Supreme Court

New South Wales

Case Name:	Hardy v Sidoti
Medium Neutral Citation:	[2020] NSWSC 1057
Hearing Date(s):	29 and 30 July; 6 August 2020
Decision Date:	12 August 2020
Jurisdiction:	Equity - Real Property List
Before:	Kunc J
Decision:	Plaintiff's claim for possessory title upheld
Catchwords:	LAND LAW - Adverse possession – Actual possession – Claim to remnant of "dunny lane" incorporated into plaintiff's garden – Land converted from old system title to limited title during period of possession but before limitation period expired – Whether plaintiff's rights survived conversion – Whether possessory title provisions of Real Property Act applicable to limited title land – Limitation Act 1969 (NSW), s 27(2), s 65(1) – Real Property Act 1900 (NSW), s 28T(8), s 45C(2)
Legislation Cited:	Limitation Act 1969 (NSW) Real Property Act 1900 (NSW)
Cases Cited:	Braye v Tarnawskyj (As administrator of the Estate of the Late KING) & Anor (2019) 19 BPR 39,213; [2019] NSWSC 277 Powell v McFarlane (1979) 38 P & CR 452 South Maitland Railways Pty Ltd v Satellite Centres of Australia Pty Ltd (2009) 14 BPR 26,823; [2009] NSWSC 716
Texts Cited:	Muir, Lesley, "Shady Acres – Politicians, Developers and Sydney's Public Transport Scandals 1872-1895", Royal Australian Historical Society, Halstead Press,

	2016
Category:	Principal judgment
Parties:	Christopher Luke Hardy (Plaintiff) Council of the City of Sydney (First Defendant) Joseph Geoffrey Sidoti (Second Defendant) Natalie Martinoski (Third Defendant) Androula Theodorou (Fourth Defendant) Theodorou Theodorou (Fifth Defendant) Christopher Theodorou (Sixth Defendant) Jenny Theodorou (Seventh Defendant)
Representation:	Counsel: J Van Aalst (Plaintiff) L-A Walsh (Second and Third Defendants) Solicitors: Wright Law & Justice (Plaintiff) Legal Services - Council of the City of Sydney (First Defendant) Connor & Co Lawyers (Second, Third, Fourth, Sixth and Seventh Defendants)
File Number(s):	2019/342572
Publication Restriction:	No

JUDGMENT

Summary

1 These proceedings concern two very Australian phenomena: the “dunny” and dedication to home improvement. At issue is the ownership of a 3.35 square metre remnant of a “dunny lane” in Redfern, a suburb of historic significance for First Australians and in the development of Sydney as a city.

2 At the end of the 19th century, Redfern suffered from typhoid epidemics “directly attributable to the lack of drainage, airless tenements, and the use of

the cesspit system".[1] Today, according to one writer, the suburb "has succumbed to a tsunami of smashed avocado and man buns".[2] Whatever the truth of that latter statement, those parts of Redfern which feature exquisitely renovated terrace houses are now highly prized Sydney real estate. The vestigial remains of "dunny lanes" are a reminder of a less sanitary past.

3 The plaintiff, Mr Hardy, lives in a terrace house in Baptist Street, Redfern (the "Hardy Property"). The Hardy Property runs east-west, with its backyard garden at the western end, facing Dalley Lane. Attached as Annexure A to these reasons is a not to scale schematic drawing of the back half of the Hardy Property which shows the location of the key physical features referred to in this judgment (the "Schematic"). Mr J Van Aalst of Counsel appeared for Mr Hardy.

4 The second and third defendants (the "defendants") bought a terrace house in Boronia Street, Redfern (the "Sidoti Property"). The two streets form a right angle. The second defendant, Mr Sidoti, is a builder experienced in renovating inner city properties. The Sidoti Property runs north-south, with its backyard at the northern end. Ms L-A Walsh of Counsel appeared for the defendants.

5 The backyard of the Sidoti Property abuts the Hardy Property (the two properties taken in isolation forming a T shape). The rear of the Sidoti Property is burdened by a right of way. The right of way runs east-west along the length of the Hardy Property from Baptist Street in the west to Dalley Lane in the east. It burdens the rear of the seven north-south lots on Boronia Street (including the Sidoti Property) which abut the southern side of the Hardy Property. The right of way is the "dunny lane" which was created when those lots were originally subdivided and developed at the end of the nineteenth century to enable the nightsoil carter or "dunny man" to collect waste from the brick outhouses at the rear of the Boronia Street properties.

6 These proceedings are about so much of the right of way as passes over the rear of the Sidoti Property adjoining the Hardy Property. According to a survey plan attached to the Second Amended Summons, it is approximately 88cm

[1] Lesley Muir, "Shady Acres – Politicians, Developers and Sydney's Public Transport Scandals 1872-1895", Royal Australian Historical Society, Halstead Press, 2016, p 210.
[2] Elizabeth Farrelly, Sydney Morning Herald, 28 April 2017

wide (close enough to 1 yard in Imperial measurement) and 3.81 metres long (making a total of 3.35 square metres of land). At the hearing, this strip of land was referred to as the "Yellow Land" because it was marked in that colour on the survey plan (and is shown as such on the Schematic). Mr Hardy and his then partner bought the Hardy Property in January 1998 by old system conveyance. A limited title under the *Real Property Act 1900* (NSW) (the "Act") for the Hardy Property was issued by the Registrar General in August 1998. At that time, what is now the Sidoti Property (and referred to as such on the Schematic) had been owned by the Theodorou family for 40 years.

7 By January 1998, the Yellow Land was no longer used or usable as a right of way. It had been blocked off at various points, including at the western end of the Yellow Land. It was enclosed by an old paling fence on the northern side which ran along the southern, east-west boundary of the Hardy Property. On the southern side (i.e. 88cm into the Sidoti Property) it was enclosed by an old, corrugated iron fence which was itself in line with the rear of the old brick outhouse on the Sidoti Property. There were gates in each fence, providing access to the Yellow Land from both the Hardy Property and the Sidoti Property.

8 Like his predecessor in title to the Hardy Property, Mr Hardy initially used the enclosed Yellow Land for what he accepted could be described as a "garden tool storage area", storing gardening tools and related items at the western end. However, in May 2002, Mr Hardy took down the old paling fence dividing his backyard from the Yellow Land and an adjoining part of the right of way to the east over land still owned by the Theodorou family (referred to at the hearing and on the Schematic as the "Green Land"). From 2003 to early 2005, Mr Hardy and his then partner proceeded to make improvements to the backyard in a Japanese style extending it into the Yellow Land and the Green Land. By reason of that and other conduct, Mr Hardy's case is that he has acquired the legal title to the Yellow Land by adverse possession.

9 In September 2005, the Registrar General converted the Sidoti Property to limited title.

10 The defendants purchased the Sidoti Property from the Theodorou family in April 2018. The Yellow Land was included on the title as part of the Sidoti Property. As part of the renovation of the Sidoti Property, the defendants demolished the brick outhouse and the old corrugated iron fence which stood on the southern side of the Yellow Land, built a new fence on the northern boundary of the Yellow Land (where the old paling fence had been, and thereby purporting to reclaim the Yellow Land from Mr Hardy) and built a barbeque area on the Yellow Land to form the rear of the backyard of the Sidoti Property.

11 The Court's conclusions may be summarised as:

(1) The Sidoti Property is land under the Act.

(2) Possessory title to land under the Act can generally only be acquired in accordance with the provisions of Part 6A of the Act. If the Act applies in this case, Mr Hardy's case must fail as against the defendants.

(3) The Act does not apply because Mr Hardy's adverse possession of the Yellow Land commenced by no earlier than either May 2002 (with the removal of the old paling fence as the commencement of the extension and landscaping of Mr Hardy's backyard garden) or no later than January 2005 (by which time landscaping was well advanced including laying a weed mat covering the whole area including the Yellow Land and the Green Land and putting granite pavers and some mondo grass on the Yellow Land), and was extant as such when the Sidoti Property was brought under the Act in September 2005. By reason of ss 28U(2) and 45C(2) of the Act, the Act does not prevent Mr Hardy's acquisition of a possessory title by adverse possession of the Yellow Land at common law.

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

(5) Mr Hardy has therefore acquired possessory title at common law to the Yellow Land. He is entitled to orders to recognise that ownership, including that the defendants cease to trespass upon the Yellow Land, and by removing structures they have erected on it and relocating the fence they have built.

Procedural history

12 Mr Hardy's summons filed on 31 October 2019 originally included the Council of the City of Sydney as the first defendant and members of the Theodorou family as the fourth to seventh defendants. That summons sought relief in relation to both Yellow Land and the Green Land.

