"The Kangaroo, 7 Inches & the Court"

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Abstract

Following a dispute between the owners of Nos. 35&37 Kangaroo Street, Manly over the location of their common boundary an application was made to the Registrar General pursuant to s 135 B of the *Real Property Act* 1900 for a determination of the boundary.

The Registrar General made a determination of the boundary and advised the applicant and the adjoining owner accordingly.

The applicants challenged the determination in the Land and Environment Court seeking a re-determination by that Court of the position of the boundary. The appeal was heard by Justice Bignold who determined that the common boundary between No.35 and No.37 was that which had been determined by the Registrar General.

When Justice Bignold of the Land and Environment Court favoured the Registrar General's determination of the common boundary, the appellants appealed against the decision.

The appeal was made to the Supreme Court of NSW – Court of Appeal – and was confined to questions of law. The appeal was heard before Justice's Handley, Sheller and Tobias, who dismissed the appeal on all grounds with costs.

The following paper examines the series of events and how a gap of 7 inches led to litigation in two courts.

Time Line

The Registrar General received an Application for Determination of Title Boundary No.8084613 under *Part 14A* of the *Real Property Act 1900* between No.35 & 37 Kangaroo Street, Manly on the 5 November 2001.

Simultaneously a letter was received in Land and Property Information (LPI) from a Surveyor requesting that alterations be made to the Certificate of Title dimensions for No.35 Kangaroo Street.

The Registrar General directed a survey to be carried out to determine the common boundary between No.35 & 37. This was undertaken in December 2001.

The determination was issued to the applicant and adjoining owner on 15 January 2002. The applicant and his Surveyor attended LPI and the determination was discussed in detail.

On 8 February 2002 the applicant lodged an appeal against the boundary determination in the Land and Environment Court of NSW.

The hearing was held before Justice N R Bignold in the Land and Environment Court on 16, 17, & 18 September 2002.

On 23 December 2002 Justice N R Bignold delivered his judgment dismissing the appeal lodged by the applicant, thereby confirming the boundary determination of the common boundary.

On 5 March 2003 the applicant lodged an appeal to the Supreme Court of NSW – Court of Appeal

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On 14 November 2003 the appeal was heard by Justice's Handley, Sheller & Tobias.

On 15 December 2003 Justice Tobias delivered judgment on behalf of the Court dismissing the appeal on all grounds with costs.

Set aside by Appeal : [2003] NSWCA 343

Land and Environment Court of New South Wales

CITATION :	**Westfield And Anor. v The Registrar-General [2002] NSWLEC 248**
PARTIES :	APPLICANTS: Westfield And Anor. RESPONDENT: The Registrar-General
FILE NUMBER(S) :	30008 of 2002 of 2002
CORAM:	Bignold J
KEY ISSUES:	Practice and Procedure :- boundaries-determination of common boundary by Registrar General-appeal to Court
LEGISLATION CITED:	Real Property Act 1900, s 135J
CASES CITED:	
DATES OF HEARING:	16, 17, 18/09/02
DATE OF JUDGMENT:	23/12/2002
LEGAL REPRESENTATIVES:	APPLICANTS: Mr R Dalgleish, Barrister with Ms C Ravenscroft, Barrister SOLICITORS N/A RESPONDENT: Mr P Walsh, Barrister SOLICITORS Solicitor for the Registrar General

JUDGMENT:

IN THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

Matter No. 30008 of 2002
Coram: Bignold J
23 December 2002

M AND A WESTFIELD

Applicants
v
THE REGISTRAR-GENERAL

JUDGMENT

Bignold J:
A. INTRODUCTION

1. This is an appeal pursuant to the *Real Property Act 1900*, **s 135J** (the *RP Act*) by the Applicants (being the co-owners of a residential property known as No 35 Kangaroo Street, Manly) who are dissatisfied with a determination made by the Respondent of the position of the **northern boundary** of their property (being the common boundary with the adjoining property known as No 37 Kangaroo Street) as notified to the Applicants in the Respondent's letter given to the Applicants on **15 January 2002**.

