

**IN THE HIGH COURT OF NEW ZEALAND  
DUNEDIN REGISTRY**

**CIV-2012-412-000926  
[2013] NZHC 2770**

BETWEEN	GILBERT JOHN EDMUNDS AND RUTH MARGARET EDMUNDS Plaintiffs
AND	MARK BEDFORD LAUDER First Defendant
AND	THE REGISTRAR-GENERAL OF LAND Second Defendant

Hearing: 9 and 10 September 2013

Appearances: L A Andersen for Plaintiffs  
C S Withnall QC and SMD Guest for First Defendant  
No appearance for Second Defendant

Judgment: 22 October 2013

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**JUDGMENT OF PANCKHURST J**

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**A claim in adverse possession**

[1] Mr and Mrs Edmunds own a farm property to the south-east of Dunedin. Their farm is in several connected lots, but also separated by public roads including Green Island Bush Road. Previously, the property included two rectangular sections, numbers 119 and 120 in the district survey plan, running to the south of Green Island Bush Road. Each section was 4.2492 hectares “more or less” and each title was “limited as to parcels”. In 1989 the Edmunds sold section 119 to Mr Mark Lauder and his then partner.

[2] In 2012 Mr Lauder served a fencing notice. He wanted to erect a new boundary fence between sections 119 and 120. The Edmunds responded with a

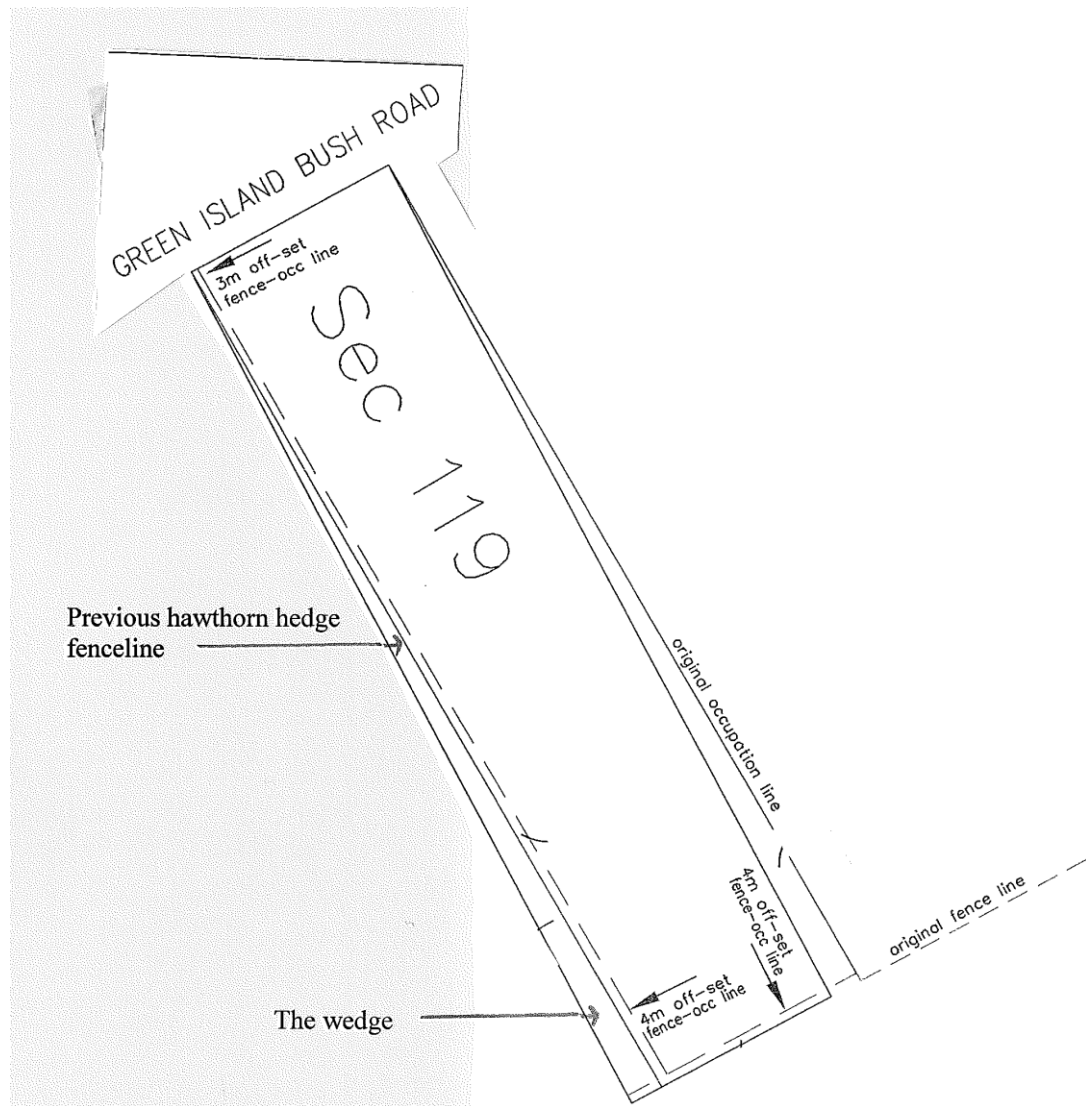
notice of opposition. Mr Lauder retained a registered surveyor to verify the boundaries of section 119. A surprise was in store.