13 As the proceedings were prepared for hearing, there was debate between the parties about what relief Mr Hardy would finally seek. The proceedings were discontinued against the Council of the City of Sydney at an early stage. In the period shortly before the hearing, Mr Hardy discontinued the proceedings against the Theodorou family for relief in relation to the Green Land. Accordingly, while what Mr Hardy did on and in relation to the Green Land forms part of the evidence relevant to his case in relation to the Yellow Land, the Court's findings are confined to the Yellow Land and what, if any, rights Mr Hardy has in relation to that land against the defendants as registered proprietors of the Sidoti Property.

14 The relief pressed by Mr Hardy was ultimately crystallised in a Second Amended Summons filed in Court on the second day of the hearing and which seeks this relief:

> "1 Declaration that by reason of the plaintiff's adverse possession for a period of about 21 year of that part of lot E in deposited plan XXXXXX coloured yellow and marked (A) , shown in the attached survey sketch by Infocus Surveyors dated 30 October 2019 ("the Survey") , the cause of action by the defendants to recover that part of lot E is not maintainable because of the expiration of the limitation period of twelve years pursuant to s27(2) of the Limitation Act 1969 ("the Act").
>
> 2 Declaration pursuant to s65(1) of the Act that upon the expiration of the limitation period on 8 January 2010 fixed under s27 (2) the cause of action specified in column 1 of schedule 4 of the Act to recover the land described in prayer 1 above was extinguished.
>
> 3 Declaration that the defendants' estate and interest in that part of the right of way burdening lot E (coloured yellow in the Survey), being a limited title for the purposes of Part 4B of the Real Property Act 1900 is extinguished by reason of the plaintiff's adverse possession, as a consequence he has possessory title to that land.
>
> 4 Order that the first and second defendants cause to be removed from the above part of lot E the new paling fence they erected on that land where shown in the above survey sketch by Infocus Surveyors dated.
>
> 5 Order the first and second defendants within 21 days from the date of this order cause to be carried out at their expense such work as is necessary to

erect a similar quality fence to that referred to in order 3 above on the southern boundary of the part of lot E adversely possessed by the plaintiff.

6 Costs."

15 There was also debate between the parties about the adequacy of the relief sought by Mr Hardy in terms of the Torrens register and whether Mr Hardy intended, if he was successful, to seek to register a dealing to show his ownership of the Yellow Land. In that context, the defendants ultimately relied on an Amended First Cross Claim, also filed in Court on the second day of the hearing and which sought this relief:

> "1. A declaration that, on the proper construction of s 45D(4) of the *Real Property Act* 1900, the plaintiff is not entitled to make an application for possessory title of that part of the land contained in Lot E DPXXXXXX marked "A" on the plan prepared by Infocus Surveyors dated 30 October 2019 (described in these proceedings as the "Yellow Land").
>
> 2. An order restraining the plaintiff from lodging with the Registrar-General any plan that purports to include the "Yellow Land" within the boundaries of Lot 1 of DPXXXXXX.
>
> 3. An order that Caveat APXXXXXX be withdrawn.
>
> 4. A declaration that the first and second defendants are entitled to seek the registration of unregistered dealing DPXXXXXX, being a plan of redefinition of the boundaries of Lot E of DPXXXXXX lodged by the defendants with the Registrar-General on 6 November 2019.
>
> 5. Costs.
>
> 6. Such further order as the court see fit."

16 Finally, it is appropriate to note that on the afternoon of the first day of the hearing the parties and their legal representatives had the benefit of a view of the Yellow Land and the Green Land from both the Hardy Property and the Sidoti Property. On the second day of the hearing I said this in relation to the view (T36.14-27):

> "HIS HONOUR: For the benefit of the transcript I record that yesterday the Court and the parties attended a view at the two premises to look at the area in question. The Court thanks the parties and their legal advisors for facilitating that process. I confirm my indication from yesterday that what was said on the view is not evidence but leave is granted to each of the parties to adduce in chief from their respective witnesses any matter which fell from their clients yesterday which they wish to have formally form part of the evidence before the Court.
>
> For the Court's part I simply record that I was assisted in my understanding of the evidence by being able to see the area the subject of the proceedings and the fencing and other surrounding features of the relevant land, and also

> assisted to appreciate the photographs attached to the plaintiff's evidence by being able to actually compare those photographs to the actual locations. …"

The facts

17 With two, ultimately irrelevant exceptions, the facts were not in dispute. Both Mr Hardy and Mr Sidoti were credible witnesses. However, their credit was not in issue because the essential facts were proven either by conveyancing records or Mr Hardy's uncontradicted evidence corroborated by photographs which he had taken over the time of his occupation of the Hardy Property showing the work he had done to his back garden. The Court finds the facts to be as set out in paragraphs [18] to [58] below. Where any reference is made to findings on contentious matters, they are cross-referenced to that part of the judgment where reasons for the findings are given.

18 The Theodorou family purchased what is now the Sidoti Property in 1958. Four years later, they purchased the neighbouring property to the east. This neighbouring property included the Green Land and is referred to in the Schematic as the "Remaining Theodorou Property". In 1969 the Theodorou family moved out of both properties and let them out. Tenants remained in possession of the Sidoti Property until its purchase by the defendants in 2018. Tenants continue to occupy the Remaining Theodorou Property.

19 Mr Hardy and his then partner successfully bid for the Hardy Property at public auction in November 1997.

20 A survey of the Hardy Property dated 16 December 1997 makes no reference to the right of way or the Yellow Land, but includes:

> "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."

21 On 19 January 1998 the deed conveying the Hardy Property to Mr Hardy and his then partner as joint tenants was registered and they moved into the Hardy Property.

22 At the time they moved in, there was an old timber paling fence marking the northern boundary of the Yellow Land and Green Land (marked "B" on the Schematic). Gates provided access from the Hardy Property to the Yellow Land and the Green Land respectively. Although nothing turns on this, I note

for completeness that the Hardy Property was not legally benefitted by the right of way on the Yellow Land and the Green Land. However, the presence of those gates demonstrates that occupants of the Hardy Property predating Mr Hardy's ownership had used the right of way.

23 The evidence was unclear as to whether there was also a fence between the Yellow Land and the Green Land. It seems unlikely this was the case given that both were in the common documentary ownership of the Theodorou family for so many years. However, nothing turns on this because there was no issue that if there had been such a fence, it would have been removed at the same time Mr Hardy caused the old timber paling fence to be taken down (see paragraph [29] below).

24 The western end of the Yellow Land and the eastern end of the Green Land were each blocked off by a paling fence (marked "C" on the Schematic). An old corrugated iron fence (marked "D" on the Schematic) ran along the southern boundary of the Yellow Land and Green Land. Gates in the corrugated iron fence provided access from the Sidoti Property and the Remaining Theodorou Property to the Yellow Land and the Green Land respectively.

25 An old brick outhouse sat inside the Sidoti Property adjacent to the Yellow Land (marked "A" on the Schematic). The Yellow Land was being used by the previous owners of the Hardy Property as what Mr Hardy accepted could be described as a "garden tool storage area" at its western end. He continued that practice using the area marked "G" on the Schematic for that purpose, going onto 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.

26 The Registrar-General converted the Hardy Property from old system title to Torrens title by Conversion Action 7XXXX. Limited folio 1/XXXXXX, comprising the Hardy Property, was registered in August 1998.

27 Up until around 2001 Mr Hardy did not seek to enter the Green Land. By that time he observed it was so filled with rubbish and domestic waste, which he saw accumulate from the tenants and their parties in the Remaining Theodorou

Property, that the old paling fence was leaning from the Green Land into the Hardy Property.

28 Between October 2001 and June 2002 Mr Hardy and his then partner commenced renovating on the Hardy Property. During this period they lived at another property.

29 In early to mid-May 2002, the builder employed by them to do the renovations on the Hardy Property removed the entire old paling fence on the northern boundary of the Yellow and Green Land (including, if there was one, any fence that divided the Yellow Land 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. Around this time the water meter was also relocated from the Yellow Land to the front courtyard of the Hardy Property.

30 In June 2002 Mr Hardy and his then partner moved back into the Hardy Property. They continued to use the western portion of the Yellow Land (marked "G" on the Schematic) to store garden equipment.

31 During 2003 and 2004 Mr Hardy and his then partner undertook work to landscape the back garden of the Hardy Property. By 31 December 2004 this included:

(1) Mr Hardy completing construction of the downstairs bathroom with a large swinging window that opened onto a small boutique Japanese style garden ("E" on the Schematic) enclosed by an L-shaped "semi see-through roll of bamboo screening" (Mr Hardy's description) ("F" on the Schematic) approximately 170cm in height. The screen stood a few centimetres to the north of the Yellow Land (i.e. inside the Hardy Property) and did not run the entire length of the Yellow Land to the east;

(2) Laying some underground irrigation pipes for a watering system including across the Yellow Land and the Green Land in or about August and September 2004.

(3) Laying a weed mat in or about September 2004 across the entire backyard area up to the various boundaries and including across the Yellow Land and the Green Land up to the old corrugated iron fence which formed their southern boundary.

