41/81

IN THE PRIVY COUNCIL No. 38 of 1980

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT
OF SOUTH AUSTRALIA

BETWEEN:

SOUTHERN CENTRE OF THEOSOPHY INCORPORATED (Plaintiff) Appellant

- and -

THE STATE OF SOUTH AUSTRALIA (Defendant) Respondent

CASE FOR THE APPELLANT

Record

NATURE OF PROCEEDINGS

1. This is an appeal from a decision of the Full Court of the Supreme Court of South Australia (King C.J., Zelling and Wells JJ.) given in May 1979 upholding an appeal by the State of South Australia from the judgment of Walters, J. delivered in August 1978 in favour of the plaintiff in the action.

2. The appellant is the registered proprietor of a perpetual lease from the Crown of about 500 acres of land adjoining Lake George in South Australia. Lake George lies at the eastern boundary of the land. The high-water mark of the lake has gradually receded over the years. The present action was brought by the plaintiff in order to establish its entitlement to the land between the original high-water mark and the present high water-mark or, to put the matter slightly differently, that its land still has a water frontage.

3. The appellant's claim was for a declaration that the high-water mark of Lake George forms the eastern boundary of the land comprised and described in the Crown Lease and that accretions of land east of the original high-water mark form part of the land comprised and described in the Crown Lease. The appellant also claimed consequential relief. The claim succeeded before Walters J. The State of South Australia's appeal to the Full Court of South Australia was unanimously upheld. pp. 2 - 4

THE FACTS

4. In about 1879 the south-east of the colony of South Australia was divided into "hundreds". The Hundred Plan exhibit

Record

Exhibit No. 4

P4 was originally prepared in 1879. Between 1879 and 1889 the Government Surveyor, Stephen King, made a survey for the purpose of dividing the relevant hundred into "sections". By December 1889 the Hundred Plan, which was a public map, had the sections which are shown on the exhibit marked out on it. One of those sections was section 16 SW. The western boundary of that section is shown on the Hundred Plan as adjoining a government road. The eastern boundary was marked out by a thick line which corresponded with (and was described in Surveyor King's field notes and diagrams as) the high-water mark of Lake George. Surveyor King had surveyed the high-water mark and he described the boundary of the section in his notes as high-water mark. It is not possible by reference to the Hundred Plan alone to plot the precise boundaries of Section 16 SW. A surveyor would have to go back to the field notes and diagrams or Surveyor King to do that.

Exhibits Nos. 5 and 6

Exhibit No. 3

5. By Indenture bearing date the 9th of December 1889 the Crown granted Right of Purchase Lease No. 198 in relation to "all that piece or parcel of land containing by admeasurement five hundred (500) acres or thereabouts being Section No. 16 SW situate in the Hundred of Lake George County of Grey in the Province aforesaid as the same is delineated in the public maps deposited in the Land Office in the City of Adelaide".

6. On the 27th day of September 1911, Right of Purchase Crown Lease No. 198 having been surrendered, the appellant's predecessor in title was granted, as from the 1st of April 1910, Crown Lease Perpetual No. 11887 Register Book Volume 584 Folio 12. The description of the land the subject of the lease is identical with the description of the land the subject of Right of Purchase Lease No. 198. The appellant became the registered proprietor of the perpetual lease in 1972.

Exhibit No. 1

Exhibit No. 2

Exhibit No. 4

7. The Hundred Plan had been revised in irrelevant respects and a new Hundred Plan had been certified in 1906. The Hundred Plan which was in existence in 1910 was, so far as is presently relevant, in the same form as the Hundred Plan that had existed in 1889. In particular, it employed the same method of designation of Section 16 SW.

8. The perpetual lease was granted pursuant to the Crown Lands Act 1903. Part V Division III of that Act regulates the grant of Perpetual Crown Leases. For the purposes of these proceedings the only relevant provision of that Division is Section 41, which provides:-

> "41. Perpetual leases shall vest the land leased in the lessee in perpetuity, and shall contain the provisions for rent and the reservations, covenants and conditions set forth in the Fifth Schedule, subject to such modifications thereof or additions thereto and such other provisions as the Governor shall think fit, together with a right of re-entry, and shall be read and construed as if any reservations, covenants and conditions in the form of the Fifth Schedule had been expressed in the extended form in the Sixth Schedule and the lessee and all persons entitled to any benefit of the lease shall be bound thereby."

p. 37, l.50 - p. 38, l.5

9. Lake George is a large inland lake. It is a salt or brackish body of water which is navigable by small craft such as boats used by

fishermen who catch fish in the open sea and in the lake itself. The lake is affected by tidal influences arising from currents in the lake and by the inflow of tides which ebb and flow into the lake from the open sea by means of a channel from Lake George to the open sea.