2. The Respondent's determination of the northern boundary of No 35 Kangaroo Street, Manly had been made in response to an application dated **2 November 2001** made by the Applicants pursuant to the *RP Act*, **s 135B** for his determination of the position of the common boundary between the two properties (Nos 35 and 37 Kangaroo Street, Manly). The Applicants acquired No 35 in September 1999. At that time and thereafter, there has been a continuing dispute with the owners of No 37, Mr Murphy, concerning the common boundary between the two properties and more particularly the position of the paling dividing fence on that boundary, Mr Murphy having twice relocated the dividing fence closer towards the Applicants' house without the Applicants' approval. It was following the second relocation of the dividing fence that the Applicants applied to the Respondent for a boundary determination. Their application was supported by surveying reports which they had commissioned, including reports of Mr surveyor Mudge.

3. The notification to the Applicants of the Respondent's determination had, stated inter alia:

1. The position of the common boundary between lot 1 in Deposited Plan 115714 and lot 26 in Deposited Plan 456033 has been determined to be in the position as shown on the attached sketch.

> *The determination has been based on an exhaustive search of records within this Office as well as marks placed and found in surveys on public record as no original marking could be located. It should be noted that the determination is in agreement with Deposited Plan 69952 (Primary Application 19952).*

4. **A copy of the sketch attached to the Respondent's notification is annexed hereto and marked "*A*".**

5. Following subsequent discussions between the parties in what proved to be an unsuccessful attempt to settle the Applicants' response to the Respondent's notification suggesting that the

boundary determination was incorrect, the Applicants commenced the present proceedings on **8 February 2002** in exercising the statutory right of appeal conferred by the *RP Act*, **s 135J(1)** which provides as follows:

> *A person who is dissatisfied with a determination under this Part may appeal to the Land and Environment Court for determination by the Court of the position of the boundary.*

6. Pursuant to **s 135J(4)**, the Registrar-General is not to take action under **s 135K** (noting the boundary determination on plans or documents registered or recorded in the office of the Registrar-General) until the expiration of the 28 day period for appealing his determination or if an appeal is made within that period "*until the matter has been determined*" by the Court. Accordingly, to date, the Respondent's boundary determination has not yet taken effect as provided for by **s 135L** of the Act.

7. The crux of the Applicants' case, founded upon the opinion of Registered Surveyor Philip Mudge, is that the Respondent's determination did **not** determine the position of the **common boundary** between the properties Nos 35 and 37 Kangaroo Street, Manly. Rather, the determination had only determined the northern boundary of No 35 but that boundary did **not** correspond to the southern boundary of No 37, and hence was not a determination of the **common** boundary between those two properties. Moreover, it was Mr Mudge's opinion that there existed an "*excess*" or "*no-man's* land" comprising a small wedge shaped area (**5 m2**) separating the properties, over and above the dimensioned areas of the two properties according to their respective land titles, which excess was available for allocation between the properties by way of the Court determining the **common boundary** between the two properties upon the basis of what appears to the Court to be "*just and reasonable*" within the meaning of **s 135H** of the *RP Act*.

8. Although disputing Mr Mudge's opinion that there existed in respect of properties Nos 35 and 37 an excess of land area over and above their respective title dimensions, the Respondent's ultimate response to the case presented by the Applicants was to submit that they were seeking a form of relief which was beyond the jurisdiction conferred upon the Court, and indeed was beyond the scope of, and hence unavailable under, the statutory regime for "*boundary determinations*" that is provided by **Part 14A** of the *RP Act*.

9. Moreover, the Respondent submitted that because the Applicants' case did **not** dispute the accuracy and appropriateness of the Respondent's determination in respect of the position of the northern boundary of the property No 35, the Court would be satisfied that the Respondent's determination was sound and implicitly or necessarily correct and reflected the **common boundary** of the adjoining properties with the consequence that the Court would adopt for itself that determination, by dismissing the Applicants' appeal.