(4) Commencing in about September 2004, laying approximately five granite "railway sleeper" type slabs along the base of the old corrugated iron fence, running along the southern boundary of the Yellow and Green Lands. The sleepers were then used as a footing for a reed

matting screen (which Mr Hardy also referred to as a fence – see paragraph [41] below) that was placed alongside the length of the old corrugated iron fence on the southern boundary of the Yellow and Green Lands to conceal that fence. This effectively closed off the access provided by the gates in the old corrugated iron fence from the Sidoti Property and the Remaining Theodorou Property (as to which see further paragraphs [56] to [58] below). Looking east from the back of the house into the garden, what one saw was a wall of Japanese style reed fencing on both the northern and southern boundaries of the garden.

(5) The laying of granite pavers to provide a floor for the garden. This was well advanced by 31 December 2004 in the main backyard area but not completed in the Yellow Land until early 2005 (see next paragraph). The pavers were not laid into the Green Land, which was landscaped with mondo grass and pine mulch.

32 As part of completing the laying of the pavers, Mr Hardy laid 12 granite pavers in the Yellow Land in early 2005 with a small amount of mondo grass up to the point where the garden equipment was stored. He continued to store garden equipment at the western end of the Yellow Land (at the point shown as "G" on the Schematic).

33 In late September 2005, the Registrar-General converted the Sidoti Property and the Remaining Theodorou Property from old system title to limited title under the Act by Conversion Action 9XXXX.

34 In late 2006 Mr Hardy planted a magnolia tree in the middle of the Green Land (marked as "I" on the Schematic).

35 In January 2007, as a result of his relationship with his former partner ending, Mr Hardy became the sole registered proprietor of the Hardy Property by transfer.

36 Sometime in 2011, due to dilapidation from the weather, Mr Hardy replaced the bamboo screen referred to in paragraph [31(1)] above with "an arrangement of antique Japanese sliding doors". As before, the doors encased the boutique garden in an L-shape and sat just a few centimetres to the north of the Yellow Land.

37 The Sidoti Property was sold by the Theodorou family to the defendants in April 2018. Shortly after acquiring the property, Mr Sidoti lodged a Development Application ("DA") with the Council of the City of Sydney on 7 May 2018. In

respect of the proposed alterations and additions to the Sidoti Property, the DA relevantly identified 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"

38 It was not in dispute that the Council of the City of Sydney had Mr Sidoti's DA on public exhibition between 22 May and 6 June 2018, during which time members of the public were able to make submissions (including any objections) on the proposal. It was also not in dispute that Mr Hardy did not raise any objections - to the boundary relocation specifically or the proposed development more generally – during this consultation period.

39 The parties accepted that as part of its usual assessment process, the Council of the City of Sydney notifies surrounding neighbours and property owners of development applications received, seeking their views on the proposals set out therein. There was evidence to suggest that such a notification would have been prepared in the ordinary course in relation to the Sidoti Property DA. However, it was Mr Hardy's evidence that he did not raise any objections for the simple reason that he did not receive this notification and was not otherwise made aware of the DA until after works on the Sidoti Property had commenced. For the reasons set out in paragraphs [59] to [64] below, the Court accepts Mr Hardy's evidence.

40 Mr Sidoti received notice of approval to his DA on 27 July 2018 and renovation work commenced at the Sidoti Property, initially confined to internal renovations.

41 On 30 October 2018 Mr Sidoti's building foreman left a handwritten note addressed to Mr Hardy under the front door of the Hardy Property. Responding to the note's request for Mr Hardy to contact Mr Sidoti, Mr Hardy sent a text message to Mr Sidoti on 31 October 2018:

> "Hi Joe, this is Luke Hardy at XX Baptist Street. Ok to demolish the toilet out-house and fence at the rear of your property as soon as you need, and even today. Your builder may need to detach and roll back the reed fence I placed there years ago to cover the corrugated iron. If there's time I can do that this afternoon. Otherwise, peel it off. There is also a granite slab or two at the bottom of the fence that might need moving. Cheers, Lh"

42 As will be apparent from paragraph [48] below, Mr Sidoti did not see this text message until several months later. No demolition work was immediately undertaken in relation to the outhouse or the old corrugated iron fence.

43 I also observe in passing that, contrary to a submission put by Ms Walsh (see paragraph [127] below) Mr Hardy's text message agreeing to the demolition of the old corrugated iron fence does not assist the defendants. That agreement went no further than its terms and, Mr Hardy accepted, for the erection of the builders' fence on the line of the old corrugated iron fence. I am satisfied that at this point in time (October 2018) Mr Hardy had not appreciated that the defendants were intending to cross into and incorporate the Yellow Land.

44 In or around December 2018, the renovation work on the Sidoti Property had progressed to external renovation work to the main residence. The Court accepts that it was these alterations and additions that raised Mr Hardy's concerns, so that he made inquiries with the Council of the City of Sydney and first became aware of the DA regarding the Sidoti Property outlined at paragraph [37] above.

45 In late January 2019 renovation work to the rear backyard area of the Sidoti Property began.

46 On or before 1 February 2019 a builder employed by Mr Sidoti, Mary Rose Burrow, attended the Hardy Property to discuss the renovation work in the rear backyard area of the Sidoti Property. The parties accept that Mr Hardy and Ms Burrow discussed the removal of the old corrugated iron fence and installation of a temporary builder's fence "on the boundary of the property". However, the defendants otherwise dispute Mr Hardy's recollection of the conversation deposed to in his affidavit evidence. Relevantly, this included the date of the conversation, that Mr Hardy informed Ms Burrow of his occupation of the Yellow Land "for around 20 years" and that Mr Hardy informed Ms Burrows of a land title registration application in respect of the Yellow Land.

47 For the reasons set out in paragraphs [68] and [69] below, I accept Mr Hardy's evidence of his conversation with Ms Burrow. However, nothing ultimately turns on this finding.

48 In any event, Ms Burrow shortly thereafter relayed a version of the conversation to Mr Sidoti, following which Mr Sidoti sent a text message to Mr Hardy on 1 February 2019:

> "Hi Luke
>
> Joe, Redfern neighbour here.
>
> Rosie sent me your details and just realise (sic) I've previously got this msg from you, sorry. What's your email address ?
>
> I'll send survey through so we both have the same document to talk about and I'm sure we can sort something out
>
> Many thanks
>
> Joe"

49 In the absence of any evidence to the contrary, I am satisfied that the previous message referred to by Mr Sidoti is Mr Hardy's text message of 31 October 2018, set out in paragraph [41] above. I am fortified in this conclusion when considering that despite Mr Hardy's consent to demolish the outhouse and the corrugated iron fence contained therein, these were the very issues Ms Burrows attended upon Mr Hardy on or before 1 February 2019 to discuss.

50 The surveyor's plan referred to in Mr Sidoti's text in paragraph [48] above was emailed to Mr Hardy by Mr Sidoti at 12:30pm on 1 February 2019. The surveyor's plan depicted the Yellow Land as a "right of way variable width", as to which Mr Sidoti said in his covering email:

> "…The existing metal fence that divides our properties is currently within our block of land by approx.. 750mm.
>
> Our actual boundary as per the survey sits against your brick wall. The land in between is a right of way but it sits on our block of land..."

51 On 5 February 2019, Mr Hardy's solicitor sent a letter to Mr Sidoti in which a number of "problematic issues" with the proposal to move the fence dividing the two properties to the northern boundary of the Yellow Land were raised. This included referring to Mr Hardy's intention to make an application to the Registrar General for title to the Yellow Land by adverse possession.

52 It is not necessary for present purposes to detail the correspondence between, and various formal actions taken by, the parties subsequent to that letter. However, it is important to note that sometime between 1 February and 18 March 2019, the defendants' builders removed the old corrugated iron fence

and erected a temporary builder's fence along the southern boundary of the Yellow Land. On 18 March 2019 this was relocated to the northern boundary of the Yellow Land and on 11 April 2019 was replaced with a solid timber fence. It is this fence which now runs along the northern boundary of the Yellow Land and which is one of the items Mr Hardy claims the defendants should remove.

53 In or around early September 2019, the defendants' builders commenced excavation and landscaping work on the Yellow Land, so that the Yellow Land was incorporated into a renovated courtyard space at the rear of the Sidoti Property.

54 All works in the rear courtyard area were completed by early October 2019.

55 These proceedings were commenced by summons filed by Mr Hardy on 31 October 2019.

56 Before leaving the chronological findings of fact, it is convenient to set out an additional finding in relation to access to the Yellow and Green Lands during the period considered above. As was identified in paragraph [24], gates in the old corrugated iron fence also provided access from the Sidoti Property and the Remaining Theodorou Property to the Yellow and Green Lands respectively. Although the old corrugated iron fence running along the Sidoti Property was only demolished in February or March 2019 and remains in situ along the southern boundary of the Green Land, there was no evidence from the parties that either gate had been used to enter the Yellow and Green Lands from the south in the period Mr Hardy has resided in the Hardy Property.