[3] The fenceline on the western side of Mr Lauder's land encroached onto his property by about three metres at the Green Island Bush Road end and by about 20 metres at the rear boundary. The full length of the fenceline, just over 400 metres, was not perpendicular (at a right angle) to the road but a few degrees out of alignment. This gave rise to a wedge of land fenced in favour of the Edmunds and grazed by their stock, which in terms of the original survey plan belonged to Mr Lauder. The wedge is about 4,800 square metres.

[4] Mr Lauder's section, however, benefits in a similar way on its eastern side boundary. The side boundary fences are parallel, both therefore not perpendicular to Green Island Bush Road by a few degrees. Accordingly Mr Lauder, at the expense of his other neighbour, enjoys the use of grazing land which is roughly similar in area to the Edmunds' encroachment.

[5] This proceeding concerns the encroachment onto section 119 by the Edmunds. They assert that their predecessors in title long exercised adverse possession over part, about 3,200 square metres, of the present encroachment area. A previous hawthorn hedge fenceline existed in 1932 when a certificate of title to section 119 was issued, and remained the boundary for many years so that a fully matured adverse possession entitlement accrued in about 1944. Because the title is still limited as to parcels the matured entitlement enables the Edmunds to be recognised as the legal owners of that part of the wedge on their side of the previous hawthorn hedge, albeit not the 4 metre wide sliver between the hedge and the present day fenceline. They seek a declaration that they own that part of the wedge defined by the previous hawthorn hedge. Mr Lauder, however, contests the validity of the adverse possession claim on various grounds.

[6] This diagrammatic representation depicts the surveyed boundaries of section 119, the estimated position of the previous hawthorn hedge fenceline as arrowed and the present-day fencelines shown by the dotted line.



The present day fencelines were established by the Edmunds following removal of the hawthorn hedge. The side boundary fenceline is inset three-four metres from the previous position of the hawthorn hedge and the rear boundary is similarly inset by four metres.

[7] I note that the Registrar-General of Land is named as the second defendant. He filed an appearance reserving rights. However, shortly before the substantive hearing counsel for the Registrar-General sought and obtained leave excusing the need for an appearance, given that the proceeding was in the control of experienced senior counsel.

## **The issues**

[8] The true boundary lines to section 119 are not in dispute. The parties each retained a registered surveyor and they are in agreement as to this aspect. Similarly the surveyors agree about the mathematical aspects, including that the part of the wedge that is the subject matter of the adverse possession claim represents an area of about 3,200 square metres. Mr Paul Haddon, the surveyor retained by Mr Lauder, has prepared a survey report which was submitted to Land Information New Zealand (LINZ). The report relates to section 119 and was approved as to survey by LINZ in July 2012.

[9] The surveyors, however, disagree about matters of relevance to the adverse possession claim. Mr Simon Jenkin, the registered surveyor retained by the Edmunds, considers that there is sufficient historical and anecdotal evidence to establish previous occupation for the requisite period of that part of the wedge up to the previous hawthorn hedge, so that Mr and Mrs Edmunds are the rightful owners of this area of land. By contrast, Mr Haddon concluded that there was no actual evidence of previous occupation sufficient to found an adverse possession claim. Accordingly, LINZ's approval of Mr Haddon's survey awaits the determination of this proceeding.