10. There has been gradual accretion of land to the east of the original eastern boundary by reason of windswept sand and longshore drift. There is now an area of land between the originally surveyed and existing high-water marks which Zelling J. calculated as being approximately twenty acres. The southern part of the accretion is due entirely to windswept sand and comprises sand dunes. The northern part of the accretion is different in character comprising very low lying beach sand. There was a substantial issue of fact at the trial as to the cause of this accretion. The Full Court refused to interfere with the trial judge's finding that this was due to longshore drift.

p. 46, l.12-50
p. 57, l.30
p. 70, l.8-15
p. 46, l.19-29

DECISION AT FIRST INSTANCE

11. The trial judge held that the land between the old high-water mark and the new high-water mark formed part of the land demised in Crown Lease Perpetual No. 11887. The judge based his decision on two grounds.

12. The first ground was that it was the intention of the parties to the Crown Lease that the high water mark of Lake George should at all times constitute the eastern boundary of Section No. 16 SW. In other words, the eastern boundary of Section No. 16 SW is ambulatory.

p. 39, l.8 - p. 40, l.14

13. The second ground of the decision was that the doctrine of accretion applied in the present case. In particular, the trial judge held that :-

(i) at the date of the grant of Crown Lease Perpetual No. 11887 the demised land was bounded on its eastern side by the high-water mark of Lake George;

p. 37, l.26-40

(ii) the doctrine of accretion extends to a leasehold estate in Crown land held in perpetuity;

p. 40, l.27-49

(iii) the doctrine of accretion extends to accumulations of sand formed as a result of sand being shifted by the operation of nature from the land to the lake;

p. 42, l.36-41

(iv) the doctrine of accretion applies to Lake George - "a large lake, which is both navigable and tidal - a lake in which tides ebb and flow from currents in the lake itself and from the shores of Rivoli Bay";

p. 45, l.16-18
p. 43, l.20-23

(v) the alluvion has been formed "partly by longshore drift, partly by the action of the wind on sandhills in the environs of Section No. 16 SW and the transport of that sand to the body of water in the lake, and partly by retreat of waters from the body of the lake resulting from the construction of channels from the lake to the shores of Rivoli Bay";

p. 46, l.27-33

Record

p. 46, l.38-39 (vi) the accretion has been slow, gradual and imperceptible.

14. It is the second ground that was, and remains, the appellant's primary contention. However, the appellant submits, in the alternative, that the first ground is correct. For reasons that appear below the two issues became confused in the Full Court.

15. It is to be noted that there is an important distinction between the two grounds upon which Walters J. found in favour of the appellant. The legal principles relating to accretion, although their operation may presumably be excluded by the terms of the relevant grant or instrument of title, do not depend upon a construction of the instrument according to which one boundary is said to be ambulatory. If, as a matter of construction of an instrument the boundary of certain land is "the high-water mark (of a lake) wherever that may be from time to time" then sudden and readily discernible changes in the high-water mark, as well as gradual and imperceptible changes, will alter the boundary. In other words, rejection of the trial judge's first ground of decision does not carry with it a rejection of his second ground.

THE DECISION OF THE FULL COURT

16. Reference is made in the judgments below to a change of
p. 75, l.25 direction which the case took in the Full Court, and this is reflected in the order for costs that was made. During argument in the Full Court their Honours drew attention to a matter which had not previously been regarded as important but which they ultimately
Exhibit Nos. 1 and 3. held to be decisive. The two relevant leases described the subject land as being "delineated" upon certain public maps. On those maps the eastern boundary of the land corresponded with the high-water mark of Lake George. It was not contended by the defendant at first instance that anything turned upon the use of the word "delineated". However, such a contention was ultimately advanced in the Full Court and was the basis upon which the Full Court decided the case.

17. King C.J., running together the two grounds of decision at
p. 53, l.28-33 first instance, held that the doctrine of accretion could not apply to a property whose boundary is delineated in the documents of title by a line on a plan which line is not expressed to be the water's edge. That was the simple ground upon which he decided the case.