57 A photograph exhibited to both Mr Hardy's and Mr Sidoti's affidavit evidence shows that in around October 2017, the garden at the rear of the Sidoti Property was overgrown and blocked access to the gate in the old corrugated iron fence. Prior to the defendants' purchase of the Sidoti Property in April 2018, there is no evidence that any of the previous tenants entered the Yellow Land. Nor is there any reason why those tenants would have had to go onto the Yellow Land because it led nowhere other than through another gate into the back garden of the Hardy Property. The Green Land was being used by the tenants of the Remaining Theodorou Property for some time as a convenient means of disposing rubbish only. Since around September 2004, the reed

matting screen attached by Mr Hardy alongside the length of the old corrugated iron fence (see paragraph [31(4)] above) remained undisturbed until it was rolled back by Mr Sidoti's builders when they entered onto the Yellow Land. It still remains in place across the Green Land.

58 By reference to the matters set out in the preceding paragraphs, the Court finds that neither gate in the old corrugated iron fence had in fact been used to gain entry across the southern boundary into the Yellow and Green Lands since at least late 2004, and more probably than not, since at least when Mr Hardy and his then partner purchased the Hardy Property in November 1997.

Contested facts

Mr Hardy's receipt of the Council of the City of Sydney notification on the Sidoti Property DA

59 The defendants challenged the plausibility of Mr Hardy's evidence that he did not receive the Council of the City of Sydney notification seeking the views of surrounding neighbours and property owners on the proposals set out in the Sidoti Property DA (see paragraph [39] above). In contending that Mr Hardy had in fact received the notification but failed to take an interest in the proposed DA works at the Sidoti Property, the defendants submitted that his lack of interest demonstrated that Mr Hardy did not have *animus possidendi* in relation to the Yellow Land. Ms Walsh did not contend for any more significant conclusion, such as that Mr Hardy's alleged lack of interest should be taken to have abandoned any right of possession he may have had to the Yellow Land.

60 In support of the defendants' submission, Ms Walsh relied on evidence given by Mr Hardy in cross-examination:

(1) Mr Hardy's purported familiarity with the Council of the City of Sydney's development application process, having lodged a development application for his own renovations carried out in 2002 to 2003 and dealt with neighbour objections to that (see paragraph [28] above);

(2) Mr Hardy received mail at his home address (the Hardy Property) including Council rates notices, and that he said he sometimes did not open mail from the Council; and

(3) When asked if it was possible that he could have received the notification of the Sidoti Property DA and simply did not open it, all Mr Hardy could say was "one could speculate".

61 In cross-examination, Mr Hardy also gave evidence that he had experienced stolen mail in the past. The inference to be drawn from this was that the Council of the City of Sydney notification could have been delivered to the Hardy Property, but was stolen before it was brought to Mr Hardy's attention. In response, Ms Walsh contended that the Court could not accept this "new assertion" given Mr Hardy had specifically addressed the issue of his alleged non-receipt of the notification in his own affidavit evidence (with no reference to stolen mail).

62 Ms Walsh submitted that the Court could not be satisfied that Mr Hardy had not received any notification from the Council of the City of Sydney, especially when the matters set out above were considered in light of the surrounding circumstances of Mr Hardy's "passive stance" taken in the face of the defendants' development works.

63 The onus was on the first and second defendants to establish, on the balance of probabilities, that Mr Hardy had in fact received the Council of the City of Sydney notification. Notwithstanding the matters raised by Ms Walsh in paragraph [60] above, no direct evidence was put before the Court which would support this proposition such as, for example, evidence from a Council officer responsible for such notifications. The defendants have failed to discharge that onus. Accepting (as I do) that Mr Hardy was a witness of truth, I therefore accept Mr Hardy's evidence that he did not receive any notification from the Council of the City of Sydney regarding the Sidoti Property DA.

64 I am fortified in this conclusion by the earnestness of Mr Hardy's actions from December 2018 onwards, being the time Mr Hardy said he first became aware of the DA (see paragraph [44] above). From that time, Mr Hardy made inquiries with the Council of the City of Sydney and retained legal representation. There is no reason to doubt that Mr Hardy would have taken such steps earlier, and participated in the public exhibition consultation process between 22 May and 6 June 2018, if he had in fact received the Council of the City of Sydney notification.

The conversation between Mr Hardy and Ms Burrows on or before 1 February 2019

65 As set out in paragraph [46] above, the parties agree that at some time on or before the morning of 1 February 2019, Ms Burrows, the defendants' builder, attended upon the Hardy Property and had a conversation with Mr Hardy.

66 In her affidavit evidence, Ms Burrows agrees that Mr Hardy and she discussed the removal of the old corrugated iron fence and the installation of a temporary builder's fence in its place. Ms Burrows otherwise denies the recollection of events deposed to by Mr Hardy and the words attributed to her in his affidavit evidence. This included that:

(1) Ms Burrows said "my client [Mr Sidoti] instructed me not only to remove the corrugated iron fence and the last of the brick outhouse but also to erect the temporary builder's fence on the north side of the space";

(2) Ms Burrows said 'Mr Sidoti acknowledged that [Mr Hardy] had taken care of the land for some time but that it was time to take it back';

(3) Mr Hardy informed Ms Burrows that he had occupied the Yellow Land "for around 20 years", there was a process on foot to establish legal clarity in the matter and that pending the outcome of his land title registration application, he was not expecting anyone to erect a fence other than a temporary one in place of the demolished old corrugated iron fence;

(4) Mr Hardy said he would await and accept the outcome of his land title registration application, and Ms Burrows said Mr Sidoti would also do so; and

(5) Ms Burrows said that "either way [Mr Sidoti] had a landscaping plan for his back yard".

67 Ms Burrows was not cross-examined in relation to this conversation. Mr Van Aalst submitted that this was not a conversation that would determine any issue in the proceedings. He was correct in that submission. Ultimately neither party contended that the conversation was relevant. Nevertheless, for completeness, I will deal with the issue.

68 I accept Ms Walsh's submission that there was no reason to think Ms Burrow's was anything other than a truthful witness with no personal interest in the outcome of the proceedings. I also accept the oral evidence of Mr Sidoti that notifying affected neighbours of the need to erect a temporary fence was usual practice during his projects, and such a conversation was therefore not out of

the ordinary. However, these two matters are not incompatible with Mr Hardy's recollection of events.

69 Having considered the competing versions, the Court is satisfied on the balance of probabilities that Mr Hardy's evidence is to be preferred. The conversation was far more important to Mr Hardy than to Ms Burrow. It is no criticism of Ms Burrow to conclude, as I do, that Mr Hardy's recollection of it is likely to be better than Ms Burrow's. However, the determinative objective consideration underlying my view is that, shortly after this conversation, Mr Sidoti sent Mr Hardy a copy of the surveyor's plan so they "both have the same document to talk about" and "can sort something out" (see paragraph [48] above). If the conversation had been limited, as Ms Burrow deposed, to a brief discussion about the removal of the old corrugated iron fence and installation of a temporary builder's fence with no intimation of a dispute from Mr Hardy, Mr Sidoti's text message and subsequent email (see paragraph [50] above) make no sense.

Legal Principles

70 These proceedings require consideration of both the common law of adverse possession and the provisions of the Act.

71 There was no dispute between the parties about the applicable common law principles. Mr Van Aalst placed considerable weight on the decision of Darke J in *Braye v Tarnawskyj (As administrator of the Estate of the Late KING) & Anor* (2019) 19 BPR 39,213; [2019] NSWSC 277 ("*Braye*"). He submitted that case was very similar factually to the case at bar. In *Braye* the plaintiff succeeded in a claim for possessory title over a small strip of land adjoining the plaintiff's land over which the plaintiff had the benefit of a right of way. The conduct which was said to constitute possession adverse to the defendant documentary owner including parking cars, establishing a garden, storing goods, concreting and later pebblecreting the surface.