[10] There are three main issues for determination:

- (a) whether the Edmunds have a valid adverse possession claim to that part of the wedge up to the line of the previous hawthorn hedge fenceline,
- (b) whether the plaintiffs' adverse possession claim is time barred under the Limitation Act 1950, and
- (c) whether Mr Lauder's positive defences (the doctrine of non-derogation from a grant of land, estoppel or deliberate encroachment amounting to unconscionable conduct) defeat the claim.

The resolution of issue (a) will require consideration of various sub issues, including the definition of the concept of adverse possession and whether the evidence relied upon by the plaintiffs is sufficient to establish their claim.

### **The factual background**

#### *Initial subdivision*

[11] In about 1850 a survey office plan for various districts to the south of Dunedin was prepared, including the Green Island Bush District. Whether this plan was drawn up in New Zealand or in the United Kingdom is unclear. The plan, referred to as SO3, depicts the layout of numerous sections including more than 20 sections of similar shape and size on the south side of Green Island Bush Road. Sections 119 and 120 are members of this group. There is no evidence that a field survey to peg the boundary corners to the sections was ever carried out. Nor is there evidence to establish how, when and by whom the sections were first occupied.

[12] In 1930 a survey plan was prepared in relation to the establishment of a loop road on the north side of Green Island Bush Road, commencing a few sections to the west of section 119. Markings on this plan confirm that the sections in SO3 were occupied and fenced by that time. The names of some section owners are noted, as are the existence of some boundary hedges and fence types. Of relevance are markings indicative of a post and wire fence on the roadway frontage of section 119 and a marking “thorn hedge” across the frontage of 120 and continuing a short distance along the side boundary with section 119. The side boundary between sections 119 and 118 also has a hedge marked for a short distance, before a marking “P & W fence” (indicating a post and wire fence).

#### *The issue of titles*

[13] On 29 October 1932 certificates of title under the Land Transfer (Compulsory Registration of Titles) Act 1924 were issued in relation to sections 119 and 120. The registered owner of section 119 was Deborah Wilkinson, the wife of Robert Wilkinson of Green Island, settler. The registered owner of section 120 was Adam Wilkinson of Green Island, farm labourer. Both certificates of title were

limited as to parcels and title. However, in September 1939 the title to section 119 ceased to be limited as to title when a transmission to Sarah Wilkinson as executrix was also registered. Similarly, section 120 ceased to be limited as to title a few days earlier in August 1939. I shall refer to further changes in relation to ownership of the sections shortly.

[14] By February 1967 sections 119 and 120 were in common ownership, the registered owner being William Wilkinson, described as a farmer. Following his death in 1978 both sections were transmitted to his executor, a trustee company. In July 1979 the Edmunds purchased the two sections from the trustee company.

*Edmunds ownership and sale*

[15] Ruth and Gilbert Edmunds said in evidence that the boundary between sections 119 and 120 was defined by a hawthorn hedge, which also extended across the rear boundary to section 119. In about 1980 the hawthorn hedge was removed using two bulldozers. They described this as a “difficult task” on account of the age of the hedge estimated by them to be at least 100 years. This caused ground disturbance to a depth of at least one metre and for two metres either side of the hedge.

[16] Some 18 months later a new boundary fence was constructed, and this was positioned “away from the disturbed ground but as close as practicable to the hawthorn hedge line”. This resulted in a fenceline inset onto section 119 by three-four metres along the side boundary and also inset four metres along the rear boundary (as depicted by the dotted line in the diagram in [6]). The Edmunds attached no significance to the repositioning of the fenceline because they owned both sections and had no intention of selling any part of the land at that time.

[17] However, in November 1988 section 119 was sold at auction to Mr Lauder and his then partner. Mr Lauder considered the boundary fence substandard. It comprised two strainer posts and four further posts spaced over more than 400 metres. Between the six posts were approximately 50 stakes hand driven into the ground at about eight metre intervals. The fencing comprised several high tensile wires and droppers at 1.8 metre intervals to comprise an electric fence.

[18] Upon taking possession in January 1989 Mr Lauder spoke to Mr Edmunds about a new fence. Mr Edmunds considered the existing fence adequate. This did not prove to be the case as Mr Lauder experienced constant and ongoing problems, including stock losses and an unplanned cow in calf. In the course of discussions between neighbours the inseting of the fenceline in the early 1980's was not mentioned.