10. In my judgment, and for the reasons that I shall presently explain, the Respondent's determination should be confirmed and be adopted by the Court as the determination of the common boundary between properties Nos 35 and 37 Kangaroo Street, Manly.

B. THE RELEVANT PROVISIONS OF PART 14A OF THE *RP ACT*

11. **Part 14A** was introduced into the *RP Act* by the *Real Property (Boundary Determinations) Amendment Act 1989* (Act No 171).

12. The Minister's Second Reading Speech (NSW Parliamentary Debates p 12516 to 12518 of 15 November 1989) included the following statement of the purpose of the Bill:

> *The purpose of this bill is to provide a simple alternative to the court system for determining the position of a lost or confused land title boundary. At present, landowners who cannot agree on the position of a common boundary, and who seek a formal resolution of their dispute, have no alternative but to initiate action in the Supreme Court. Often this results in substantial costs and lengthy delays. In may instances disputes are left unresolved because the parties are deterred by the daunting prospect of court action, particularly where one owner is anxious to sell or want to proceed with development. By vesting power in the Registrar General to make binding determinations on the correct position of title boundaries, the bill will allow expeditious resolution of these disputes at greatly reduced cost to the parties. The determinations will also have the added benefit of*

improving the State's cadastral database by ensuring that matters of doubt do not remain unresolved

13. The provisions of **Part 14A** most relevant for the purposes of adjudicating in this case must be fully recited. They are as follows:

135B. Application may be made for boundary determination

(1) Application may be made to the Registrar-General for the determination under this Part of the position of the common boundary of adjoining lands.

(2) Such an application can be made only by or on behalf of:

(a) an owner of land on either side of the boundary, or

(b) the purchaser under a contract for sale of land on one side of the boundary but only if the owner of the land consents to the application or the whole of the purchase price has been paid to the owner or the owner's agent, or

(c) a public or local authority or the Head of a Government Department.

135C. Boundaries to which Part applies

This Part authorises the determination of the position of a boundary between adjoining parcels of land, whether or not each parcel is under the provisions of this Act.

135E. Notice of application to be given to certain persons

(1) Before determining the position of a boundary pursuant to an application, the Registrar-General is to give notice of the application:

(a) to the owner of each parcel of land adjoining the boundary concerned (other than land owned by the applicant), and

(b) to such other persons as the Registrar-General considers appropriate.

(2) The notice is to contain such details of the application as the Registrar-General considers appropriate and is to invite the person to make a written submission concerning the application within a specified period (not less than 21 days).

(3) In determining the position of the boundary, the Registrar-General is to take into consideration any submissions made in accordance with the requirements of such a notice.

135F. Procedure in determining boundaries

(1) In determining the position of a boundary under this Part, the Registrar-General must consult with a surveyor registered under the Surveyors Act 1929.

(2) If the Registrar-General decides that a survey or other investigation should be carried out to assist the Registrar-General in determining the position of the boundary, the Registrar-General:

(a) may require any applicant for the determination to pay the reasonable costs of any such survey or investigation (and for that purpose may require payment in advance), and

(b) may refuse to proceed with the determination until the required payment is made.

135G. Determination of other boundaries

(1) If as a result of considering an application under this Part in respect of a boundary of land, the Registrar-General becomes aware that there is doubt as to the position of another boundary of that or other land, the Registrar-General may determine the position of that other boundary.

(2) Before making a determination under this section, the Registrar-General:

(a) is to give notice of the proposed determination to the owner of each parcel of land adjoining that other boundary inviting the person to make a written submission on the matter within a specified period (not less than 21 days), and

(b) is to take into consideration any submissions made in accordance with the requirements of such a notice.

(3) The Registrar-General must not make a determination under this section without prior consultation with the Surveyor-General.

135H. Basis of determination

The Registrar-General is to determine the position of a boundary on the basis of all the evidence available to the Registrar-General but, if that evidence is inconclusive, may determine it on the basis of what appears to the Registrar-General to be just and reasonable in the circumstances.