72 What is clear from the authorities is that each case must turn on its facts. Nevertheless, I respectfully adopt as a convenient summary the statement of relevant principles set out by Darke J in *Braye*:

"31. The much acclaimed judgment of Slade J in *Powell v McFarlane* (1979) 38 P&CR 452 serves as a good starting point. At 470-472 his Honour said:

> "It will be convenient to begin by restating a few basic principles relating to the concept of possession under English law:
>
> (1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.
>
> (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("*animus possidendi*").
>
> (3) Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. In the case of open land, absolute physical control is normally impracticable, if only because it is generally impossible to secure every part of a boundary so as to prevent intrusion. "What is a sufficient degree of sole possession and user must be measured according to an objective standard, related no doubt to the nature and situation of the land involved but not subject to variation according to the resources or status of the claimants": West Bank Estates Ltd. v. Arthur, per Lord Wilberforce. It is clearly settled that acts of possession done on parts of land to which a possessory title is sought may be evidence of possession of the whole. Whether or not acts of possession done on parts of an area establish title to the whole area must, however, be a matter of degree. It is impossible to generalise with any precision as to what acts will or will not suffice to evidence factual possession.
>
> …
>
> Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.
>
> (4) The *animus possidendi*, which is also necessary to constitute possession, was defined by Lindley M.R., in Littledale v. Liverpool College (a case involving an alleged adverse possession) as "the intention of excluding the owner as well as other people." This concept is to some extent an artificial one, because in the ordinary case the squatter on property such as agricultural land will realise that, at least until he acquires a statutory title by long possession and thus can invoke the processes of the law to exclude the owner with the paper title, he will not for practical purposes be in a position to exclude him. What is really meant, in my judgment, is that the *animus possidendi*

> involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.
>
> The question of *animus possidendi* is, in my judgment, one of crucial importance in the present case. An owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession. The position, however, is quite different from a case where the question is whether a trespasser has acquired possession. In such a situation the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite *animus possidendi* and consequently as not having dispossessed the owner."

32. In *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419; [2002] UKHL 30 Lord Browne-Wilkinson, who delivered the leading speech, made it clear that the notion of adverse possession as found in the statutes of limitation was concerned with possession in the ordinary sense of the word. His Lordship stated (at [35]-[36]):

> "From 1833 onwards, therefore, old notions of adverse possession, disseisin or ouster from possession should not have formed part of judicial decisions. From 1833 onwards the only question was whether the squatter had been in possession in the ordinary sense of the word. That is still the law, as Slade J rightly said…
>
> Many of the difficulties with these sections which I will have to consider are due to a conscious or subconscious feeling that in order for a squatter to gain title by lapse of time he has to act adversely to the paper title owner. It is said that he has to "oust" the true owner in order to dispossess him; that he has to intend to exclude the whole world including the true owner; that the squatter's use of the land has to be inconsistent with any present or future use by the true owner. In my judgment much confusion and complication would be avoided if reference to adverse possession were to be avoided so far as possible and effect given to the clear words of the Acts. The question is simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner."

(See also Lord Hope at [69]).

33. At [41] Lord Browne-Wilkinson expressly agreed with what Slade J said about "factual possession" in Powell v McFarlane (supra). In relation to the question of intention to possess, Lord Browne-Wilkinson said (at [42]):

> "…Once it is accepted that in the Limitation Acts, the word "possession" has its ordinary meaning (being the same as in the law of trespass or conversion) it is clear that, at any given moment, the only

> relevant question is whether the person in factual possession also has an intention to possess: if a stranger enters on to land occupied by a squatter, the entry is a trespass against the possession of the squatter whether or not the squatter has any long term intention to acquire a title."

34. Lord Hutton stated (at [76]-[77]):

> "…Where the evidence establishes that the person claiming title under the Limitation Act 1980 has occupied the land and made full use of it in the way in which an owner would, I consider that in the normal case he will not have to adduce additional evidence to establish that he had the intention to possess. It is in cases where the acts in relation to the land of a person claiming title by adverse possession are equivocal and are open to more than one interpretation that those acts will be insufficient to establish the intention to possess. But it is different if the actions of the occupier make it clear that he is using the land in the way in which a full owner would and in such a way that the owner is excluded.:

The conclusion to be drawn from such acts by an occupier is recognised by Slade J in *Powell v McFarlane*, at p 472:

> "If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite *animus possidendi* and consequently as not having dispossessed the owner."

And, at p 476:

> "In my judgment it is consistent with principle as well as authority that a person who originally entered another's land as a trespasser, but later seeks to show that he has dispossessed the owner, should be required to adduce compelling evidence that he had the requisite *animus possidendi* in any case where his use of the land was equivocal, in the sense that it did not necessarily, by itself, betoken an intention on his part to claim the land as his own and exclude the true owner."

In another passage of his judgment at pp 471-472 Slade J explains what is meant by "an intention on his part to … exclude the true owner":

> "What is really meant, in my judgment, is that the *animus possidendi* involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."

35. Reference should also be made to the well-known statement of Bowen CJ in Eq in *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464 at 475, where his Honour stated:

> "Possession which will cause time to run under the Act is possession which is open, not secret; peaceful, not by force; and adverse, not by consent of the true owner. Lord Shaw of Dunfermline, giving the opinion of the Privy Council in *Kirby v. Cowderoy*, discussed the nature and incidents of adverse possession. Adopting earlier judicial observations, he said: "Possession 'must be considered in every case with reference to the peculiar circumstances … the character and value of the property, the suitable and natural mode of using it, the

course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests; all these things, greatly varying as they must under various conditions, are to be taken into account in determining the sufficiency of a possession'."

73 The applicable provisions of the LA are:

> "**27. General**
>
> …
>
> (2) Subject to subsection (3) an action on a cause of action to recover land is not maintainable by a person other than the Crown 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.
>
> (3) Subsection (2) does not apply to an action brought by a person claiming through the Crown and brought on a cause of action which accrues to the Crown.
>
> …
>
> **65. Property**
>
> (1) Subject to subsection (2), on the expiration of a limitation period fixed by or under this Act for a cause of action specified in column 1 of Schedule 4, the title of a person formerly having the cause of action to the property specified opposite the cause of action in column 2 of that Schedule is, as against the person against whom the cause of action formerly lay and as against the person's successors, extinguished.
>
> (2) Where, before the expiration of a limitation period fixed by or under this Act for a cause of action specified in column 1 of that Schedule, an action is brought on the cause of action, the expiration of the limitation period does not affect the right or title of the plaintiff to property specified in column 2 of that Schedule in respect of which the action is brought:
>
> (a) for the purposes of the action, or
>
> (b) so far as the right or title is established in the action. …"

74 Because Mr Hardy's claim is to a section of the Sidoti Property, and the Sidoti Property was converted from old system title to limited title, it is next necessary to set out those provisions of the Act which are relevant to the effect of such a conversion on the parties' rights.

75 The creation of limited folios and the rights attaching to them are governed by Part 4B of the Act. The essence of limited folios, as appears from s 28T of the Act, is to bring land under the provisions of the Torrens title system notwithstanding doubt about the location of its boundaries. In practical terms, this is catered for by recording a notation on the folio pursuant to s 28T(4):

> "(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."

76 Of importance to the present case is s 28T(8) (especially paragraph (a)):

> "(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,
>
> (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."

77 In the ordinary course, upon the creation of a limited folio the registered proprietor of that limited folio would obtain the benefit of the indefeasibility provisions of s 42 of the Act. However, for the purposes of s 28T(8)(a), s 28U(2) otherwise provides:

> "(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."

78 That provision serves a clear and logical purpose in relation to a form of title whose raison d'etre is to deal with the situation where there is doubt about the boundaries of the subject land. To the extent that doubt means that land has been incorrectly included in the limited folio, then the effect of s 28U(2) is that the person who has an interest in the land wrongly included does not lose that

interest to the registered proprietor by reason of the indefeasibility provisions of the Act.

79 However, that is not the end of the matter. The next question is the extent to which Part 6A of the Act ("Possessory titles to land under the Act") applies to land which has been brought under the Act by the creation of the limited folio. Part 4B of the Act does not exclude the application of Part 6A to the land comprised in a limited folio, so Part 6A applies to land comprised in a limited folio by reason of s 28T(8)(a) (see paragraph [76] above).

80 The applicable provisions of Part 6A are:

> "**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. …"

81 The effect of s 45C(1) is that land under the Act can only be the subject of an application for title by possession in accordance with s 45D of the Act: *South Maitland Railways Pty Ltd v Satellite Centres of Australia Pty Ltd* (2009) 14 BPR 26,823; [2009] NSWSC 716. However, s 45C(2) preserves the right of an adverse possessor to acquire possessory title to land which has been brought under the Act in a limited folio "by reason of possession of the land for any length of time commencing before the creation of the folio". The words "any length of time" make it clear that the exception in s 45C(2) applies to land where time is running under the LA at the time the limited folio is created. It does not require the documentary titleholder's cause of action to recover possession to have been extinguished before conversion of the land by the creation of a limited folio. On the other hand, if the adverse possession has not commenced before conversion of the land to a limited folio, then any claim can only be brought to that land under s 45D.

Mr Hardy's submissions

Adverse possession at common law

82 Mr Van Aalst submitted that Mr Hardy had clearly satisfied the requirements to establish at common law a claim of title by adverse possession of the Yellow Land, having continuously and exclusively used the Yellow Land since early 1998 (when Mr Hardy and his former partner first became registered proprietors of the Hardy Property).