[19] In March 2011 the Edmunds sought Mr Lauder's consent in relation to a proposed plan of subdivision. They wished to divide sections 120 and 121 into four house sections. Mr Jenkin prepared a plan of the proposed sections depicting the positions of four building platforms. Mr Lauder was asked to consent to the building platform positions, but he declined to do so.

[20] The subdivision proposal stimulated a discussion between Mr Lauder and his other neighbour, Mr Ross Allan, the owner of section 118. Mr Allan pointed out that the fenceline between sections 118 and 119 did not mirror the true boundaries shown on Dunedin City Council fire permits issued to himself and Mr Lauder. The permits showed the true boundaries overlaid on an aerial photograph. There was an obvious discrepancy between the fenceline and occupation boundary on the one hand, and the true boundary on the other. Both the side boundaries of section 119 were not perpendicular to the road, but rather angled slightly in an easterly direction and therefore they remained parallel.

#### *A boundary/fence dispute*

[21] In early 2012 Mr Lauder went to a Citizens Advice Bureau concerning the boundary/fencing issue. He prepared a fencing notice which included this:

Please take notice that I desire that a fence be erected on the true boundary as established by a registered surveyor between your property sections 120 and 125, and [my] section 119 on Green Island Bush Road.

The notice detailed the proposed fence construction and required the Edmunds to agree to meet a half share of the cost, or provide a notice of objection. On 2 March 2012 Mr Lauder served the notice on Mrs Edmunds, who accepted it at the door without comment.

The reference to section 125 requires explanation. This section is a triangular lot also owned by the Edmunds and lying to the south of sections 118 and 119, as depicted in this 2007 aerial photograph:



[22] As can be seen from the overlaid true boundary lines (in white), the north-western corner of section 125 does not connect to section 120, so that the Edmunds could not access 125 from section 120. But, by virtue of their occupation of the wedge including the four metre inset of the side boundary, and the inset of the rear boundary as well, the Edmunds enjoyed road access to their southern most lot. This, of course, was at Mr Lauder's expense.

[23] On 19 March 2012 the Edmunds served a notice of objection. It included this:

The present fence has been the existing undisputed boundary and farmed by you for the past 27 plus years. The fence was agreed upon when you purchased the property from us, *and was the existing fenceline when we purchased it in 1979.* (emphasis added)

The notice continued that there was no need to replace or renew the fenceline and noted that if unresolved the dispute could be settled in the District Court.



### *A full survey of the land*

[24] At this point Mr Lauder instructed Mr Haddon to carry out a full survey of his land. Subsequently, armed with Mr Haddon's report, he arranged to meet the Edmunds at their home. He showed them the extent of the encroachment on the side and rear boundaries and indicated that he required two new fences to be erected on the true boundaries with the cost shared equally. Mr Lauder said in evidence that the Edmunds described the "misalignment" as a "minor mistake" on their part and suggested there was nothing to worry about over "an insignificant portion of land". Mr Lauder was told he could put a fence up where he liked, but the Edmunds would not put a cent towards it. Mrs Edmunds then asked Mr Lauder to leave.

[25] A few days later Mr Lauder erected a temporary two wire waratah electric fence on the true side, and rear, boundary lines. He did this by reference to pegs placed by an employee of Mr Haddon's. Soon after completing erection of the fence Mr Lauder was contacted by Mr Haddon and told that the Edmunds intended to contest the survey and that the waratah fence was ill advised. This was soon confirmed when Mr Edmunds dismantled it and threw the fence materials across the fenceline onto Mr Lauder's property.

[26] Finally, on 12 June 2012 Mr Haddon lodged his survey report with LINZ. On 18 June 2012 Mr Jenkin sent an email to LINZ in which he advised that he disagreed with Mr Haddon's approach and invited consideration of factors not considered, or accepted, by Mr Haddon. I shall refer to the differences of approach shortly. LINZ, however, considered that the Haddon survey report was soundly based and on 5 July 2012 confirmed that the report was approved as to survey.

### *Credibility findings*

[27] Most events in the above narrative are a matter of record and not, therefore, in dispute. There are, however, two aspects which require credibility findings.