18. Zelling J. found for the State of South Australia on three grounds. The first ground was the most important, because His
p. 62, l.40 Honour said that the second ground would only have led him to send the matter back to the trial judge to find further facts, and the third ground would only entitle the State to succeed in relation to
p. 58, l.38 - p. 62, l.10 part of the land in question. The first ground was similar to that upon which King, C.J. decided the case. His Honour held that under the grant the plaintiff's predecessor in title received a lease of
p. 62, l.6 land "as delineated in the public maps", that it was possible to identify the original boundary at the time of the delineation, and that the doctrine of accretion did not apply in such a case even though it would have applied if the boundary had been expressed
p. 62, l.11 - 47 to be a water boundary. The second ground was that there was an insufficiency of evidence as to exactly where the boundaries of the alluvium stood in either 1910 or 1975. This would have led His Honour to send the matter back for an enquiry. The Third ground

Record

was that the doctrine of accretion, if otherwise applicable, would only entitle the plaintiff to succeed in relation to accretion the result of longshore drifts, but would not entitle the plaintiff to succeed in relation to accretion the result of windswept encroachment of sandhills. His Honour considered various other matters raised in the notice of appeal but did not regard any of them as decisive. p. 62, l.48 - 55

19. Wells, J. agreed generally with Zelling, J. and said the case turned on "conveyancing issues" which had been given more attention on the appeal than at the trial. He regarded the word "delineated" as "crucial". His Honour said that the terms of the conveyancing instrument (by which he must have meant the description of the subject land) exclude, by necessary implication, the operation of the doctrine of accretion. Wells, J. specifically agreed with what Zelling, J. said about sand drift as distinct from longshore drift. His Honour also raised a matter not mentioned by any other judge and which was not the subject of argument. He said that whilst he was ready to assume that the doctrine of accretion would operate in favour of a lessee it seemed to him that it could not operate where the same person (here the Crown) owned the land on both sides of the boundary in question. p. 71, l.15
p. 71, l.32 - 34
p. 72, l.44-47
p. 73, l.34 - 48
p. 73, l.12-33

20. The substantial ground upon which the Full Court decided the case adversely to the present appellant was, therefore, a ground based upon the manner of description of the subject land in the appellant's document of title. That was what Wells J. described as a "conveyancing issue".

THE CONVEYANCING ISSUE

21. It is respectfully submitted that the decision of the of the Full Court involved error both as to the nature of the doctrine of accretion and as to the interpretation of the relevant documents in the present case.

22. At common law, where there has been an acquisition of land from the sea, or from a river, or (so the appellant submits and the Courts below accepted) a lake, by gradual and imperceptible means, the accretion belongs to the title-holder of the land to which it is added, and where the opposite takes place the title-holder of the land encroached upon will be the loser. In this context "imperceptible" means imperceptible in its progress, not imperceptible after a length of time (R. v. Lord Yarborough 1824 3 B. & C. 91 at p. 107). The doctrine applies to other estates and titles as well as freehold estates (Mercer v. Denne 1904 2 Ch. 534; 1905 2 Ch. 538, Tilbury v. Silva 1890 45 Ch. D 98 at 109).

23. The reason underlying the doctrine was explained by the Privy Council in Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool) Ltd. 1915 A.C. 599 at 612 as follows:

> "The reason of this is not far to seek, and it is substantially to be found in that general convenience and security which lie at the root of the entire doctrine of accretion. To suppose that lands which, although of

> specific measurement in the title deeds, were de facto fronted and bounded by the sea were to be in the situation that their frontage to the sea was to disappear by the action of nature to the effect of setting up a strip of land (it might be yards, feet, or inches) between the receded foreshore and the actual measured boundary of the adjoining lands, which strip was to be the property of the Crown, and was to have the effect of converting land so held into inland property, would be followed by grotesque and well-nigh impossible results, and violate the doctrine which is founded upon the general security of landholders and upon the general advantage."

24. For the doctrine to apply in a case such as the present it is not necessary for the boundary of the land to be expressed to be the high-water mark from time to time. If the boundary were so described it would be unnecessary to resort to the doctrine and, as indicated above, different results would follow.

p. 52, l.33 - p. 58, l.38 / 44

25. The members of the Full Court made reference to a question said to have been left unresolved by the High Court of Australia in Williams v. Booth 1910 10 C.L.R. 341 at 361-362. As to that, the appellant makes two submissions. First, the question is rather different from the question which their Honours were considering. Second, in any event the question was later resolved in a manner favourable to the appellant, by English decisions to which their Honours apparently did not advert. The question is related to the matter of imperceptibility. If there are certain means of identifying the original boundaries of the property can the rule of accretion apply? That question was answered in the affirmative after 1910 in Brighton and Hove General Gas Co. v. Hove Bungalows Ltd. 1924 1 Ch. 372. The following passage from the advice of the Privy Council in Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool) Ltd. 1915 A.C. 599 at 612-613 indicates that delineation on a map does not displace the rules relating to accretion:-