83 Mr Van Aalst relied upon Mr Hardy's affidavit evidence and oral testimony to demonstrate the various acts undertaken since 1998 that supported his claim for possession of the Yellow Land. Particular emphasis was placed on 16 colour photographs attached to Mr Hardy's affidavit. All but one were taken by him. These photographs depicted the rear back garden of the Hardy Property and the Yellow and Green Lands at various stages of renovation and

landscaping between January 2003 and December 2018, as well as a photograph of the Sidoti Property in or around October 2017 prior to its sale to the defendants. The photographs also depicted the works undertaken at the rear courtyard area of the Sidoti Property from December 2018, specifically in relation to the removal of the old corrugated iron fence and erection of the new paling fence along the northern boundary of the Yellow Land.

84 At the view conducted at the Hardy and Sidoti Properties on the first hearing day, Mr Hardy spoke extensively to these photographs in explaining the work he had done to his back garden, including to the Yellow Land over the years. Pursuant to the leave I granted to each of the parties to adduce evidence in chief from their respective witnesses of any matter which fell from their clients during the view that they wished to have formally form part of the evidence before the Court, Mr Hardy gave evidence about these photographs on the second hearing day. That evidence, which was not challenged, informed the findings of fact set out in paragraphs [29] to [58] above.

85 Further, it was contended that Mr Hardy's occupation of the Yellow Land (as well as the Green Land) was done *nec vi, nec clam, nec precario*: peacefully, openly and without the agreement of both the Theodorou Family (from January 1998) and the defendants (from April 2018). Mr Van Aalst contended that as a result of all of this work undertaken "over many years", Mr Hardy had "assumed a proprietorial position" concerning the Yellow Land as if it (together with the Green Land) formed part of his whole backyard and an important part of his property.

86 Turning to the prescribed limitation period under s 27(2) of the LA, Mr Van Aalst submitted that Mr Hardy's adverse possession of the Yellow Land had commenced running in early 1998, when his former partner and he first became registered proprietors of the Hardy Property. As such, the limitation period of 12 years expired sometime in early January 2000.

87 Against the possibility the Court was not satisfied Mr Hardy had shown the requisite degree of physical custody and control over, and the requisite *animus possidendi* toward, the Yellow Land since 1998, it was alternatively submitted that even if the period of adverse possession was taken to run from mid-2002

(when the old paling fence was removed), the limitation period expired sometime in mid-2014.

Application of the Act

88 If Mr Hardy was successful in establishing his claim for adverse possession at common law, Mr Van Aalst submitted that his client would seek to have the Yellow Land incorporated into the Hardy Property by a delimitation plan in relation to the limited folio. He submitted this was not a case for a possessory application because Part 6A of the Act did not apply to the current proceedings. Rather, because the Sidoti Property was a limited folio, then pursuant to s 28T(4) of the Act the case at bar involved only consideration of matters governed by Part 4B of the Act.

89 Mr Van Aalst contended in the alternative that if Mr Hardy were to make an application for possessory title, this would have turned on s 28U(2) of the Act. If the Court accepted Mr Hardy had demonstrated his adverse possession over the Yellow Land, there existed in effect a wrong description of the boundary in the limited folio of the Sidoti Property, which incorrectly (it was submitted) shows the Yellow Land as being part of the defendants' land. This being the case, the Register General's conversion of the Sidoti Property to a limited folio in September 2005 and the defendants' subsequent purchase of that land for value in April 2018 cannot operate to defeat Mr Hardy's benefit of possession. In such circumstances, the indefeasibility of title provision under s 42(1) of the Act was not engaged.

90 In the further alternative, Mr Van Aalst submitted that in the event Part 6A of the Act did apply to land comprised in a limited folio, Mr Hardy had the benefit of the exception in s 45C(2). That is, based on the evidence before it, the Court would be satisfied that Mr Hardy's possession of the Yellow Land commenced prior to the Sidoti Property's conversion to a limited folio in September 2005, so that Mr Hardy's period of adverse possession thus accumulated up to that point was protected and continued to run. The engagement of s 45C(2) took the proceedings outside the operation of s 45D of the Act. Mr Van Aalst did ultimately accept in the course of argument that Mr Hardy could not succeed if his claim had to rely on s 45D.

The defendants' submissions

Adverse possession at common law

91 It was the defendants' submission that Mr Hardy's claim at common law of adverse possession of the Yellow Land must fail because:

(1) Mr Hardy was unable to show a sufficient degree of physical custody and control of the Yellow Land;

(2) Mr Hardy was unable to show the requisite *animus possidendi* – being his intention to exclude the world at large; and

(3) As a consequence of the matters in (1) and (2), Mr Hardy had failed to satisfy the limitation period provided in s 27(2) of the LA for a continuous and uninterrupted period.

92 Turning first to Mr Hardy's physical custody and control of the Yellow Land, Ms Walsh accepted that physical custody and control of land is measured according to an objective standard, which will depend on the particular circumstances of the case, "in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed": *Powell v McFarlane* (1979) 38 P & CR 452 at 471 and 472. However, she submitted that the Court's inquiry should be confined to the Yellow Land and that what had been done in relation to the Green Land or the rest of the back garden was irrelevant.

93 In her written submissions on behalf of the defendants, Ms Walsh set out in detail at paragraphs 25 and 27 of those submissions the acts of Mr Hardy which purportedly went to his use of the Yellow Land. Those matters are reflected in the findings set out at paragraphs [29] to [36] above.

94 Ms Walsh did not dispute that the acts asserted by Mr Hardy occurred. Rather, she gave them a very different emphasis to that contended for by Mr Van Aalst in order to make the case that Mr Hardy's acts of possession were incremental over time, were of a makeshift and non-permanent nature and were for the purpose of improving the amenity of his own land (specifically the back garden of the Hardy Property), rather than to secure possession of the Yellow Land. She submitted, for example:

> "25 …
>
> g. His installation for the boutique garden and L-shaped partition was for the purpose of privacy and enhancing the view of his own garden from his

> bathroom window so as to create an aspect that was "more intimate and enclosed";
>
> h. He "later" partially paved the area known as the Yellow Land with granite tiles and ornamented mondo grass; …
>
> 27 …
>
> e. Some time in December 2004, he ordered "cut to size" concrete pavers yet at that time he was still deciding where he intended to lay them. (The plaintiff's claim that he cut the pavers "to size" is inconsistent with his simultaneous claim that he had not yet decided where to place them – his evidence was that he was "umming and ahhing" as to where he wanted to place them, therefore his assertion that he had them "cut to size" does not make sense); …
>
> h. … In his oral evidence, the plaintiff sated that his use of the Yellow Land was infrequent, the plaintiff stating that he only ever accessed the Yellow Land either to pat this pet cat at times when the cat had chosen to wanted into that area, or else to occasionally access garden equipment; …"

95 In addition to the insufficiency of Mr Hardy's purported acts of possession of the Yellow Land, the defendants also submitted that Mr Hardy had failed to show the required intention to exclude the world at large, including the owner with the paper title (being the defendants from April 2018). This was said to be clearly apparent when considering "key events that, in the ordinary course of dealing, would reasonably have been expected to provoke protest and/or some kind of physical action" on the part of Mr Hardy, so as to exclude the defendants' attempts to reclaim possession of the Yellow Land.

96 These can be broadly summarised as seven alleged failures to act on the part of Mr Hardy.

97 First, Mr Hardy failed to take an interest in the DA works being undertaken at the Sidoti Property until in or around December 2018. This included his failure to lodge or otherwise make known any objection to the DA works being carried out at the Sidoti Property, notwithstanding Mr Hardy's:

(1) Knowledge that the Sidoti Property had been sold to a new proprietor in April 2018;

(2) Own familiarity with the development application process (see paragraph [60(1)] above); and

(3) Own affidavit evidence that he had first noticed "some months after" April 2018 internal renovation work commencing at the Sidoti Property.

98 Further, and in any event, Ms Walsh emphasised that Mr Hardy's own affidavit evidence indicated that even when he did raise his concerns over the Sidoti

Property DA works with the Council of the City of Sydney, it was because particular aspects of these works were "intrusive" and threatened his privacy (as opposed to his purported possession of the Yellow Land).

99 Second, Mr Hardy failed to immediately make enquiries about the extent of the defendants' DA works following receipt of the handwritten note from the Sidoti Property's site foreman on 30 October 2018 (and in fact sent a text message to Mr Sidoti granting permission to remove the corrugated iron fence and reed covering – see paragraph [41] above);

100 Third, Mr Hardy failed to take any steps to ensure the fence replacing the old corrugated iron fence or the pavers laid over part of the Yellow Land would be reinstated by the defendants, or replaced in the same location, even though Mr Hardy was aware as early as December 2018 of the "precise nature" of the approved works that were being carried out as part of the defendants' development consent.

