IN THE COURT OF APPEAL OF NEW ZEALAND

CA190/05

	BETWEEN	DOMINIC DEFAUX BOSKETT AND GLENDA ANN BARNES Appellants
	AND	DOUGLAS WALTER DRUMMOND, BARBARA MARJORIE DRUMMOND, BRUCE JAMES GILKISON AND TERENCE ALLAN FRATER Respondents

Hearing: 23 August 2006

Court: William Young P, O'Regan and Ellen France JJ

Counsel: G M Downing for Appellants
S J Zindel for Respondents

Judgment: 21 December 2006

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants are to pay the respondents $6,000 costs together with usual disbursements.

REASONS OF THE COURT

(Given by William Young P)

Introduction

[1] Mr Dominic Boskett (who is the son of Mr Michael Boskett) and Ms Glenda Barnes (who is Mr Michael Boskett's partner) and the respondents – to whom (along with their predecessors in title) we will refer as "the Drummonds" – are in dispute as to the ownership of 1.5 acres of land. The Drummonds are the registered proprietors of the disputed land but their title is limited as to parcels.

[2] The immediate setting for the litigation is the desire of the Drummonds to obtain an unqualified title to the disputed land. The Bosketts lodged a caveat to prevent such a title issuing. The Drummonds responded with an application under s 145A of the Land Transfer Act 1952 to remove the caveat and the Bosketts then applied to the High Court for an order that the caveat not lapse. In the High Court they relied primarily on s 3 of the Land Transfer Amendment Act 1963. Miller J dismissed their application in a judgment delivered on 6 September 2005.

[3] In this Court the Bosketts continue to rely on s 3 of the 1963 Act but they have also sought to raise a new argument based on s 200 of the Land Transfer Act 1952. For reasons that we will explain shortly, we think it best to address the new argument first. So the key issues in the case are:

(a) Do the Bosketts have an arguable claim to the disputed land under s 200 of the 1952 Act? And,

(b) Do the Bosketts have an arguable claim to the disputed land under s 3 of the 1963 Act?

Before we discuss these issues, however, we will explain the factual background.

The factual background

[4] The Drummonds own land at 652 Central Road, Moutere near Nelson. To the north is the Bosketts' property, which is at 915 Central Road. Both areas of land

formed part of a larger block that was the subject of a Crown grant to James Drummond in 1860. The land currently owned by the Drummonds has therefore remained in the family for 146 years.

[5] There is a drainage ditch (dug in the nineteenth century) which approximately but not exactly follows the boundary between the two properties as surveyed in 1890. The differences between the line which the ditch follows and the boundary line are such that approximately one and a half acres of the Drummonds' land (according to the 1890 survey) is on the Bosketts' side of the ditch and approximately half an acre of the Bosketts' land (according to the same survey) is on the Drummonds' side of the ditch.

[6] In 1892, James Drummond transferred the Bosketts' property to his brother Daniel. The two had previously been farming in partnership. Daniel died in 1920 and on his death the land went to his daughter Marjorie Catherine Franklyn and her husband Alexander.

[7] Both properties were brought under the Torrens system on 1 May 1929. Both the 1929 titles were limited as to title and parcels. The limitations as to titles are no longer of significance. The limitations as to parcels, however, are fundamental to the first of the issues we have identified.

[8] It seems at least likely that from 1892 on, the ditch marked a practical boundary between the two properties with the Drummonds farming to the south of the ditch and Daniel Drummond and later the Franklyns operating to the north. A row of pine trees was planted (probably in or about 1918) along the north side of the ditch and it seems that from at least the mid-1940s there was a fence which was also on the north side of the ditch.

[9] The Bosketts' property was first transferred out of the wider Drummond family in 1958.

[10] Messrs Michael Boskett and John Halls purchased the property in 1974. Mr Michael Boskett acquired the interest of Mr Halls in 1979. In December 1974, another fence was built along the general line of the ditch but this time it was on the Drummonds' side of the ditch. Both parties co-operated in its construction. The Drummonds maintain that they agreed to this line of fence to enable Mr Boskett to water his stock. The fence was upgraded and to some extent repositioned in the early 1980s.

[11] Due to financial difficulties Mr Michael Boskett sold the property in 1996 to the Drummonds with an option to repurchase if exercised within two years. After a dispute about the exercise of that option, Mr Michael Boskett re-acquired the property in 2002 and shortly afterwards transferred it to the present appellants. Between 1996 and March 2000, Mr Michael Boskett leased the house and a shed from the Drummonds for rent of $300 per week, but the disputed land was used by the Drummonds. During this period the Drummonds constructed a new fence along the legal boundary as established by a 1998 survey which the Drummonds had commissioned. When Mr Boskett took the property over again he removed the fence erected by the Drummonds.

Do the Bosketts have an arguable claim to the disputed land under s 200 of the 1952 Act?

