

# LAND COURT OF QUEENSLAND

CITATION: *Canaway v Chief Executive, Department of Natural Resources and Water* [2009] QLC 0120

PARTIES: Mark Canaway  
(appellant)  
v.  
Chief Executive, Department of Natural Resources and Water  
(respondent)

FILE NO: AV2007/0829

DIVISION: Land Court of Queensland – General Division

PROCEEDING: Appeal against annual valuation under the *Valuation of Land Act 1944*

DELIVERED ON: 14 August 2009

DELIVERED AT: Brisbane

HEARD AT: Brisbane

MEMBER: Mr PA Smith

ORDER: **1. The appeal is dismissed**  
**2. The appellant pay the costs of the respondent, to be agreed, or failing agreement, to be assessed.**

CATCHWORDS: Valuation – unimproved value – appellant seeking unimproved value – validity of *Vegetation Management Act* – Deed of Grant – contract – fee-simple – whether fee-simple is excluded from legislative power – whether the State has power to legislate with respect to use or management of freehold land – costs – frivolous – vexatious – doomed to failure

*Valuation of Land Act 1944*  
*Land Court Act 2000*  
*Vegetation Management Act 1999*  
*Constitution Act 1867*  
*Land Title Act 1994*

COUNSEL: The appellant appeared on his own behalf  
Mr G Sammon and Mr P Prasad for the respondent

SOLICITORS: Crown Solicitor for the respondent

## Background

- [1] This is an appeal against the Chief Executive's valuation of a rural property situated in Manumba. The subject land contains a total area of 574.8 ha and is located at Kaboona Road, Manumba. The Chief Executive has determined the unimproved value of this land at \$97,000; the appellant contends for an unimproved value of \$108,000. The date of the valuation is 1 October 2005, with a date of effect of 30 June 2007.
- [2] The appeal proceeds on a rather narrow basis. This is because, at a preliminary conference conducted in this matter, the parties agreed that the Chief Executive's valuation of the subject land was correct if the provisions of the *Vegetation Management Act 1999* (the VMA) apply and that the appellant's contention of an unimproved value of \$108,000 for the subject land is correct if the provisions of the VMA do not apply.
- [3] In the unusual circumstances of this matter, neither party relied upon any evidence. Due to the admissions of both parties as to the valuation of the land, it was not necessary for the Court to be provided with any valuation evidence. The hearing accordingly proceeded on the basis of written and oral submissions by the parties.

## The appellant's contentions

- [4] In short, the appellant complains that the Chief Executive should not have reduced the valuation of the subject land as, in his view, the provisions of the VMA do not apply to the subject land as the subject land is freehold.
- [5] The appellant contends that the Deed of Grant which he holds for the subject land is a contract with the State Government, and that the only rights that the Crown has in his land are those as reserved in the Deed of Grant. The appellant contends that s.5 of the *Constitution Act 1867* binds the State to a contract, and that pursuant to Chapter 6 of the *Constitution Act*, the State does not have any lawmaking authority with respect to privately owned land.
- [6] The appellant relies upon the comments of Justice Isaacs in *The Commonwealth v New South Wales*<sup>1</sup> where Justice Isaacs describes the rights that a landholder who holds fee-simple enjoys. In *The Commonwealth v New South Wales*, Justice Isaacs relevantly had this to say:<sup>2</sup>

“In *Challis's Real Property*, 3<sup>rd</sup> ed., p. 218, it is stated with perfect accuracy:- ‘In the language of the English law, the word fee signifies an estate of inheritance as distinguished from a less estate; not, as in the language of the feudists, a subject of tenure as distinguished from an allodium. Allodium being wholly unknown to English law, the latter distinction would in fact have no meaning. A fee simple is the most extensive in quantum, and the most absolute in respect to the rights which it confers, of all estates known to the law. It confers, and since the

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<sup>1</sup> [1920-23] 33 CLR 1.

<sup>2</sup> At p.42.

beginning of legal history it always has conferred, the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination, including the right to commit unlimited waste; and, for all practical purposes of ownership, it differs from the absolute dominion of a chattel, in nothing except the physical indestructibility of its subject. Besides these rights of ownership, a fee simple at the present day confers an absolute right, both of alienation *inter vivos* and of devise by will.’ ”

[7] The appellant contends that, in light of Justice Isaacs’ comments referred to above, the law in Queensland is as follows:<sup>3</sup>

“Most non-leased properties in Queensland are ‘Fee-Simple’ and therefore the majority of property owners have rights that override any Government Department or any Municipal Council. Unfortunately many landowners are not aware of their rights. There are also other court rulings [such as *Plenty v Dylan* in 1991] and Parliamentary legislation that further confirm the fact that property-owners in this country have the law entirely on their side”.