[28] The first concerns the Edmunds' notice of objection to Mr Lauder's fencing notice. In it they stated that the existing fenceline had been the undisputed boundary for over 27 years and was agreed upon when Mr Lauder purchased section 119. This

was not quite correct. In the first place Mr Lauder had owned the land for about 24 years and there had been no agreement concerning the accuracy of the fencelines at the time of purchase. Mr Lauder in giving evidence said he understood the fencelines to section 119 coincided with the true boundaries until he was told otherwise by his neighbour, Mr Allan, and this was confirmed by Mr Haddon's survey. There was no challenge to this evidence in cross-examination.

[29] More importantly, the further assertion that the existing fenceline was the fenceline when the Edmunds purchased sections 119 and 120 in 1979 was simply untrue. They must have been aware when the objection notice dated 18 March 2012 was served that the side and rear boundary fencelines had been inset by about four metres soon after removal of the hedge in 1980.

[30] Secondly, there is a conflict in relation to whether there was in fact a meeting between Mr Lauder and the Edmunds at which Mr Haddon's survey report was discussed. I have recorded Mr Lauder's version of that meeting at [23]. In giving evidence both Mr and Mrs Edmunds said they had no recollection of this meeting. I am satisfied that a meeting as described by Mr Lauder occurred. He was a straight forward witness. The tone of the discussion he described was consistent with the impression I formed of the Edmunds as they gave evidence. I am satisfied Mr Lauder did not manufacture the remarks he attributed to the Edmunds. For these reasons I accept Mr Lauder's account.

### **Is adverse possession established?**

#### *The relevant statutory provisions*

[31] It is convenient to first set out the relevant limitation provisions. The Limitation Act 1950 applies because the acts giving rise to the cause of action occurred before 1 January 2011.<sup>1</sup>

[32] Section 7(2) of the 1950 Act provides:

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<sup>1</sup> Sections 2A(i) Limitation Act 1950, and s 59 Limitation Act 2010.

No action shall be brought by any ... person *to recover any land after the expiration of 12 years from the date on which the right of action accrued* to him or to some person through whom he claims ... (emphasis added)

[33] On what date does a right of action by adverse possession accrue? Section 8(1) of the 1950 Act provides:

Where the person bringing an action to recover land, or some person through whom he claims, has been in possession thereof, and has while entitled thereto been dispossessed or discontinued his possession, *the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.* (emphasis added)

In this instance it is the date of dispossession which is material.

[34] However, s 8(1) must be read alongside s 13(1), which relevantly provides:

**Right of action not to accrue or continue unless there is adverse possession**

- (1) No right of action to recover land shall be deemed to accrue *unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as adverse possession)*, and, where under the foregoing provisions of this Act any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land. (emphasis added)

As can be seen time runs in favour of the person in adverse possession and therefore against the registered owner.

[35] Finally, s 18 of the 1950 Act provides:

**Extinction of title after expiration of period**

Subject to the provisions of section 10 of this Act, at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinguished.

The provisions of s 10 are not relevant in this case.

[36] Turning to the Land Transfer Act 1952, s 79 governs an adverse possession title acquired at the time land was first bought under the Act. The section relevantly provides:

**Certificate void in certain cases**

Any certificate of title issued upon the first bringing of land under this Act, ..., and every certificate of title issued in respect of the same land, or any part thereof, to any person claiming or deriving title under or through the first registered proprietor *shall be void as against the title of any person adversely in actual occupation of and rightfully entitled to that land, or any part thereof, at the time when the land was so brought under this Act*, and continuing in such occupation as aforesaid at the time of any subsequent certificate of title being issued in respect of the said land; ...

(emphasis added)

In this case there is no evidence to establish adverse possession for the requisite period before 1932 at which point the land was bought under the then Act. Rather, the Edmunds' claim was advanced on the basis of adverse possession maturing 12 years later in 1944.

[37] Section 191(1) provides that a certificate of title may be limited “either as to description of parcels or as to title”, or limited as to both. As noted earlier, the title to section 119 was limited as to both parcels and title when issued in 1932.