135I. Notice of determination of boundary

The Registrar-General is to give notice of a determination of the position of a boundary under this Part:

(a) to any applicant for the determination, and

(b) to the owner of each parcel of land adjoining the boundary, and

(c) to the Surveyor-General, and

(d) to such other persons as the Registrar-General considers appropriate.

135J. Appeals to Land and Environment Court

(1) A person who is dissatisfied with a determination under this Part may appeal to the Land and Environment Court for determination by the Court of the position of the boundary.

(2) Only the following persons can appeal:

(a) an owner of land adjoining the boundary,

(b) a person who applied for the determination as purchaser under a contract for the sale of land adjoining the boundary,

(c) a public or local authority or the Head of a Government Department.

(3) An appeal must be made not later than 28 days after notice of the Registrar-General's determination is given to the person concerned.

(4) The Registrar-General is not to take action under section 135K (Noting of boundary on plans etc):

(a) until the expiration of the period during which an appeal can be made against the determination concerned to the Land and Environment Court, and

(b) (if an appeal is made during that period) until the matter has been determined by the Land and Environment Court.

(5) The Registrar-General is entitled to be joined as a party, and to appear and be heard either personally or by his or her duly appointed agent, at the hearing of an appeal under this section and at the hearing of any appeal under the Land and Environment Court Act 1979 *in respect of any such appeal.*

135K. Noting of boundary on plans etc

(1) When the position of a boundary is determined under this Part, the Registrar-General:

(a) is to make such notations and entries on any plan or other document registered or recorded in the office of the Registrar-General as may be necessary to show the position of the boundary determined, and

(b) may cause to be registered in the office of the Registrar-General a plan showing the position of the boundary determined.

(2) The Registrar-General may also amend any plan or other document to correct any error in it or supply any omission from it in respect of the position of the boundary.

(3) The Registrar-General may also take action under this section in respect of the determination by a competent court of the position of a boundary as if it were a determination under this Part.

(4) The Registrar-General may, if the position of a boundary is determined under this Part,

request the applicant for the boundary determination to lodge in the office of the Registrar-General a plan (being, if the Registrar-General so specifies, a plan of survey) showing details of the boundary as so determined, together with such number of copies of the plan, if any, as the Registrar-General may specify.
(5) The Registrar-General may refuse to take action under this section if an applicant fails to comply with a request under subsection (4).

135L. Effect of boundary determination

(1) A determination of the position of a boundary under this Part takes effect when the position of the boundary is shown as referred to in section 135K (1).

(2) Once the determination takes effect, the boundary is for all purposes to be taken to be in the position so shown despite any discrepancy with any plan of survey or other plan or any other record.

C. THE COURT'S FUNCTION IN RESPECT OF THE APPEAL

14. The *RP Act*, **s 135J(1)** conferring the right of appeal to this Court defines its scope and purpose, namely "*for determination by the Court of the position of the boundary*".
15. An appeal pursuant to **s 135J(1)** is a proceeding within class 3 of the Court's jurisdiction: **vide the *Land and Environment Court Act* 1979, s 19(c)**. (the *LEC Act*)
16. In determining an appeal within classes 1, 2 or 3 of its jurisdiction, the *LEC* Act, **s 39(2)** provides:

> *In addition to any other functions and discretions that the Court has apart from this subsection, the Court shall, for the purposes of hearing and disposing of an appeal, have all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal.*

