this Act,

…

(d) a limited folio of the Register shall be evidence as to title in all respects as if it were an ordinary folio of the Register, except that:

(i) the certification of title is not conclusive as regards the definition of the boundaries of the land comprised therein …

186 Section 28U provides as follows:

28U Defeasibility of limited title

(1) Section 12 (3) (b) does not apply to or in respect of a correction made by the Registrar-General of any wrong description of parcels or of boundaries in relation to land included in a limited folio of the Register.

(2) Where by any wrong description of parcels or of boundaries any land is incorrectly included in a limited folio of the Register, section 42 (1) does not operate to defeat any estate or interest in that land adverse to or in derogation of the title of the registered proprietor and not recorded in the folio, whether or not the registered proprietor is a purchaser or mortgagee of that land for value or derives title from such a purchaser or mortgagee.

(Section 12(1)(d) permits the Registrar-General to correct errors and omissions in the Register; by s 12(3)(b), any such correction is deemed to have no force or effect where the correction would prejudice or affect a right already accrued from a recording in the Register).

Part 6A

187 Part 6A (ss 45B-45G), inserted in 1979 (by the *Real Property (Possession Titles) Amendment Act 1979*, Sch 1, cl 9), provides for the acquisition, in limited circumstances, of possessory title to land under the provisions of the Act. The key provision is s 45D. As s 45D has been set out in its entirety in the other judgments, it is sufficient to summarise its relevant provisions, as I understand them:

(1) pursuant to subs (1) an application may be made to the Registrar-General by a person in possession of property to be registered as the proprietor of the property where:

(i) the land is comprised in an ordinary, qualified, or limited folio of the Register;

(ii) the title of the registered proprietor would, had statutes of limitation been applicable, have been extinguished as against the person in possession;

(iii) the possession by virtue of which title would have been extinguished commenced after the creation of the folio by

which the land was brought under the provisions of the Act; and, importantly,

(iv) the land in respect of which the claim is made is a whole parcel of land.

(2) Subsection (2) applies where the possession is of part only of a whole parcel of land: the subsection nevertheless permits an application for possessory title of the whole parcel. There is no provision in s 45D or elsewhere in the Act for a claim for possessory title of part of a whole parcel of land.

(3) Subsection (2A) provides for application for possessory title by adjoining owners of "residue lots" which are defined (in subs (2B)) as lots intended to be used as service lanes, lots created to prevent access to roads, and otherwise as prescribed by regulation.

(4) By subs (4) a possessory application may not be made if:

(v) the registered proprietor became registered without fraud and for valuable consideration; and

(vi) the whole of the period of adverse possession would not have occurred after the proprietor became registered

unless the application is made on the basis that the estate or interest applied for will, if the application is granted, be subject to the estate or interest of the registered proprietor.

The relevant facts

188 As the relevant facts are comprehensively stated in the judgments of Basten JA and Brereton JA and in the judgment of Kunc J at first instance (*Hardy v Sidoti* [2020] NSWSC 1057), I can be brief. The following assumes familiarity with the judgments of Basten JA and Brereton JA.

189 The salient facts, which are not, for the purposes of the appeal, in dispute, are:

(i) in January 1998 the respondent (Mr Hardy) and his then partner purchased the property that runs from west to east between Baptist St and Dalley Lane in Redfern ("the Hardy property"). The property was then held under Old System, or common law, title;

(ii) adjoining the Hardy property, at right angles, is a series of seven properties (Lots A-G) that face Boronia Street and run south to north. These properties were also, until 2005, held under Old System title;

(iii) on the southern side of the Hardy property (but not part of that property), running the length of the property between Baptist Street and Dalley Lane, is a narrow strip of land that was, in past times, used as a laneway for the purpose of “night soil” collection;

(iv) the laneway mentioned in (iii) above forms part of each of Lots A-G of the Boronia Street properties; that is, each of Lots A-G includes that part of the laneway that falls within the eastern and western boundaries of the individual Lot. In each case, that part of the Lot that constitutes the laneway is subject to a right of way for the purpose mentioned above;

(v) at the time of the Hardy purchase, and until 2018, Lot E of the Boronia Street properties was owned by members of the Theodorou family. There were two fences (although dilapidated) on Lot E: one on the northern boundary, that marked Lot E from the Hardy property; and one that marked the southern boundary of the right of way and was well within Lot E;

(vi) from 2002 Mr Hardy so acted as to assert proprietorial rights over that part of Lot E that constitutes part of the right of way. He demolished the fence on the southern boundary of the Hardy property and used the space so accessed for storage of garden tools; by 2005 he had undertaken landscaping works on what had been the laneway;