[38] Accordingly, s 199 of the Land Transfer Act applies:

**Application of Act to limited certificate of title**

- (1) Except as otherwise provided in this Part, all the provisions of this Act shall, so far as the circumstances of the case will admit, apply with respect to the land comprised in a limited certificate of title, and to the registration of instruments and other matters affecting the land, save that the title of the proprietor of an estate or interest in any land comprised in a limited certificate of title shall be indefeasible only against the person named in the original limited certificate of title for that land, and all persons claiming through, under, or in trust for him:

provided that a limited certificate of title, and the memorials entered thereon of outstanding interests in the land comprised therein, shall be evidence or conclusive evidence, as the case may be, of the matters referred to in section 75, subject only to-

...

- (d) *the title (if any) of any person adversely in actual occupation of, and rightfully entitled to, any such land or any part thereof.*

(emphasis added)

- (2) Sections 62, 63, 65, 75, 79, 182, and 183 shall, in their application to a limited certificate of title, be deemed to be modified accordingly.
- (3) Notwithstanding the provisions of section 64, the issue of a limited certificate of title for any land shall not stop the running of time ... in favour of any person in adverse possession of that land at the time of the

issue of the certificate, or in favour of any person claiming through or under him.

[39] Persons claiming title adverse to that of the proprietor under a limited certificate of title may apply for an ordinary certificate of title.<sup>2</sup> They must demonstrate “possession adverse to the title of the proprietor” and if the Registrar-General of Land is “satisfied as to the grounds of the applicants’ claim” he may “call in and cancel or correct the limited certificate of title”, as appropriate.

#### *Adverse possession*

[40] In *Sinton Damerell Properties Limited v King*<sup>3</sup> O’Regan J identified three elements of a valid claim:

- (a) adverse possession of the relevant land by the claimant<sup>4</sup> when the first limited certificate of title was issued, here in October 1932,
- (b) that such adverse possession continued for at least 12 years, therefore until at least October 1944, and
- (c) that such possession continued thereafter at least at the time any subsequent certificate of title was issued in respect of the land.

This third element is of no moment in this case because no subsequent certificate of title has been issued in relation to section 119.

[41] How is adverse possession defined? There must be both factual possession and an intention to possess. As to the former, Cooper J described it in these terms:

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 to 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

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<sup>2</sup> Section 200 Land Transfer Act 1952.

<sup>3</sup> *Sinton Damerell Properties Limited v King* [2004] 2 NZLR 66 (HC).

<sup>4</sup> Claimant includes successors in title.

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.<sup>5</sup>

[42] Possession is a question of fact depending on the particular circumstances of the case. Enclosure, such as fencing, is considered strong evidence of adverse possession, although not conclusive. But, occupation of land either side of a “give and take fence” does not constitute adverse possession.<sup>6</sup> Other factors include payment of rates, the degree of physical control exercised and the nature of the land itself. Hence the determination in an individual case is intensely factual.

[43] Secondly, the person in possession must act deliberately with the intention to possess land owned by another. Such a person may be described as a trespasser, or squatter. Because intention must be inferred from conduct:<sup>7</sup>

[T]he Courts ... 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 the requisite animus possidendi and consequently as not having dispossessed the true owner.

#### *The surveyors' evidence*

[44] Mr Jenkin explained that a three step approach should be adopted in surveying land limited as to parcels. The first step is to determine the mathematical (theoretical) boundary corners based on the available survey information. This was done by Mr Haddon and Mr Jenkin accepted the accuracy of the mathematical boundary lines.

[45] The second step is to search for old pegs, or other boundary marks. In this case there is no evidence of this nature. Mr Jenkin therefore considered the third step the most important, being the search for evidence of historic occupation, initially with reference to 1932 when the limited certificate of title to section 119 was issued.

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<sup>5</sup> *McDonell v Giblin* (1904) 23 NZLR 660 at 662-663.

<sup>6</sup> Section 21, Fencing Act 1978.

<sup>7</sup> *Powell v McFarlane* (1977) 38 P & CR 452 at 472, per Slade J.

[46] In the result Mr Jenkin concluded there was clear evidence of occupation of the wedge on the western side of section 119 up to a boundary line created by a hawthorn hedge and dating back to at least 1932. Various pieces of evidence prompted this conclusion:

- (a) an aerial photograph taken in 1947 confirmed the existence of a hawthorn hedge along most of the western boundary to section 119,
- (b) towards the road frontage end of this side boundary there was a line of old macrocarpa trees (two of which are still standing),
- (c) anecdotal evidence from the Edmunds of the existence of the previous hawthorn hedge along the rear (or southern) boundary of section 119,
- (d) the existence today of 120 metres of hawthorn hedge running from the rear of the section and along the eastern side boundary between sections 119 and 118,
- (e) anecdotal evidence from the owner of section 118 that the current fence along the eastern side of section 119 from the end of the existing hawthorn hedge to the road boundary is on the line of the original fence.