A new point

[12] In the High Court the Bosketts relied primarily on s 3 of the 1963 Act and sought to persuade the Judge that they had a prescriptive title to the disputed land. This claim failed and, as will be come apparent, there are other difficulties with the argument which were not appreciated when the case was argued in the High Court. In this Court, the appellants, while maintaining the claim under s 3 of the 1963 Act also wished to advance a quite different claim, namely that they are entitled to a certificate of title in relation to the disputed land under s 200 of the 1952 Act. They also sought leave to adduce further evidence in support of this claim.

[13] Although there was some discussion in the High Court of the possibility of the Bosketts having a claim under s 200 of the 1952 Act, their reliance on this section before us nonetheless was in substance an attempt to open a new front on appeal. This attempt and the associated deployment of extensive further evidence understandably attracted opposition from the Drummonds. The difficulty, however, is that unless abuse of process principles are applied very broadly, the rejection in the High Court by Miller J of the Bosketts' claim under s 3 of the 1963 Act would not preclude the Bosketts making an application to the Registrar under s 200 of the 1952 Act. Accordingly, we consider it appropriate to address the new argument and the evidence adduced in support of it.

Overview

[14] Section 200 of the 1952 Act provides:

> **200 Applications by persons claiming title adverse to that of proprietor under limited certificate**
>
> So long as any land continues to be comprised in a limited certificate of title any person claiming to be seized or possessed of an estate of freehold in that land or any part thereof—
>
> > By virtue of possession adverse to the title of the proprietor in whose name the certificate of title was issued;
> >
> > …
>
> may make an application under the provisions of this Act as if the Land Transfer (Compulsory Registration of Titles) Act 1924 and this Part of this Act had not been passed and the limited certificate of title had not been issued.

What do the appellants have to prove to make out a claim under s 200 of the 1952 Act?

[15] There are two separate approaches that might be open.

[16] First, the Bosketts might maintain that the Franklyns had a matured claim to the disputed land in 1929 (when a certificate of title was first issued). At that time, 20 years adverse possession was necessary to establish title under s 2 of the Real Property Limitation Act 1833 (UK) which applied in New Zealand. If such a claim

could be established, the title to the Drummonds' land would be subject to the title of the Franklyns (see s 16(1)(d) of the Land Transfer (Compulsory Registration of Titles) Act 1924 and s 200(a) of the 1952 Act). So the Bosketts would have to prove possession by the Franklyns which was adverse to that of the Drummonds and which began in or before 1909 and continued up until 1 May 1929.

[17] Secondly, the Bosketts might claim that the Franklyns had established adverse possession before the date of issue of the relevant title (ie in 1929). Under s 16(3) of the 1924 Act the issue of a title did not stop the running of time for limitation purposes associated with adverse possession claims. This is now provided for by s 199(3) of the 1952 Act. There is a complexity here because the Limitation Act 1950 reduced the relevant period from 20 years to 12 years and it is open to question which period should be applied, see for instance *Cotton v Keogh and Ors* [1996] 3 NZLR 1 at 6 (CA) per Blanchard J. This, however, is of no particular moment given the state of the evidence.

[18] Either way, the Bosketts would have to establish that as at 1 May 1929, the Franklyns were in possession of the disputed land and that such possession was adverse to the interests of the Drummonds.

Is it arguable on the evidence that as at 1 May 1929, the Franklyns were in possession of the disputed land?

[19] It appears that sometime around 1918 (or earlier) pine trees that were eventually removed in 1973 were planted generally along the line of the ditch but on the Bosketts' side of it. Aerial photographs taken in 1940 and 1946 show the pine trees. These photographs also show the apple orchard that the Franklyns operated and suggest that the disputed land was being worked. What is not clear (at least from the photographs) is whether the land was then being worked by the Franklyns or the Drummonds. On the other hand, there is evidence to suggest that by the early 1970s, the orchard and a raspberry garden on the Bosketts' land went up to the ditch. The photographs also do not show whether there was a fence along the line of the trees although there is other evidence (in the form an affidavit from a Mr Nicholas

Boyd) to suggest that such a fence in place by 1945-46 on the Bosketts' side of the ditch and that its purpose was to keep the Drummonds' sheep out of what was then the Franklyns' orchard.

[20] Overall – and despite the absence of direct evidence - it seems reasonable to assume (at least for the purposes of caveat proceedings) that most of the disputed land was occupied by the Franklyns in 1929. We say "most" because the pine trees and fence, if there was one, were on the Bosketts' side of the ditch (unlike the 1974 fence that the Bosketts primarily rely on as indicating the boundary).

Is it arguable on the evidence that such possession of the disputed land was adverse to the interests of the Drummonds?

[21] We start by referring to the judgment of Cooper J in *McDonell v Giblin* (1904) 23 NZLR 660 at 662:

> In order to constitute a title by adverse possession, the possession relied on must be for the full period …, actual, open and manifest, exclusive, and continuous; and the onus of proof in such an action as this rests upon the plaintiff. … In order to dispossess the rightful owner the possession which is claimed to be adverse to his rights must be sufficiently obvious to give such owner the means of knowledge that some person has entered into possession adversely to his title and with the intention of making a title against him; it must be sufficiently open and manifest that a man reasonably careful of his own interests would, if living in the locality and passing the allotment from time to time, by his observation have reasonably discovered that some person had taken possession of the land. No doubt, in applying this rule, regard must be had to the character and position of the land.