(vii) in September 2005, consistently with government policy to bring existing Old System parcels of land under the Torrens System, the Registrar General, on his own initiative, commenced a process of converting the Boronia Street titles (including that of Lot E) to Torrens title under the provisions of the Act (s 28E). Initially, a qualified folio (s 28E(2)) was created; on 27 September 2005 the qualification was removed and a limited folio created (s 28T); the folio included the land subject to the right of way that was in accordance with the deposited plan that identified the boundaries of Lot E; it also included the recording, required by s 28T(4), that the boundaries of the land had not been investigated by the Registrar-General;

(viii) on 18 April 2018 the appellants purchased Lot E from the Theodorou family and their title was registered in accordance with the Act. The registered title includes that part of the land that constitutes the laneway and is subject to the right of way; the registration is subject to the limitation specified in s 28T(8)(d)(i) – that is, it is not conclusive as regards the definition of the boundaries of the land;

(ix) the appellants began renovations of Lot E and, in so doing, removed the fence on the southern boundary of the right of way and relocated it to the northern boundary, that is the boundary with the Hardy property. They thus effectively reclaimed that part of Lot E that Mr Hardy had occupied at least since 2005 and possibly since 2002.

190 Mr Hardy then commenced proceedings claiming possessory title to that part of Lot E that is subject to the right of way (referred to in the pleadings and primary judgment as "the Yellow Land"). His claim was ultimately formulated in a Second Amended Summons filed in court on 30 July 2020 (the second day of the hearing). He claimed declarations to the effect (in the interests of clarity, I have taken the liberty of reformulating the declarations sought):

(i) that, by reason of his adverse possession over a period of about 21 years of that part of Lot E that constitutes the laneway ("the Yellow Land"), any cause of action the appellants may have had to recover the land was not maintainable because the limitation period of 12 years fixed by s 27(2) of the *Limitation Act* had expired;

(ii) that, by operation of s 65(1) and Schedule 4 of the *Limitation Act,* from 8 January 2010 (representing the expiration of the 12 year limitation period fixed by s 27(2) thereof, the date apparently having been chosen by reference to the purchase by Mr Hardy and his partner of the Hardy property) the title of the appellants to the Yellow Land was extinguished;

(iii) that, as a consequence of his adverse possession, and the extinguishment of the title of the Theodorou family, he had acquired possessory title to the Yellow Land.

Mr Hardy also claimed consequential orders, for rectification works, to affirm his title to the Yellow Land.

191 By amended cross-claim also filed in court on 30 July 2020 the appellants claimed:

(i) a declaration that, on the proper construction of s 45D(4) of the Act, Mr Hardy was not entitled to claim possessory title of the land,

(ii) an order restraining Mr Hardy from lodging with the Registrar-General any plan purporting to include the Yellow Land in the boundaries of the Hardy property;

(iii) a declaration that they were entitled to seek registration of a dealing redefining the boundaries of Lot E.

192 The primary judge initially stated his conclusions in [11] of the primary judgment. The effect of his stated conclusions (again, I paraphrase and reformulate, but for brevity) is:

(i) that the appellants' property (Lot E) is land under the Act;

(ii) that possessory title under the Act can generally only be acquired in accordance with Pt 6A thereof, and that, if the Act applied, Mr Hardy's claim must fail;

(iii) that the Act (that is, Part 6A) did not apply because Mr Hardy's adverse possession commenced by no earlier than either May 2002 (with the demolition of the fence on the boundary of the Hardy property and the commencement of landscaping) or no later than January 2005 (with additional landscaping) and was extant in September 2005 when the limited folio was issued;

(iv) that, by no later than January 2017 (12 years from 2005), the limitation period for action by the then owners (the Theodorou family) to recover the Yellow Land had, by s 27(2) of the *Limitation Act,* expired, and their title to the land was extinguished by operation of s 65(1) thereof, and that, therefore, when the appellants purchased Lot E in April 2018 they did not acquire title (because by that time, the Theodorou family did not have title to the Yellow Land to convey); and, therefore,

(v) that Mr Hardy had, by January 2017, acquired possessory title at common law to the Yellow Land and was entitled to orders recognising that title.