[47] Based on this mix of photographic, visual and anecdotal evidence Mr Jenkin concluded:

It is my opinion that the clear and consistent evidence is that the owner of the Lauder land in 1932 occupied a physical parcel of land defined on all sides by established fences and hedges. The fences and hedges can be accurately reproduced on the ground today and can be seen in the aerial photograph on the current Dunedin City Council web map which shows both theoretical boundaries and the occupational boundary on the eastern side. I have identified already (by diagram) that the current occupation on the western side ... is currently four metres further into the Lauder land than the original hawthorn hedge, which is the correct occupational boundary.

Mr Jenkin also noted that the land Mr Lauder lost on the western boundary he gained back on the eastern boundary, and hence that he was neither advantaged nor

disadvantaged. The error, a failure to establish boundary lines perpendicular to Green Island Bush Road, was perpetuated in relation to a number of sections on the south side of the road.

[48] Mr Haddon disagreed with the approach taken by Mr Jenkin. In substance, he did not accept that there was physical or anecdotal evidence sufficient to found a claim of adverse possession. He noted that the hawthorn hedge, said to have evidenced the occupational boundary between sections 119 and 120, was removed in about 1980 (according to the Edmunds) and that there was no longer any physical evidence of its location. He thought that any attempt to reproduce its position would be an exercise in “presumption”.

### *Evaluation*

[49] The submissions of counsel reflected the different conclusions reached by the surveyors. Mr Anderson argued that the evidence established that the Edmunds’ predecessors in title to section 120 had occupied the disputed wedge of land for at least 12 years. That is, the wedge occupied to the line of the former hawthorn hedge, not to the existing fence line which encroaches an additional four metres onto Mr Lauder’s land along both the western and rear boundaries.

[50] Mr Withnall QC, however, argued that the plaintiffs had not met the onus of establishing adverse possession, including as at 1932 when titles were issued to the two sections. He particularly analysed such evidence of ownership as exists in 1932 and in relation to the period after then. In 1932 the registered owners of sections 119 and 120 were Deborah Wilkinson and Adam Wilkinson respectively (see [13]). In 1939, section 119 was transmitted to Sarah Jane Wilkinson, a spinster, as executor of the previous owner. The same year Adam Wilkinson transferred section 120 to William Wilkinson. In 1967 William Wilkinson became the owner of both sections, upon transfer from Sarah Wilkinson. Then, in 1978 both sections were transmitted to a trustee company no doubt following William Wilkinson’s death. Finally, the Edmunds purchased the sections some months later in mid 1979.

[51] As Mr Withnall pointed out, aside from evidence derived from the certificates of title there was no other evidence relating to the Wilkinsons’ ownership of the land.



The Edmunds provided evidence that when they acquired the land in 1979 the boundary between sections 119 and 120 consisted of a hawthorn hedge which they asserted was about 100 years old. It was removed two years later, when new fence lines were established on the eastern and southern (rear) sides of section 119.

[52] Turning to the photographic evidence, Mr Withnall submitted that the 1947 photograph did not support the Edmunds' evidence. The hawthorn hedge on the eastern boundary of section 119 was not continuous, and moreover, towards the rear boundary the hedge was indistinct on account of bush growing on section 120 which appeared to extend to the side boundary. The aerial photograph depicted an interrupted hedge line with bush growth on section 120 merging into it towards the rear of the section.

[53] I accept this description of the 1947 photographic evidence. But, there is a prior problem as well. The Edmunds must establish adverse possession as at 1932. As these words signify, and the authorities confirm, there must be evidence that the "trespasser", in this instance the occupiers of section 120, intended to occupy the wedge to the detriment of the occupiers of section 119, and did so in circumstances where such adverse occupation was readily apparent.

[54] In my view there is no such evidence. At most there is sketchy evidence of the actual side boundary, and also persuasive evidence to show that the successive occupiers of section 119 surrendered a wedge of land on the western side, but gained a similar wedge on the eastern side. That is, the side boundaries to section 119 have been askew for an extended time, but still remained parallel.