[8] Other contentions by the appellants can best be summed up in his own words from his written submissions:

**“IF THE CONSTITUTION IS VALID AND THE QUEEN IS LEAGALLY HEAD OF STATE.**

Whereas the Queen makes the laws in all cases whatsoever bound by oath to Uphold Magna Carta, Bill of Rights etc.

She cannot make Vegetation Management Act. Legislative Standards Act tells the legislator they must have regards for rights and liberties of individuals and fair compensation for compulsory acquisition.

Must also have regard to the institution of parliament ( the Queen and the restrictions she has for law making). State Government cannot interfere with Deed of Grant as they are bound by contract **section 5 Queensland Constitution.**

A Deed of Grant can only be changed if it was issued incorrectly. The only other way is to buy land back under common law as the Crown must own land to issue a Deed of Grant.

**The only lawful rights Crown has are in the reservations on the said Deed of Grant.**

The mandate for government is to protect our rights, liberties and our property under Common Law.  
The State Government has no right in law to help themselves to peoples land.

**They are servants. ‘We the people hold sovereign power’.**”

**“IF THE CONSTITUTION IS INVALID AND THE QUEEN CANNOT BE HEAD OF STATE**

IN THE CHANCERY DIVISION OF THE BRITISH HIGH COURT IN LONDON, DAVID CLAUDE FITZGIBBON AND HM ATTORNEY GENERAL, HEARD BY MASTER BENCHER BOWMAN, WHERE ON FRIDAY 25<sup>th</sup> JUNE 2004 A RULING CLEARLY STATED THAT :  
LETTERS PATENT ISSUED UNDER THE GREAT SEAL OF AUSTRALIA BY HER MAJESTY-QUEEN ELIZABETH 11, QUEEN OF

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<sup>3</sup> Appellant’s submissions page 5.

THE UNITED KINGDOM AND NORTHERN IRELAND. APPOINTING A GOVERNOR GENERAL IN AUSTRALIA HAS BEEN ISSUED INCORRECTLY. FURTHER UNDER THE RULING OF SIR GAVIN LIGHTMAN 9<sup>TH</sup> FEBRUARY 2005, DAVID FITSGIBBON AND HM ATTORNEY GENERAL ALSO IN THE IN THE UK HIGH COURT OF JUSTICE THE COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT IS AN ACT UNDER THE AUTHORITY OF UK PARLIAMENT AND NO LONGER APPLIES TO AUSTRALIA.

IT HAS BEEN FURTHER SAID THAT AUSTRALIA BECAME AN INDEPENDENT NATION IN 1919 AND THE ACT HAS BEEN ULTRA VIRES SINCE 1<sup>ST</sup> OCTOBER 1919.

IN THIS CASE, I WOULD SUBMIT THE GOVERNMENT HAS NO LEGALLY VALID CLAIM TO THE GOVERNANCE OF AUSTRALIA.

NO GOVERNOR GENERAL OR STATE GOVERNOR HAS BEEN LEGALLY APPOINTED UNDER THE ACT OR ANY STATE CONSTITUTION, AS THEY HAVE NOT BEEN AND CANNOT BE APPOINTED BY THE QUEEN OF THE UNITED KINGDOM AND THEREFORE CANNOT GIVE THE ROYAL ASSENT REQUIRED TO ENACT ANY LAW.

THIS BEING THE CASE, THERE IS NO LAW MAKING AUTHORITY AT ALL.  
ONCE AGAIN-HOW CAN I BE AFFECTED BY A LAW THAT CANNOT EXIST.  
VALUATION \$108,000.00 STANDS.”

## Overview

- [9] At the outset, I consider it appropriate in this case to make some comment as to the manner in which the appellant conducted himself before the Court. The appellant has at all times conducted himself respectfully, and has attempted, to the best of his abilities, to abide by all orders and directions of the Court. The appellant consented to an approach in dealing with his argument which was as cost effective to all the parties as possible.
- [10] I have no doubt that the arguments put by the appellant are all honestly held by him. He has made it clear that he is unhappy with the VMA and considers his valuation as his chance to argue against the enforcement of the VMA. Unfortunately for the appellant, just because he honestly holds a view as to what the law of Australia is, his honestly held view does not make it so.
- [11] Having carefully considered all of the relevant authorities,<sup>4</sup> I am in no doubt that the VMA is a valid Act of the Queensland Parliament and applicable to the appellant's land.
- [12] There are a number of key concepts which arise from the authorities which, particularly for the benefit of the appellant, I will deal with in the following paragraphs.