193 After reviewing the evidence and the applicable legal principles the primary judge (at [128]) again summarised his conclusions, relevantly (for the purposes of the appeal) to the following effect;

(i) Mr Hardy was in continuous possession of the Yellow Land adverse to the title of the Theodorou family commencing, at the earliest, in May 2002, or by no later than January 2005;

(ii) when Lot E was brought under the provisions of the Act by the creation of the limited folio in September 2005, Mr Hardy had been in possession of the Yellow Land for the purposes of s 45C(2) since at least January 2005 and as early as May 2002, so that, by reason of s 45C(2), his claim to possessory title was not subject to the prohibition in s 45C(1) and he was able to acquire possessory title to the Yellow Land at common law rather than under the provisions Pt 6A of the Act;

(iii) at the date of creation of the limited folio (in September 2005) comprising Lot E Mr Hardy had possessory title to the Yellow Land; therefore the Yellow Land was incorrectly included in the limited folio by a wrong description of boundaries for the purposes of s 28U(2). The indefeasibility provisions of the Act therefore did not defeat his possessory claim;

(iv) pursuant to s 27(2) of the *Limitation Act*, the Theodorou family's cause of action to recover the Yellow Land was not maintainable as early as May 2014 (12 years from 2002) and by not later than January 2017 (12 years from 2005). The Theodorou family's title to the Yellow Land was, by s 65(1) of the *Limitation Act*, extinguished no later than January 2017;

(v) accordingly, the Theodorou family did not, at the time of the conveyance to the appellants, have title to the Yellow Land.

194 The primary judge rejected a contention made on behalf of Mr Hardy that Pt 6A of the Act does not apply to land contained in a limited folio of the Register, and explained why, if it did, Mr Hardy's claim would fail (at [111]). However, he

accepted an alternative proposition, that s 45C(2) applied to preserve Mr Hardy's common law claim to possessory title (at [112]).

195 The primary judge found, on the application of common law principles, that Mr Hardy had established his claim to possessory title as a result of his assertion of proprietorial rights. Although a ground of appeal asserted that possessory title at common law "could not and did not '*arise at common law*'" no submissions were directed to that proposition.

The application of the Real Property Act

Part 6A

196 It was not in issue on the appeal that, once the limited folio was issued, the land comprising Lot E became subject to the Act (s 28T(8)(a)) and the appellant had the benefit of the indefeasibility provisions (s 42, s 45), subject to any relevant exceptions in the Act. The relevant exceptions are to be found in s 28U and Pt 6A.

197 Part 6A provides the avenues (limited to two) by which land under the provisions of the Act may be the subject of claims for title by adverse possession. Those avenues are provided in s 45D (and outlined above).

198 None of these was applicable to Mr Hardy's claim. Subsections (1) and (2) of s 45D require the claim to be for the whole parcel of land (although, for a subs (2) application, it is not necessary that the adverse possession be of the whole parcel). Mr Hardy's claim was never for the whole parcel of land, and, accordingly, s 45D(1) and (2) provide no avenue by which he could claim possessory title. Subsection (2A) provides for title of "residue lots" which are the subject of separate folios. Although in this case, the laneway was created as a "service lane", it was part of each of Lots A-G of the Boronia Street properties, and was not contained on a separate title. Subsection (2A) provided no avenue for Mr Hardy to claim possessory title.

199 Mr Hardy was not entitled to claim possessory title under Pt 6A.

Section 28U(2)

200 As indicated above, the appellants acquired the benefit of indefeasibility subject to any relevant exceptions contained in the Act. The primary judge

found that subs 28U(2) provided an exception. It is worth repeating subs 28U(2), which provides:

> "Where by any wrong description of parcels or of boundaries any land is incorrectly included in a limited folio of the Register, s 42(1) does not operate to defeat any estate or interest in that land adverse to or in derogation of the title of the registered proprietor and not recorded in the folio, whether or not the registered proprietor is a purchaser or mortgagee of that land for value or derives title from such a purchaser or mortgagee."

201 The primary judge found that that exception applied because the Yellow Land had incorrectly been included in the limited folio when it was created in September 2005 (at [128 (4)]). His explanation for that conclusion is puzzling. The limited folio was created in 2005. The primary judge said that, at the date of creation of the limited folio, Mr Hardy had possessory title of the Yellow Land. In the previous paragraph, however, he had said that, by September 2005, Mr Hardy had been in possession of the Yellow Land (for the purposes of s 45C, to which I will come) since at least January 2005, and as early as May 2002. That is well short of the 12 years necessary to enliven the relevant provisions of the *Limitation Act.*

202 In those circumstances, Mr Hardy could not have had possessory title to the Yellow Land at the time the limited folio was created in September 2005. There was no wrong description of any parcel or boundary at that time. Section 28U(2) did not operate to counter the effect of s 42(1).