This passage was cited with approval by this Court in *Cotton v Keogh* at 7.

[22] Section 22 of the Fencing Act 1908 was in these terms:

> **Line of fence** – (1) Where a river, creek, ditch, natural or artificial watercourse, or rocky or impracticable land is on the boundary of adjoining lands, the occupier of such lands may agree upon a line of fence on either side of such boundary, and if they cannot agree, the line of the fence shall be determined by a Magistrate in manner hereinafter provided.
>
> …

> (4) The occupation of lands on either side of such line of fence shall not be deemed adverse possession, and shall not affect the title to or possession of any such lands, save for the purposes of this Act.

[23] Given s 22 of the Fencing Act 1908 and the family connection between the owners of the two blocks of land, there is no scope for the assumption that such possession as the Franklyns may have had of the disputed land was adverse to the interests of the Drummonds.

Conclusion

[24] For these reasons, the material before the Court, including the new evidence relied on by the Bosketts, does not support a claim to the disputed land under s 200 of the 1952 Act.

Do the Bosketts have an arguable claim under s 3 of the 1963 Act?

Overview

[25] Section 3 of the 1963 Act provides:

> **3 Application for certificate of title based on possession**
>
> (1) Where—
>
> > (a) Any person has been in possession of any land which is subject to the principal Act, being land for which a certificate of title has been issued or a Crown grant has been registered under that Act, for a continuous period of not less than 20 years, and continues in possession of the land; and
> >
> > (b) That possession was such that he would have been entitled to apply for a title to the land on the ground of possession if the land had not been subject to the principal Act,—
>
> he may, in accordance with the provisions of this Part of this Act, apply to the Registrar in the prescribed form for the issue to him of a certificate of title for an estate in fee simple in the land.
>
> (2) For the purposes of this Part of this Act, possession of any land by any person through or under whom the applicant claims shall be deemed to be possession by the applicant.

[26] The Bosketts have sought to invoke this section and claim two separate periods of 20 years continuous possession. The first is the period 1974-1996. The second is the 20 years prior to the bringing of proceedings. The case was addressed in the High Court primarily on the question whether the Bosketts were within s 3(1) of the 1963 Act. What was not addressed was whether it would, in any event, be of any assistance to the Bosketts if they were within s 3(1).

Were the Bosketts within s 3(1) of the 1963 Act?

[27] At [15] of his judgment the Judge found that it was arguable that the Bosketts could sustain a claim to adverse possession between 1974 and 1996. However, he found that whatever claim they had was lost when the property was sold in 1996.

[28] On appeal the Bosketts say that that is irrelevant. Mr Michael Boskett is a predecessor in title of the appellants and was in occupation of the land for 20 years continuously. Furthermore, the appellants are now in occupation. That is enough to establish a claim under s 3.

[29] Like Miller J we disagree with this approach. The language of s 3(1) presupposes possession at the time of the application, which has continued, up to that time, for a continuous period of at least 20 years.

[30] In respect of the second period of time (ie the twenty years prior to the making of the application) the Bosketts argue that the Judge did not properly construe s 3(2) of the 1963 Act in concluding that the five years in which the Drummonds were registered proprietors of the Bosketts' land meant that the requirement for continuous possession had not been satisfied. They say that possession by the Drummonds during that period is, pursuant to that subsection, deemed to be possession by them.

[31] Counsel for the Bosketts argued that what is important is not the identities of the parties during this time but rather the capacity in which they occupied the land. When that is considered, the period in which the Drummonds were the registered

proprietors of the Bosketts' land did not break the continuous occupation of the disputed land by the registered proprietor of the Bosketts' property.

[32] This argument ignores the reality of the situation. It makes no sense to say that during the relevant period the Drummonds' possession of the land was in some way adverse to their interests. When he was not the registered proprietor Mr Michael Boskett did not continue to use the land. The 1974 fence remained but the evidence shows that the Drummonds used the land on the Boskett side of it for their stock. Furthermore, the Drummonds surveyed the land in 1998 and erected a new fence along what the surveyor regarded as the true boundary.

Would it be of any assistance to the Bosketts if they were within s 3 of the 1963 Act?

[33] In any event, we are not persuaded that coming within s 3 of the 1963 Act would have assisted the Bosketts.

[34] The 1963 Act was not intended to apply in a situation such as this. It was rather intended to provide for title to be obtained in relation to land, which has been, in effect, abandoned. Under s 8 of the 1963 Act it would be open to the Drummonds to lodge a caveat to forbid the granting of an application by the Bosketts under s 3. Under s 9(1) the Registrar would be required to refuse the Bosketts' application.

[35] So this line of argument leads nowhere.

Result

[36] The appeal is dismissed. The appellants are to pay the respondents $6,000 costs together with usual disbursements.

Solicitors:
Smith Law, Nelson for Appellants
Zindells, Nelson for Respondents