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<sup>4</sup> *Bone v Mothershaw* [2002] QCA 120; *Burns v State of Queensland* [2004] QSC 434; *Wilson v Raddatz* [2005] QDC, Brabazon DCJ, Maryborough, 24 August 2005; *Burns v State of Queensland* [2004] P & E Court, White DCJ, Cairns, 2 August 2004; *Dore v State of Queensland* [2004] QDC, Bradley DCJ, Cairns, 5 August 2004; *Glasgow v Hall* [2006] 042 at para 12; *Watts v Ellis* [2006] QCD 056; *Burns v State of Queensland & Croton* [2006] QCA 235; and *Watts v Ellis* [2007] QCA 234.

## The law making power of the State

[13] For the appellant to succeed in what I consider to be his principal argument, it would be necessary for the law making power of the State with respect to the appellant's land to be limited by ss 30 and 40 of the *Constitution Act 1867*. What this view fails to take into account is the general law making power in the *Constitution Act 1867*. I am in absolutely no doubt that under Queensland and Australian constitutional arrangements the State Parliament has the power to make laws for the "peace, welfare and good government" of the State. As Judge Nase said in *Glasgow v Hall*:<sup>5</sup>

"Australia today is a sovereign nation with supreme law-making power residing in the Commonwealth and State legislatures. There can be no doubt the grant of power to the State to make laws for the 'peace, welfare and good government' of the State includes the power to regulate land clearing in the State. The power to regulate the use of the land does not deny Mr Glasgow's title to the land he purchased. As White DCJ commented in an earlier case, although the ownership of the land is alienated, the land itself is not alienated from the sovereign State of Queensland. Just as the State has power to prohibit the use of Mr and Mrs Glasglow's land to grow illegal drug crop so it has the power to regulate land clearing. Both powers derive from the authority of the State legislature to enact laws for the 'peace, welfare and good government' of the State"

## The contract point

[14] As already indicated, the appellant contends that the Deed of Grant which he holds is a contract with the State Government, and that the only remaining rights the Crown has with respect to his land are those reserved in the Deed of Grant.

[15] In its submissions, the respondent contends that Mr Canaway's argument as to the legal status of a Deed of Grant creating a contract with the State is misconceived. I agree. As the respondent submitted<sup>6</sup> the legal status of a Deed of Grant is a product of the *Land Title Act 1994*. As those submissions noted, s.47(1) of the *Land Title Act* provides that:

"If land is alienated from the State, the deed of grant for the land must be lodged in the land registry."

As the respondent correctly contends, the legal effect of the registration of a Deed of Grant is that, on registration of the deed, an indefeasible title is created for the relevant lot.<sup>7</sup> For completeness, the dictionary (Schedule 2) to the *Land Title Act* defines "deed of grant" to mean "an instrument evidencing the grant of land by the State".

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<sup>5</sup> [2006] 042 at para 12.

<sup>6</sup> See submissions, 4 June 2009 at paras 12 – 18.

<sup>7</sup> See s.47(3) of the *Land Title Act 1994*.

[16] I note that the contentions by the appellant were rejected by the Court of Appeal in *Bone v Mothershaw*,<sup>8</sup> and that numerous decisions of various Queensland courts have confirmed the decision in *Bone v Mothershaw*.<sup>9</sup>

[17] It would also be remiss of me not to note the comments of the Queensland Court of Appeal in the recent decision of *Millmerran Shire Council v Smith & Anor*.<sup>10</sup> Although that case related to a challenge to the validity of the *Integrated Planning Act 1997 Queensland*, and not the VMA, similar arguments were advanced to those under consideration here. As Keane JA (with whom the other Members of the Court agreed) noted:<sup>11</sup>

“The ‘Deed of Grant’ argument is also legal nonsense, which was rejected as such in *Bone v Mothershaw* and *Burns v State of Queensland and Croton*. There is no occasion for this Court to reconsider these earlier decisions which gave the quietus to these legal fantasies.”

### **The ‘New South Wales v The Commonwealth’ argument**

[18] For completeness, it is appropriate to deal with the appellant’s contentions regarding the reasons for judgment of Isaacs J in *New South Wales v The Commonwealth*. I have already set out earlier in these reasons a relevant quote from Isaacs J and it is not necessary to repeat that here.