Section 45C(2)

203 Again, it is worth repeating the relevant provision:

> **45C Acquisition of possessory title to land under the Act**
>
> (2) Subsection (1) does not prevent the acquisition of a title, adverse to or in derogation of the title of the registered proprietor thereof, to an estate or interest in land brought under the provisions of this Act by the creation of a qualified or limited folio of the Register by reason of possession of the land for any length of time commencing before the creation of the folio.

204 The primary judge found that s 45C(2) applied in such a way as to preserve Mr Hardy's common law claim to possessory title. That was because Mr Hardy had (on the primary judge's factual finding) been in possession since at least January 2005 (that is "for any length of time commencing before the creation of the [limited] folio of the Register"), as a result of which subs (1) did not prevent Mr Hardy's acquisition of possessory title. In my opinion, having regard to the

primary judge's factual findings which are not subject to challenge, that conclusion is inescapably correct.

205 Grounds 2 and 3 of the amended Notice of Appeal are relevantly in the following terms:

> "2. The Judgment below held erroneously at [11(3)] and [128(3)] that by reason of ss 28U(2) and 45C(2) of the RP Act the respondent's claim to possessory title to the 'Yellow Land' is not subject to the 'prohibition' in s 45C(1) of the RP Act, when it ought to have held:
>
> a. the respondent's claim is subject to the restrictions imposed on the operation of any statute of limitations (that might otherwise create title to any estate or interest in land adverse to or in derogation of the title of the registered proprietor or extinguish the title of any such registered proprietor);
>
> b. s 45C(2) does not negate such limitations;
>
> c. s 45C(2) instead operates to ensure that an adverse possession application that can otherwise [be] made under Part 6 of the RP Act (to the extent that statutes of limitation are taken into consideration for the purposes of that Part) can rely on a period of possession of the relevant land which commenced before the creation of a limited folio for that land – notwithstanding any restrictions imposed by s 45C(1) that might be read to the contrary); and
>
> d. s 45C(2) does not operate to facilitate the acquisition of a title, adverse to or in derogation of the appellant's registered title in the land created by registration of the transfer to the appellant, and the listing of the appellant as registered proprietor of the Sidoti Property including the Yellow Land.
>
> 3. The Judgment below held erroneously at [11(5)] and [128(3)] that the respondent '*is able to acquire possessory title to the Yellow Land at common law rather than pursuant to s 45D of the Act*', when it should have held that:
>
> a. the effect of s 45C is that except as provided for by Part 6A of the RP Act no title to any estate or interest in the Yellow Land adverse to or in derogation of the title of the appellants as registered proprietors of that land can be acquired by any length of possession by virtue of any statute of limitations relating to real estate, nor shall the title of any such registered proprietor be extinguished by the operation of any such statute (subject only to the limited qualification arising from s 45C(2) described in Ground 22 (sic) (b) above);
>
> b. at all material times since the creation of the limited folio for the Sidoti Property, Part 6A has provided the exclusive scheme by which possessory title could be established over the Yellow Land, and s 27 of the *Limitation Act* could not albeit [sic] that possession of that land for any length of time commencing before the creation of that limited folio was available to be relied upon in any application made under s 45D subject to the restrictions imposed by that section;
>
> … ."

206 The written submissions advanced in support of Ground 2 were limited to the following propositions:

> "45. Where s 45C(1) applies 'Part 6A applies exclusively' (*South Maitland Railways Pty Ltd v Satellite Centres of Australia Pty Ltd* (2009) 14 BPR 26, 823; [2009] NSWSC 716 – cited at Judgment [81] …
>
> 46. The court below erroneously held at Judgment [11(3)] and [128(3)] that the respondent's claim of possessory title of the Yellow Land is not subject to the '*prohibition*' in s 45C(1) of the Act because of ss 28U(2) and 45C(2) of the Real Property Act 1900.
>
> …
>
> 48. S 45C(2) RP Act does not say that s 45C(1) does not apply, but only that '*does not prevent the acquisition of a title … by reason of possession of land for any length of time commencing before the creation of the folio'.*
>
> 49. As set out, that proviso can work quite sensibly with the application of s 45C(1) but allowing for a period of possession commencing before the land is brought under the RP Act be taken into account.
>
> 50. For the reasons set out above, s 45C(2) RP Act does not remove the application of Part 6A of the Act. It is to be read sensibly to operate in conjunction with that Part."