17. This general empowering provision obviously must be applied with some necessary modifications, to the fulfilment by the Court of its statutory function under the *RP Act*-eg it is not for the Court to notify the application under **s 135E** or to adopt the procedure outlined in **s 135F** or to exercise the power conferred by **s 135G**.
18. As the Applicants have properly submitted, the Court in hearing and determining the appeal does so by way of re-hearing, where fresh evidence may be given (the *LEC Act* **s 39(3)**) and not by way of appeal in the strict sense against the Respondent's decision.
19. Nonetheless, I am of the clear opinion that having regard to the clear purpose of the statutory regime operating under the *RP Act*, **Part 14A** and to the particular functions conferred upon the Registrar General, having regard to his and his Office's special expertise in matters pertaining to land title, that I should, in exercising the jurisdiction "*to determine the position of the boundary*" accord due respect and deference to the determination made by the Registrar-General: especially in the light of the fact that in making that determination, the Respondent was well aware of, and considered, the views of Mr Surveyor Mudge (upon whose opinion the Applicants principally rely in the present case).
20. However, the Court's approach of according due deference to the Respondent's determination **does** not mean that the Court is, in any way, abdicating or neglecting its statutory function "*to determine the position of the boundary*" upon the basis of the evidence adduced before it (which included that of three officers of the Registrar General's Office) in litigation where the Respondent has actively participated in defending or justifying his determination, according to his entitlement under the *RP Act*, **s 135J(5)**.
21. In the present proceedings, the Applicants and the Respondent are the only parties, no application for joinder of other participation having been made by Mr Murphy, the owner of No 37 Kangaroo Street, that the adjoining property, situate to the north of the Applicants' property.
22. In the present case where there is no challenge or dispute by the Applicants (or by their Surveyor Mr Mudge) to the accuracy and reliability of the datum point situate to the **south** of No 35 Kangaroo Street, by reference to which the Respondent determined the northern

boundary of No 35, there is no need for me to recite or examine the surveying evidence supporting those matters. They are simply not in dispute. As I have earlier noted, it is the Applicants' case that although no challenge is made to the Respondent's determination of the position of **northern** boundary of No 35, there is a challenge to that determination operating to relevantly locate the position of the common boundary between Nos 35 and 37 Kangaroo Street.

23. In so submitting, the Applicants advance the following propositions-

(i) the relevant boundary determination required to be made in the instant case pursuant to the provisions of the *RP Act*, **Part 14A** is the **common boundary** between properties Nos 35 and 37 Kangaroo Street, Manly;

(ii) although the northern boundary of lot 35 has been accurately and reliably determined by reference to an accurate and reliable datum point situate to the **south** of No 35, there has been no verification that that determination reflects the common boundary between Nos 35 and 37 by means of using a datum point situate to the **north** of No 35;

(iii) since attempts to establish the southern boundary of No 37 (the putative common boundary between Nos 35 and 37) have revealed that the southern boundary of No 37 does **not** correspond with the northern boundary of **No 35** (but falls short thereof ie it is situate to the north) it must be concluded by necessary inference that there exists between the two properties a slither of "*no-mans land*" and that the Respondent's determination is **not** in respect of the position of the **common** boundary between the two properties (Nos 35 and 37);

(iv) accordingly, this is a case "*where the available evidence is inconclusive*" within the meaning of **s 135H** of the *RP Act* which enlivens the power for the Court (exercising on the appeal the powers vested in the Registrar General) to determine the position of the common boundary "*on the basis of what appears to be just and reasonable in the circumstances of the case*" and on this basis, the common boundary should be determined further to the north (approximating the position of the dividing fence between the two properties as it existed when in 1999 the Applicants acquired No 35 Kangaroo Street, Manly).

24. As I have earlier noted, the Applicants' case depends entirely upon the opinions of Mr Surveyor Mudge that **(i)** it is possible to establish the southern boundary of No 37 where that boundary does **not** correspond with the unchallenged determination of the northern boundary of No 35 and **(ii)** therefore there exists a wedge-shaped slither of "*no-man's*" land between Nos 35 and 37 Kangaroo Street.

25. Mr Mudge's opinion that the position of southern boundary of No 37 can be reliably and accurately determined principally is founded upon his acceptance of the reliability of a detail of the north-western corner of No 37 shown in **Deposited Plan 531005** being a plan of subdivision of land situate further north in Kangaroo Street immediately adjoining No 37 Kangaroo Street. (That plan was registered in 1968.) The particular detail that is shown at the north-western corner of No 37 is the beginning of what may have been a re-alignment of Kangaroo Street commencing at that point. The distance at the frontage of No 37 of the apparent realignment is 2 feet 3 and a half inches (ie **0.7 m**) and this distance may be compared with the distance of **0.445 m** of the same angled section of the frontage to No 37 shown in earlier registered plans of that property.