[19] In perhaps the best way of summarising not only this contention but all the contentions of the appellant, I can do little better than to quote from the decision of McPherson JA in *Bone v Mothershaw*. *Bone v Mothershaw* involved a challenge which related to a notice under chapter 22 of the Brisbane City Council Ordinances by which the Council had made a vegetation protection order in respect of vegetation on specified land owned by Mr Bone. The vegetation on Mr Bone’s land, despite the existence of the notice, was subsequently destroyed and removed, resulting in a conviction of Mr Bone for a contravention of the Brisbane City Council ordinances Mr Bone appealed. McPherson JA stated as follows:<sup>12</sup>

“In a memorable observation, Pollock and Maitland once remarked that English law conceived of land ownership as being “projected on the plane of time”. Vegetation does not grow on the plane of time. But to grant a fee simple estate in land is to confer the largest interest in land that is known to the common law, and one which is said to invest in the grantee “the lawful right to exercise over, upon, and in respect to the land every act of ownership which can enter into the imagination including the right to commit unlimited waste”: *Commonwealth v New South Wales* [1923] HCA 34; (1923) 33 CLR 1, 42 (Isaacs J), recently applied in *Fejo v Northern Territory of Australia* [1998] HCA 58; (1998) 195

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<sup>8</sup> [2002] QCA 120.

<sup>9</sup> I note that in *Burns v State of Queensland and Croton* [2007] QCA 240 at para 11, it was noted that the High Court on 25 June 2003 refused an application for special leave to appeal from the decision in *Bone v Mothershaw*.

<sup>10</sup> [2009] QCA 103.

<sup>11</sup> At para 10.

<sup>12</sup> At paras [17] – [19].

CLR 96, 126. Accordingly, the argument proceeds, for chapter 22 to deny a fee simple owner in Brisbane the right, liberty or power to clear vegetation from his land is inconsistent with the proprietary rights that, under s 6(1) of the *Land Act*, are intended to be conveyed by the Crown to a grantee of a fee simple estate in Queensland, and so is invalid by force of s 31 of the *Local Government Act*.

[18] It is, however, a mistake to suppose that s 6(1) of the *Land Act 1962* is directed to defining the extent of the rights conferred on a grantee of land from the Crown. The section is one of several successive re-enactments of earlier statutory provisions, of which in Queensland the first was the *Crown Lands Alienation Act 1860*; 22 Vic No 1 (1 Pring's Statutes 833). Section 2 of that Act, and comparable provisions of other statutes that applied here before Separation in 1859, represented the culmination of a political struggle with the imperial government over local control of the waste lands of the Crown and the revenue arising from their sale. As sovereign of Australia, the King exercised through the colonial governor as his local representative a prerogative power at common law of granting out parcels of the unalienated land of the Crown that in English legal theory was vested in him in that capacity. The immediate effect of the legislation in question was to supersede the Crown's prerogative by a statutory power to make grants of land, and so to bring its alienation or disposal under the authority of the colonial legislature. The subject is discussed in the reasons for judgment of Windeyer J in *Randwick Municipal Council v Rutledge* [1959] HCA 63; (1959) 102 CLR 54, 71, of Brennan J in the *Tasmanian Dam Case* [1983] HCA 21; (1983) 158 CLR 1, 209-212, and in many historical accounts of the evolution of representative and responsible government in Australia. The royal prerogative is, it is well settled, displaced by legislation that covers the same subject matter: *Attorney-General v De Keyser's Royal Hotel* [1920] UKHL 1; [1920] AC 508, 560. The primary function of s 6(1) and other such legislation is facultative. Its object and effect are to confer on the Crown legislative, as distinct from prerogative, authority to grant waste lands, and so to transfer the power of doing so from the uncontrolled discretion of the Crown to the Governor in Council acting under the direction of the legislature, while at the same time limiting the range of interests that can be granted in such land to those designated in the section. Crown land may be granted, demised or dealt with only "subject to this Act".