207 No submissions were advanced in support of Ground 3.

208 The grounds as expressed ignore the exceptions provided for by s 28U(2) and s 45C(2). Section 45C(2) excludes the indefeasibility otherwise provided by s 45C(1) where the adverse possession of land commenced before the creation of the folio. As indicated above, that possession was found to have commenced prior to the creation of the folio.

209 The effect of subs (2) is that subs (1) does not prevent the acquisition of possessory title to land under the Act by reason of possession of the land for any length of time commencing before the creation of the folio. That is precisely this case.

210 The primary judge was correct to hold that s 45C(2) operated to exclude the provisions of Part 6A, and entitled Mr Hardy to claim possessory title at common law.

211 For these reasons I agree with the orders proposed by Brereton JA.

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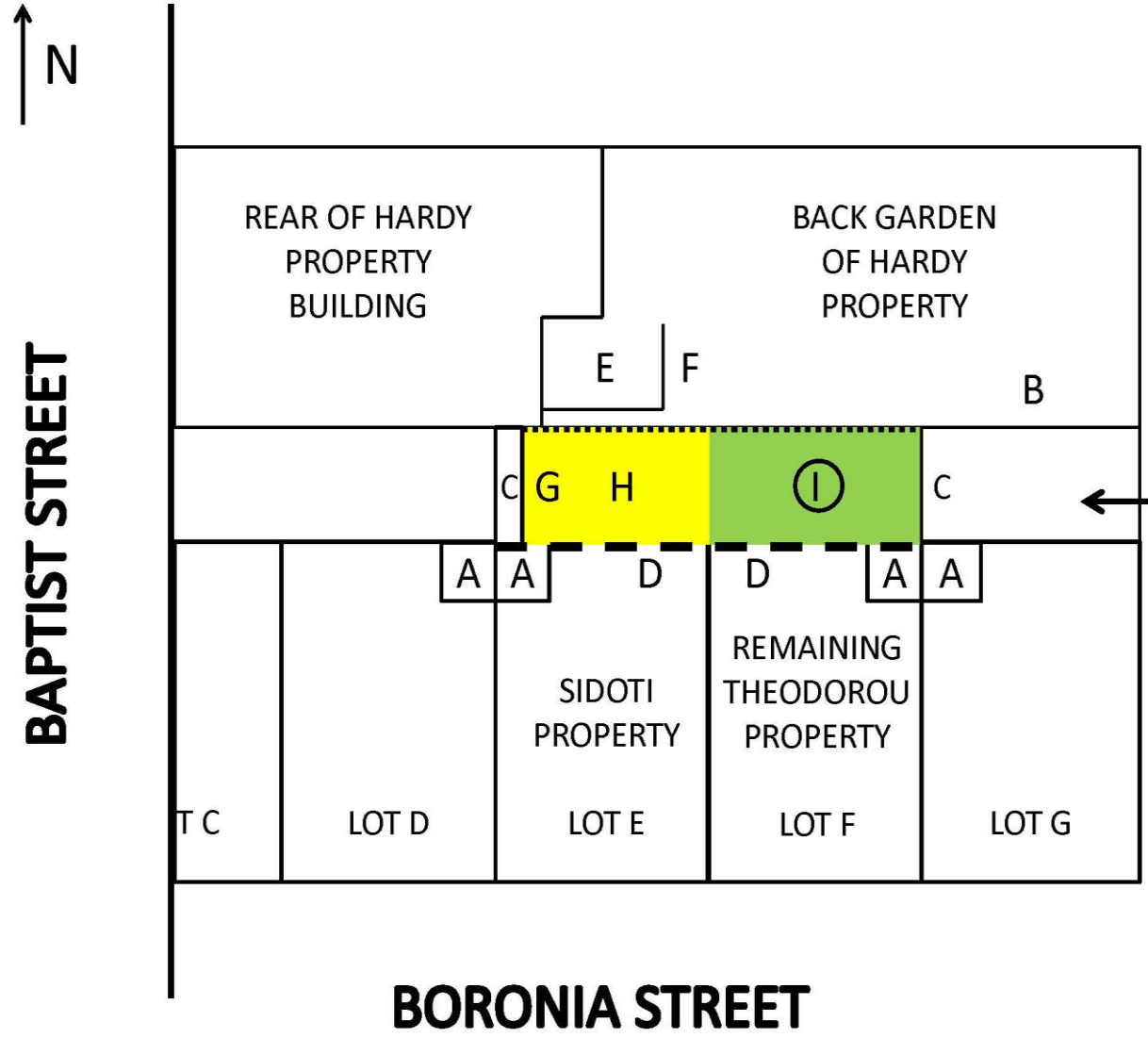

NOT TO SCALE