> "The whole of this question as applicable to lands de facto fronting a river but described by measurements which excluded its bed was anxiously discussed in the case of City of London Land Tax Commissioners v. Central London Railway. The law with reference to river and street boundaries of property was there gathered together, and it need no longer be matter of doubt that the operation of the rule of adding to the ownership of riparian lands the property of the soil ad medium filum is not interfered with on account of a specific or scheduled measurement of the land, a delineation or colouring on a plan, which measurement, delineation, or colouring does not in fact include any part of the bed of the river or of the street. Similarly, in their Lordships' opinion, properties scheduled or specifically measured but in fact abutting on the seashore are not excluded from the operation of the rule which adds to riparian lands the increment which is caused by natural and gradual accretion from the sea. In the present case, accordingly, the conveyances of the properties which are in question in this appeal were in the opinion of the Board habile to cover the land formed by slow, gradual, and natural accretion.

26. The doctrine of accretion is concerned with practicalities. To draw a distinction between a boundary line which is said to be the high-water mark of a lake and a boundary line which happens to correspond with the high-water mark of a lake is impractical. To treat the boundary of the land in 1910 as being, not the then

Record

high-water mark, but a line corresponding with what the high-watermark had been in 1889, would produce "grotesque and well-nigh impossible results".

27. In any event, to locate the boundary of Section 16 SW with precision in 1910 it would have been necessary to look beyond the Hundred Plan and to go to Surveyor King's field maps and diagrams. It was conceded at the trial "that the eastern boundary to Section 16 SW in the Hundred of Lake George in the County of Grey when that Section was first surveyed in 1888 was described by the surveyor Stephen King as the high-water mark".

Admission noted during plaintiff's opening - not reproduced in Record

28. Zelling, J. attached some importance to a covenant in the lease to fence the boundaries. His Honour said that if the appellant's approach were correct the boundary would be shifting, and this cannot have been intended. It may be observed, however, that if His Honour's conclusion were correct and the eastern boundary was a line corresponding with the 1889 high-water mark, or the 1910 high-water mark, the fence to which he was referring would have a very unusual shape.

p. 61, l.21 - 29

29. The defendant respectfully submits that the second ground of decision of Walters, J., was correct.

THE OTHER ISSUES

30. As to Zelling, J.'s second ground the appellant makes the following submissions:

(a) The point His honour makes seems to be related to his first ground and to involve the proposition that on the true construction of the 1911 Perpetual Lease the eastern boundary of the subject land was intended to be, not a natural feature (the high water mark of the lake), but a line representing the location of the high water mark of the lake in 1888. That notion is unacceptable for reasons given above.

(b) There was evidence that the northern part of the accretion, resulting from longshore drift, has occurred at an average annual rate of between 10 and 45 centimetres, and there was also evidence as to the rate of the southern part of the accretion resulting from windswept sand entering the lake.

p. 22 l.8 - p. 23 l.3 Exhib. 10 pp. 6-10, 20

(c) If this be a matter that requires further evidence the matter should be remitted for further enquiry as suggested by Zelling J.

31. As to Zelling, J.'s "third ground" (which only goes to the southern part of the area in dispute) the appellant makes the following submissions:-

(a) The principle underlying the doctrine is equally applicable whether the accretion has occurred as a result of the action of the sea or water or as a result of the processes of nature from the landward side of the boundary. Even though the accretion in the latter case has not occurred directly because of the action of sea or water, never-

theless such accretion can only occur because of the existence of a water boundary.

(b) While there are no decided authorities the appellant contends that it obtains considerable assistance from the cases which have held that man assisted accretion falls within the compass of the doctrine of accretion (Brighton and Hove General Gas Co. v. Hove Bungalows Ltd. supra, Attorney-General v. Chambers 1859 45 E.R. 22, Trafford v. Thrower 1929 45 TLR 502). It would be a very odd result if sand deposited by the action of water and sand deposited by the action of wind blown from the direction of the water is within the compass of the doctrine but sand deposited by wind blowing from the land is not encompassed by the doctrine of accretion.

p. 63, l.29-35 (c) Zelling, J. held that the windblown sand deposit was not a gradual and imperceptible accretion. The evidence is not in dispute. It establishes that in certain conditions, i.e. given certain wind directions and high velocities and with the assistance of a peg placed in the nose of a sand dune, sand might be detected moving down the slip face.

p. 24, l.33 - 36 Professor von der Borch gave evidence of a movement in these conditions of "a millimetre or centimetre or something like that" in an hour and in a day an upper figure of a yard. Mr. Armstrong gave evidence that the movement within a period of one hour, in these conditions, would be "of the order of one or two inches perhaps" and that the limit of forward movement if these conditions prevailed for a one day period would be of the order of "two or three feet perhaps". Mr. Armstrong's report gives the average rate of advance for the sand directly into the lake at 7.42 metres per annum.