101 Fourth, Mr Hardy failed to take any steps prior to 5 February 2019 (being the date Mr Hardy's solicitor wrote to Mr Sidoti – see paragraph [51] above) to raise any objections to the Sidoti Property DA works or to make known in clear and certain terms his intention to claim possession of the Yellow Land. This was almost a year after the defendants had become the registered proprietors of the Sidoti Property. Moreover, it was Ms Walsh's submission that prior to 5 February 2019, Mr Hardy had in fact encouraged an impression that he no longer wished to make a claim of possessory title of the Yellow Land. This impression was supported by Mr Hardy's failures to act (as set out in the preceding paragraphs), and reflected in a letter sent from Mr Sidoti to Mr Hardy on 13 September 2019, in which the defendants noted their assumption that Mr Hardy's previously stated position 7 months earlier concerning possession of the Yellow Land had "gone away".

102 Fifth, to date Mr Hardy has failed to take any abatement action of a kind that would be consistent with his claim right of possession of the Yellow Land.

103 Sixth, to date Mr Hardy has failed to lodge an application for possessory title of the Yellow Land, despite numerous threats to do so since 5 February 2019.

104 Finally, to date Mr Hardy has failed to obtain a properly prepared plan of redefinition of the Hardy Property that includes the Yellow Land within the title boundaries. In contrast, the defendants have obtained and lodged a plan of redefinition of the Sidoti Property, consideration of which has been suspended by Land Registry Services pending the outcome of these proceedings.

105 Ms Walsh submitted that the evidence was far from clear as to precisely when Mr Hardy says his acts of possession reached a sufficient threshold (if at all) to enable the accrual of the requisite limitation period of 12 years. This was said to be particularly the case in circumstances where the alleged acts of possession occurred incrementally over time and where Mr Hardy's purported use of the Yellow Land "was at all times minimal and infrequent". Because the Court cannot be satisfied as to when accrual of the limitation period in fact commenced, the defendants argued that Mr Hardy had failed to prove that the limitation period in s 27(2) of the LA had been reached.

Application of the Real Property Act

106 Ms Walsh submitted that even if Mr Hardy's claim of common law adverse possession was made out, such findings could not be applied in the "real world" as he was precluded from making an application for possessory title against the defendants due to the operation of s 45D(4) of the Act. Unlike the position put by Mr Van Aalst, Ms Walsh readily accepted that Part 6A of the Act applied and submitted it was the only way in which Mr Hardy could perfect his claim.

107 Ms Walsh accepted that the critical issue was whether time was running on Mr Hardy's adverse possession of the Yellow Land at the time of the conversion of the Sidoti Property in September 2005. For the reasons set out in paragraphs [92] and following above, the defendants contended that the Court could not be satisfied Mr Hardy was already in adverse possession of the Yellow Land at this juncture, and that consequently Mr Hardy did not get the benefit of s 28U(2) of the Act.

108 Ms Walsh contended that Mr Hardy's application therefore fell to be considered pursuant to the provisions in s 45D of the Act. Relying on s45D(4), Ms Walsh submitted that once the defendants became registered as proprietors of the

Sidoti Property on 18 April 2018 without fraud and for valuable consideration (those being "uncontroversial facts"), time on Mr Hardy's adverse possession of the Yellow Land started to run afresh. As such, Mr Hardy could receive no credit under the Act for any prior periods of possession (which again were themselves disputed by the defendants). Pursuant to s 45D(4) of the Act, the only relevant period of adverse possession of the Yellow Land that could be advanced by Mr Hardy was the period *after* 18 April 2018, when the accrual of the limitation period recommenced. On such calculation, Mr Hardy clearly failed to satisfy the requisite limitation period of 12 years under the LA.

109 In response to Mr Van Aalst's submission that s 28U(2) of the Act engaged the exception to indefeasibility in s 42(1)(c), Ms Walsh submitted that because Mr Hardy had not established adverse possession, the Court could not be satisfied there was a wrong description of the boundaries included in the Sidoti Property folio. Accordingly, it was the defendants' position that they had obtained indefeasibility of title over the land recorded in the limited folio (including the Yellow Land) on becoming registered proprietors on 18 April 2018.

110 Turning finally to the application of s 45C, the defendants did not accept that Mr Hardy received the benefit of subsection (2). On their behalf, Ms Walsh submitted that s 45C(2) must be read subject to s 45D(4) because any other construction would be unfair to any new purchaser who would expect in purchasing land under the Act that any adverse possessor could only succeed if they could satisfy s 45D(4).

Consideration

111 It will be apparent from the recitation of the legislative provisions set out in paragraphs [74] to [81] above that the essential factual and legal issue is whether Mr Hardy had been in "possession of the [Yellow Land] for any length of time commencing before the creation of the [limited] folio" over the Sidoti Property on 21 September 2005 for the purposes of s 45C(2) of the Act. At the forefront of Mr Van Aalst's case was the proposition that Part 6A did not apply to land contained in a limited folio. For the reasons set out in paragraph [79] above, the Court rejects that submission. Mr Van Aalst ultimately did not dispute that if Mr Hardy's rights were confined to s 45D of the Act, the claim

would fail for reasons including that the Yellow Land was not a whole parcel of land (s 45D(1)(a)), was not a residue lot (s 45D(2A)) and that the whole of the limitation period had not run against the defendants (s 45D(4)(b)).

112 In order to succeed, Mr Hardy had to satisfy the Court that his possession of the Yellow Land for the purposes of the LA and s 45C(2) of the Act had been extant for a period of time up to and including when the Yellow Land was converted to a limited folio. This would then engage Mr Van Aalst's alternative proposition that s 45C(2) of the Act would apply to preserve Mr Hardy's common law claim for possessory title. For the reasons which follow, the Court finds for Mr Hardy on this point and in relation to his claim generally.

113 In turning to the question of possession of the Yellow Land, as a preliminary point the Court disposes of Ms Walsh's submission that the Court should focus solely on what Mr Hardy did in relation to the Yellow Land and take no account of what he did on the Green Land. That submission invites an impermissibly unrealistic and artificial approach. In determining both the questions of actual possession and *animus possidendi*, it is necessary for the Court to take into account what Mr Hardy did on the Yellow Land in and for itself but also in relation to the Green Land and the rest of his backyard generally.

114 To borrow a term from another field of legal discourse, there was no dispute between the parties about what might be called the "overt acts" said by Mr Van Aalst to constitute his client's possession of the Yellow Land and to demonstrate that possession was undertaken with an intention to possess against the world, that is to say *animo possidendi*. The Court's findings in relation to those acts are set out in paragraphs [29] to [36] above. The difference between the parties was that it was submitted for Mr Hardy that those acts were sufficient to make out his claim, whereas it was said for the defendants that they were insufficient.

115 The starting point of the analysis is, to borrow the language of Slade J (see paragraph [72] above), to recall that "what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed". There was no dispute that at some point of time before Mr

Hardy's occupation of his property commenced, use of the Yellow Land for its original purpose as a right of way providing a "dunny lane" had ceased. When Mr Hardy and his then partner acquired the Hardy Property, the Yellow Land was a derelict, land locked, fenced in area of dirt less than 1 metre wide and 3.8 metres long. It contained the water meter for the Hardy Property and the western end was being used to store gardening equipment from the Hardy Property.

116 The Court has no difficulty in concluding that at the time Mr Hardy acquired his property, no one other than the proprietor of the Hardy Property was using the Yellow Land for any purpose or attempting to traverse it. As I discuss further below (see paragraph [127]), this situation continued until 2018 when the defendants did their work on the Sidoti Property. These findings are based on Mr Hardy's own evidence of what he saw, together with an inference drawn from two matters. First, there is no suggestion in the evidence that the tenants in the Sidoti Property would ever have had any reason to attempt to enter upon the Yellow Land. Second, there was in evidence a photo taken in 2017 looking to the rear of the Sidoti Property which demonstrates how overgrown the back of that property abutting the old corrugated iron fence had become. It was impassable. I am satisfied on the balance of probabilities that at all material times the vegetation abutting the southern side of the old corrugated iron fence would have made the Yellow Land inaccessible from the Sidoti Property in any event, even if the tenants had wanted to get through to it, without a real effort to cut through the vegetation.

117 These findings about the nature and use of the Yellow Land mean that for the purposes of the analysis of possession and *animus possidendi*, relatively little use would be sufficient to establish the requisite degree of possession and from which *animus possidendi* could be inferred. Having said that, merely continuing to use the Yellow Land to store garden equipment might, at its highest, establish possession but be equivocal on the question of *animus possidendi*.

118 The Court finds that the definitive and public act of possession done *animo possidendi* over the Yellow Land and the Green Land (insofar as conduct in

relation to the latter informs the finding in relation to the Yellow Land), was when Mr Hardy caused his contractor to remove the old paling fence in May 2002 from both pieces of land. Any reasonable observer, seeing that conduct, would have understood that to be the point at which Mr Hardy incorporated the Yellow Land and the Green Land *animo possidendi* into his back garden.