[19] In addition to historical considerations like these, a mere reference in a statute to an interest in land that is recognised at common law, such as an estate in fee simple, does not have the effect of transforming that interest, or the rights incidental to it, into statutory interests and rights. If it were so, s 24 of the Australian Courts Act 1828 (Imp) in introducing English law into eastern Australia would have had the effect of converting the whole of the common law received here in 1828 into a body of statute law, which, moreover, would have had the status and force under s 24 of an imperial enactment, with all the consequences which that entailed. Quite plainly, that is not what happened. The common law received in Australia under that Act was received as a body of common law and not of enacted law. A suggestion to the contrary in the Hong Kong case of *Mitchell v Lemm* (1908) 3 HKLR 75, 78, has been rightly condemned by Mr Wesley-Smith as "merely eccentric" (P Wesley-Smith, *The Sources of Hong Kong Law*, at 131, n2). The whole notion is, in any event, opposed to the established view that local laws or by-laws are capable of altering the received English law, as was recognised in *Widgee Shire Council v Bonney* [1907] HCA 11; (1907) 4 CLR 977, 982, 986-987, in the passages referred to above. Otherwise, as it was said in that case, the power to make municipal by-laws would be nugatory. The provisions of chapter 22 prohibiting an owner in fee simple of land from clearing vegetation from his land are no more inconsistent with s 6(1) of the *Land Act 1962*, or with s 14(1) of the current *Land Act 1994*, than are the provisions of the Brisbane City Council ordinances prohibiting, for example, the growing of stinking roger (*tagetes minuta*), the keeping of roosters or reptiles, or the lighting of incinerators on residential land, to name only a few of the many other intrusions effected by local laws upon rights of fee simple owners within the city."

## Conclusion

[20] Taking all of the foregoing into account, it is my view that the respondent has quite appropriately taken into account the impact that the VMA has on the appellant's land

when making the relevant valuation. It follows that the appellant's appeal must be dismissed.

## Costs

[21] The respondent seeks its costs against the appellant, on the basis that the appeal has been either frivolous or vexatious. The respondent, in this regard, relies upon the provisions of s.70(2)(a) of the VLA. Section 70 of the VLA relates to costs of an appeal against a valuation and provides as follows:

### 70 Costs of appeal against valuation

- (1) Subject to subsection (2), each party to an appeal must bear the party's own costs for the appeal.
- (2) The court may only order costs for an appeal, including allowances for witnesses attending for giving evidence at the appeal, as it considers appropriate in the following circumstances—
  - (a) the court considers the appeal, or part of the appeal, to have been frivolous or vexatious;
  - (b) a party has not been given reasonable notice of intention to apply for an adjournment of the appeal;
  - (c) a party has incurred costs because the party is required to apply for an adjournment because of the conduct of the other party;
  - (d) a party has incurred costs because another party has defaulted in the court's procedural requirements;
  - (e) without limiting paragraph (c), a party has incurred costs because another party has introduced, or sought to introduce, new material;
  - (f) a party does not properly discharge the party's responsibilities in the appeal.

[22] In his oral submissions on 20 July 2009, the appellant denied that his appeal was frivolous and vexatious, and expressed the opinion that it was the Government that was acting improperly and not obeying the laws.<sup>13</sup>

[23] I have already commented that, in my view, the appellant is proceeding with his appeal on the basis of an honestly held opinion that he holds. However, that does not mean, that, at law, his appeal is not frivolous and vexatious.

[24] Butterworths Australian Legal Dictionary, 1997, contains a useful summary of the meaning of the term frivolous and vexatious as follows:

**“Frivolous and vexatious**      Insupportable in law; disclosing no cause of action, groundless: *Dey v Victorian Railways Cmrs* (1949) 78 CLR 62 at 91. The phrase is generally used with respect to a statement of claim intended to commence legal proceedings. A court may refuse to allow an action to proceed if it considers the actions to be frivolous and vexatious: (CTH) High Court Rules O 26 r 18; (CTH) Federal Court Rules O 21 r 1; (NSW) Supreme Court Rules Pt 13 r 5. An action may be deemed frivolous and vexatious if it is ‘so obviously untenable that it cannot possibly succeed’, or is ‘manifestly groundless’, or ‘so manifestly faulty that it does not admit of argument’. Similarly, a court may refuse to hear an action where ‘under no possibility can there be a good cause of action’, or it is ‘manifest’ that to allow the pleadings to stand would ‘involve useless expense’: *L Grollo Darwin Management Pty Ltd v Victor Plaster Products Pty Ltd* (1978) 19 ALR 621; 33 FLR 170.”

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<sup>13</sup> See T. 20 July 2009 p.2.

[25] In the circumstances of the matter at hand, it is my view that the appellant's contentions were doomed to failure. It follows that the appeal may properly be classified as frivolous or vexatious. Accordingly, in my view, it is appropriate that I award costs against the appellant.

**Orders**

1. The appeal is dismissed
2. The appellant pay the costs of the respondent, to be agreed, or failing agreement, to be assessed.

**PA SMITH  
MEMBER OF THE LAND COURT**