p. 24, l.16 - 21

p. 27, l.19 - 23

Page 10 of Exhibit No. 10

The appellant contends that the trial judge might, from this evidence, very reasonably find that the increase has been insensible and imperceptible. The movement has been imperceptible in the same way "as the motion of the palm of a horologe is insensible at any instant, though it be very perceptible when put together in less than the quarter of an hour". (2 Stair's Institutions of the Law of Scotland, 201). The hourly rate of movement referred to in the evidence only related to extreme conditions and could only be detected by means of a measuring device albeit a simple measuring device. The annual rate of advance of the sand dune of 7.42 metres is not excessive. The Privy Council in Yarborough's Case (supra) did not regard an annual movement of five to ten yards as excessive.

p. 73, l.12 - 33 32. As to Wells, J.'s reservation as to the application of the accretion to leasehold estates where the land on both sides of the boundary is in common ownership the appellant makes the following submissions. :-

(a) The principle underlying the doctrine of accretion is equally applicable to leases as to freehold land. The doctrine is dependent on there being a water boundary but given such a boundary the doctrine applies whether the land is freehold, leased from a private individual or leased from the Crown (Tilbury v. Silva, supra).

(b) The doctrine of accretion can apply in favour of a lessee even where the lessor is the owner of the land contiguous to the demised land, that is, even where the adjoining parcels whose

boundary is said to have shifted are in common ownership. The limitation introduced by Wells, J. effectively only applies to Crown Leases and is unwarranted.

(c) In any event it is inappropriate to regard perpetual lease granted pursuant to the Crown Lands Act 1903 as an ordinary leasehold interest.

As appears from S.41 of the Crown Lands Act 1903 itself a perpetual lease is vested in the tenant in perpetuity and not for a mere term of years. Admittedly, a perpetual lease does not vest the fee simple in the tenant, so that Crown Lease Perpetual No. 11887 has not wholly divested the Crown of its interest in the demised land. Equally, though, the Crown retains residual ownership of land granted in fee simple in South Australia in the sense that all land is held of the Crown in one form or another.

A perpetual lease differs from a fee simple in that, as landlord, the Crown has reserved the right to re-enter the demised land and forfeit the lease for non-payment of rent; yet even land granted in fee simple can be resumed by the Crown for public purposes and can be sold by the Crown for non-payment of rates and taxes.

33. The State of South Australia argued in the Courts below that the doctrine of accretion does not apply in respect of lakes. This submission was based upon a reported observation of Eve J. in Trafford v. Thrower (1929) 45 T.L.R. 502. There is a long history of authority in the United States and Canada to the contrary of that argument, and the appellant submits that the conclusion and reasoning of Walters J. on the point, which was not criticised by the appellate Court, is correct. Lake George is a tidal, navigable body of water and there is no reason why the principles of accretion should not apply in relation to it if the relevant conditions are otherwise satisfied.

p. 42, l.41 - p. 45, l.30
p. 67, l.3 - p. 69, l.10

34. In the event that it becomes necessary to do so, either because the doctrine of accretion is held not to apply to the land in dispute or because it is held not to apply to part of it, the appellant submits that Walters, J.'s first ground of decision is correct. As a matter of construction of the lease the eastern boundary of Section 16 SW is ambulatory. The intention of the parties was that the lessee should have a water frontage. In this regard it is significant that the boundary in question cannot be re-established on land. All that can be re-established is the surveyor's tie line. And, as has been said earlier, even this can only be done by reference to the field notes and diagrams of Surveyor King.

35. The appellant submits that the appeal should be allowed for the following amongst other.

REASONS

(1) BECAUSE the land in dispute in these proceedings is land which has become the subject to Crown Lease Perpetual No. 11887 Crown Lease Register Book Volume 584 Folio 112 by virtue of the principles relating to accretion.

Record

(2) Alternatively, BECAUSE upon the true construction of the said instrument the said land is now the subject of such Lease.

(3) BECAUSE the Full Court of the Supreme Court of South Australia erred in reversing the decision of Mr. Justice Walters.

A.M. GLEESON

IN THE PRIVY COUNCIL No. 38 of 1980

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

BETWEEN:

SOUTHERN CENTRE OF THEOSOPHY INCORPORATED

(Plaintiff)
Appellant

- and-

THE STATE OF SOUTH AUSTRALIA

(Defendant)
Respondent

CASE FOR THE APPELLANT

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