[55] How this happened, whether anyone was aware of it and whether there was a positive intention to exercise adverse possession is not, however, established. The fact that sections 119 and 120 were owned in 1932 by persons named Wilkinson, remained in the ownership of persons having that surname and then in 1967 entered the common ownership of William Wilkinson suggests to me a close family association with this land. Even accepting that there was a defined side boundary between the two sections when the Edmunds acquired them in 1979, there is in my view no evidence to establish a 12 year period of adverse possession maturing into a

rightful entitlement to the wedge in 1944. The boundary line could easily have been a matter of agreement or convenience between members of the Wilkinson family.

[56] The facts of this case have parallels with those in *Boskett v Drummond*.<sup>8</sup> In 1860 James Drummond acquired land near Nelson by Crown grant. Over 30 years later his brother acquired a part of the land. When the brother died in 1920 his daughter, and son-in-law Alexander Franklyn, inherited that part. In 1929 titles to the Drummond and Franklyn land were issued, limited as to parcels. The plaintiffs, successors in title to the Franklyns, asserted a claim in adverse possession based on the contention that the Franklyns were in adverse possession in 1929 and became rightfully entitled to the disputed land when their entitlement matured 12 years later.

[57] In discussing whether the evidence showed that possession of the disputed land was adverse to the interests of the Drummonds, William Young P expressed the finding of the Court in this way:

[23] Given s 22 of the Fencing Act 1908<sup>9</sup> 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 Franklins may have had of the disputed land was adverse to the interests of the Drummonds.

[58] To my mind this paragraph is applicable to this case, at least in part. In *Boskett* there was an explanation for the existence of the disputed land. In the 19<sup>th</sup> century a drainage ditch was dug which caused the erection of a dividing fence off the true boundary. There is no similar evidence in this case, but there is the parallel of a “family connection”. Persons named Atkinson owned both sections throughout the posited adverse possession period. And, there is simply no evidence to establish adversity between the Atkinson owners. To the contrary, I consider it a natural inference that the owners were related and that they lived in close proximity for many years. In light of the available evidence it would be speculative to infer that the askew western boundary between sections 119 and 120 reflected a situation of adverse possession between neighbours.

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<sup>8</sup> *Boskett v Drummond* CA 190/05, 21 December 2006.

<sup>9</sup> Section 22 of the 1908 Act was the predecessor of s 21, the give and take fence provision, in the 1978 Act.

[59] It follows that Mr Lauder's western boundary must be adjusted to include the wedge as part of his land. I am not influenced by the situation in relation to Mr Lauder's eastern fenceline. Various views were attributed to Mr Allan, the owner of section 118, during the course of the hearing. But he was not a witness, nor of course a party, in this case. Some form of accommodation needs to be reached given that the eastern fenceline and the true boundary are not aligned. But this is a matter for another day.

### **Other defences**

#### *Limitation Act*

[60] Although identified as an issue, this aspect withered in terms of importance in the course of argument. The relevant provisions of the Limitation Act are set out at [31]-[35]. As noted, time runs in favour of the person in adverse possession and against the registered owner. It is an action to recover land, commenced more than 12 years after a rightful entitlement based on adverse possession has matured, which is statute barred.

#### *Equitable defences*

[61] Mr Lauder pleaded the equitable defences of non-derogation from a grant of land, estoppel or deliberate encroachment with reference to:

- (a) the circumstance that the Edmunds sold section 119 to Mr Lauder knowing that the western and rear boundary fences were not the true boundaries, since the fencelines had been inset by four metres, and
- (b) knowing that the area sold was less than 4.2492 hectares, more or less, as stated in the title.

Mr Withnall described this as clearly unconscionable conduct.

[62] Whatever one makes of the Edmunds' conduct in late 1988 at the time of the sale, the fact remains that had a valid cause of action based on adverse possession existed it would have accrued in 1944 - when possession adverse to that of the

registered owner matured into a rightful entitlement. Equitable doctrines based on conduct which occurred 44 years later could not affect such entitlement.

[63] But, in any event the failure of the adverse possession claim is determinative in this case.

### **Conclusion**

[64] The claim in adverse possession is dismissed.

[65] Costs are reserved. The defendants may file memoranda in support of costs within 15 working days and the plaintiffs will have ten working days within which to reply.

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