119 If the conclusion I have expressed in the preceding paragraph is wrong, because the removal of the fence in and of itself might be considered insufficient for the claiming of possession and the demonstration of *animus possidendi*, then the Court is well satisfied that the accumulation of the steps set out in paragraphs [31] and [32] above constituting the landscaping of the back garden (including laying a weed mat over the whole surface of the original back garden and the Yellow Land and the Green Land) and concluding in the laying of the pavers and planting some mondo grass in the Yellow Land in January 2005, clearly demonstrates both possession of the Yellow Land and that the possession was undertaken *animo possidendi*. Again, by that time, any reasonable observer looking into Mr Hardy's backyard would have seen a cohesively and comprehensively landscaped back garden (including the Yellow Land and the Green Land) intended to be enjoyed by Mr Hardy as the registered proprietor of the Hardy Property and to the exclusion of all others.

120 In relation to this conclusion, I make five further points in response to Ms Walsh's submissions.

121 First, I do not accept Ms Walsh's submission that, at the end of the process, the Yellow Land was no more than an area covered with some pavers and used for the storage of gardening equipment, such that the threshold for possession had not been reached. Again to borrow the language of Slade J (see paragraph [72] above) "what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so". A side lane used for little more than access and storage of garden equipment is a common feature of many backyard gardens and is no less part of the garden because of its limited and infrequent use. That

limited and infrequent use is dictated by its physical shape, and is no less a part of someone's backyard for that.

122 Second, I do not accept Ms Walsh's submission that Mr Hardy did not take possession because he did not seek to exclude the documentary title holder by taking physical action such as locking the gate in the corrugated iron fence. As I have already observed (see paragraph [117] above), the extent of conduct, including steps taken to exclude the owner, depends on the circumstances. In this case, there is no evidence of the Theodorou family or, more pertinently, their tenants, ever attempting to gain access to the Yellow Land since Mr Hardy had bought his property, assuming they could get through the vegetation that had grown on their (southern) side of the old corrugated iron fence (see paragraph [116] above).

123 If the documentary owner has shown little or no interest in ever using the land subject to the possessory claim, then in the circumstances of a case such as this, very little, if anything, is required to demonstrate an exclusion of the documentary owner. In this case, the Court is satisfied that requirement is met by Mr Hardy having run the granite footings along the bottom of the corrugated iron fence and erecting the reed mat screen along the entire length of the old corrugated iron fence. This necessarily had the effect of preventing ingress to the Yellow Land from the Sidoti Property through the gate in the old corrugated iron fence. To have got through the gate onto the Yellow Land would have required the entire reed matting screen to be pushed over. This is in fact what occurred when the defendants took down the old corrugated iron fence to gain access to the Yellow Land: it was necessary to push down and roll away the reed matting screen. Nor do I think that the fact that the reed matting screen was affixed by ties (rather than something more) derogates from the conclusion which I have reached.

124 Third, I do not accept Ms Walsh's submission that the work which Mr Hardy had undertaken in and around the Yellow Land up to and including the paving of the Yellow Land in January 2005 was motivated by aesthetic and privacy considerations rather than any factual or intentional possession of the Yellow Land. Looking at the issue realistically, beautification and possession were

inseparable. Mr Hardy had to possess it in order to beautify it, and beautified it as a demonstration of his possession.

125 Fourth, Ms Walsh submitted that the Court should not accept Mr Hardy's express evidence that in doing what he did to the Yellow Land and the Green Land, he intended to possess them to make them his own. As I have already recorded, I accept Mr Hardy as a witness of truth and accept his evidence. In any event, his express, subjective evidence merely fortifies a conclusion which the Court in any event draws from the objective acts recorded in paragraphs [29] to [32] above. On the basis of those facts the Court finds both that Mr Hardy was in possession the Yellow Land and did so *animo possidendi*.

126 Fifth, those same acts are the basis for the Court's rejection of Ms Walsh's submission that the Court could not infer *animus possidendi* by reason of the seven "failures to act" set out in paragraphs [97] to [104] above. Mr Hardy's activities in and about the Yellow Land recorded in paragraphs [29] to [32] above are sufficient to demonstrate, as the Court finds, *animus possidendi* in relation to the Yellow Land. Given the Court accepts Mr Hardy did not receive notification of the DA, his "failures to act" such as they may have been are insufficient to negative a finding of intention to possess based on what he had in fact done.

127 Knowledge of the mere fact that the Sidoti Property had been bought by the defendants in April 2018 would not warrant Mr Hardy doing or saying anything to them about the Yellow Land. I have dealt with the effect of Mr Hardy's text message in October 2019 in paragraph [43] above. It was reasonable and understandable for him to have done nothing until he saw the external backyard works on the Sidoti Property in around December 2018 and for him then to become concerned and make inquiries of the Council of the City of Sydney. The fact that at that point his concerns were about privacy does not assist the defendants. The Court accepts Mr Hardy made his claim to the Yellow Land known to Ms Burrow on or before 1 February 2019 and that the solicitors' correspondence was initiated on 5 February 2019. Assuming it was relevant, his failure to make a possessory application is explicable because his legal advisers maintain his is not a case subject to s 45D of the Act.

128 Based on the foregoing, the balance of the Court's conclusions may be concisely recorded:

(1) Mr Hardy was in continuous possession of the Yellow Land *animo possidendi* adverse to the documentary owner of the land (then the Theordorou family) commencing, at its earliest, with the removal of the old paling fence in May 2002 or, by no later than January 2005 when the works in his back garden which Mr Hardy had undertaken had culminated in the paving of the Yellow Land and its continued use as storage for gardening equipment as part of the total renovation of his back garden.

(2) For the purposes of the LA and more generally, Mr Hardy's possession of the Yellow Land was not by force, was overt and without the permission of the documentary land owners (*nec vi, nec clam, nec precario*) for an uninterrupted period commencing no earlier than May 2002 and no later than January 2005 up to and including early 2019 when the defendants took down the old corrugated iron fence.

(3) When the Sidoti Property was brought under the provisions of the Act by the creation of a limited folio in September 2005, Mr Hardy had been in possession of the Yellow Land for the purposes of s 45C(2) of the Act since at least January 2005 (and as early as May 2002) so that, by reason of s 45C(2) of the Act, Mr Hardy's claim to possessory title to the Yellow Land is not subject to the prohibition in s 45C(1) of the Act. Therefore, Mr Hardy is able to acquire possessory title to the Yellow Land at common law rather than pursuant to s 45D of the Act.

(4) The deposited plan by reference to which the limited folio for the Sidoti Property was created included the Yellow Land. At the date of creation of that limited folio, Mr Hardy had possessory title to the Yellow Land. Therefore, the inclusion of the Yellow Land in the deposited plan in the limited folio for the Sidoti Property was an incorrect inclusion of the Yellow Land by a wrong description of boundaries for the purposes of s 28U(2) of the Act. By reason of that provision, the inclusion of the Yellow Land in the limited folio did not engage the indefeasibility provisions of the Act to defeat Mr Hardy's possessory interest in the Yellow Land adverse to the title of the Theodorou family as the then registered proprietors.

(5) Pursuant to s 27(2) of the LA, the Theodorou family's cause of action to recover the Yellow Land from Mr Hardy was not maintainable as early as May 2014 and by not later than January 2017. By reason of s 65(1) of the LA, the Theodorou family's title to the Yellow Land was extinguished no later than January 2017.

(6) It follows from the preceding sub-paragraph that when the Theodorou family purported to convey title to the Sidoti Property, including the Yellow Land, to the defendants in April 2018, they did not have any right, title or interest in the Yellow Land that they could transfer to the defendants. Mr Hardy's possessory title to the Yellow Land continued

undisturbed notwithstanding the transfer of the Sidoti Property to the defendants.

(7) By demolishing the old corrugated iron fence, building a new fence where the old paling fence had been and erecting structures on the Yellow Land, the defendants have trespassed upon the Yellow Land to which Mr Hardy was solely entitled by possession.

Conclusion

129 Mr Hardy has succeeded in his claim to the Yellow Land. It follows from what I have set out in paragraph [128] above that Mr Hardy is entitled to a declaration of his ownership of the Yellow Land and to orders that the defendants bring their trespass to an end by, at their expense, removing the fence and structures which they have erected on the Yellow Land and building a new fence where the old corrugated iron fence had stood.

130 Mr Hardy will be able to formalise his entitlement to the Yellow Land under the Act by lodging an appropriate delimitation plan pursuant to s 28V of the Act, including a survey which shows the Yellow Land as part of the Hardy Property. In discussing this possible eventuality with counsel at the end of the hearing, the parties agreed that no particular orders would be required to enable this to happen. Ms Walsh confirmed that if her clients were unsuccessful against Mr Hardy, they would not stand in the way of him lodging a delimitation plan incorporating the Yellow Land into the Hardy Property.

131 The Court will give the parties an opportunity to agree short minutes to give effect to these reasons, including as to costs. The amended first cross claim will be dismissed. Subject to hearing the parties, the Court's provisional view is that costs should follow the event so that the defendants should pay Mr Hardy's costs of the proceedings.

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Hardy v Sidoti - Annexure A - Schematic (293678, pdf)

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