26. In his Statement of Evidence (**Exhibit 1**), Mr Mudge attributed error in the boundary determination prepared by Mr Surveyor Job of the Registrar General's Office "*because it (the determination) took a frontage distance from the new angle in Kangaroo Street...*"

27. However, this attribution of error was stoutly repudiated by both Mr Surveyor Job and Mr Surveyor Wallis (both officers of the Registrar General's Office-the former undertaking the field work and preliminary boundary determination in this case and the latter making that determination as the authorised delegate of the Registrar General).

28. In particular, in his affidavit in reply, Mr Surveyor Wallis gives his full reasons for concluding that the discrepancies he had particularly identified in the details of the original

field notes of the 1880 alignment plan of Kangaroo Street and in DP 531005 "*raise doubt in determining the boundary from the angle in Kangaroo Street and using the dimensions shown in DP 531005*".

29. The detailed evidence of Mr Surveyor Wallis and Mr Surveyor Job which is corroborated by the evidence of Mr Burbridge concerning the documentary evidence being the records of the Registrar General relating to both properties Nos 35 and 37 Kangaroo Street, Manly (which is traced back from the present time to a Primary Application made in 1889) satisfies me that the Respondent's boundary determination is sound and accurate.

30. I am not persuaded by the competing opinions of Mr Surveyor Mudge. In particular, I do not think his reliance upon the detail shown in DP 531005 of the apparent realignment of Kangaroo Street as it affects the north-western corner of No 37 and upon the detail shown in the field notes of the 1880 alignment plans for Kangaroo Street, is justified in quest of establishing any relevant datum point situate to the north of No 35 Kangaroo Street. Because of that finding, it follows that I have not been persuaded that the southern boundary of No 37 falls short (ie it is situate to the north) of the position of the northern boundary of No 35 as determined by the Respondent (and which is not challenged by the Applicants or by Mr Mudge).

31. Nor have I been persuaded by Mr Mudge's opinion that there exists a slither of "*no-mans land*" between the two properties (Nos 35 and 37).

32. The documentary evidence suggests that for some years now a number of surveyors have expressed the opinion that there may exist in this part of Kangaroo Street some "*excess land*" ie land in excess of title dimensions of relevant lots. Even if a case had been made out by the Applicants of the existence of some excess land, I would doubt that the present proceedings provide the appropriate forum for the distribution of any excess land among existing property owners. Rather, the case, if established, would appear to justify an appropriate survey plan of re-definition: cf the written opinion of Mr Surveyor Green (**Exhibit 4**) relied upon by the Applicants.

33. The possibility of there being a need for a re-definition survey provides a further reason corroborating the wisdom of the approach adopted by Messrs Surveyors Job and Wallis of not seeking to ultimately verifying from a datum point situate to the north of No 35 their boundary determination, which was **solely** based upon an accurate and reliable datum point situate to the **south** of No 35.

34. That there is existing doubt concerning the dimensions of No 37 Kangaroo Street, is also evidenced by the fact that its title is subject to the following notation pursuant to the *RP Act*, **s 114**:

> *Note: Disposal of any lots in DP 456033 may require registration of a deposited plan of survey pursuant to s 114 of the Real Property Act 1900.*

35. The *RP Act*, **s 114** provides as follows:

> ***114. Registrar-General may require plan to be lodged***
>
> *The Registrar-General may:*
>
> *(a) where a person is applying to have land brought under the provisions of this Act, refuse to accept lodgment of or reject the application,*
>
> *(b) where a person is seeking to obtain registration of a dealing or to lodge a caveat, refuse to register the dealing or to accept lodgment of the caveat or reject the dealing or caveat, and*
>
> *(c) where a person is seeking to obtain the creation of a folio of the Register or the issue of a certificate of title for the land comprised in a folio of the Register, refuse to create the folio or issue the certificate of title,*
>
> *if the person has refused or neglected to comply with a requirement of the Registrar-General:*
>
> *(d) to lodge in the office of the Registrar-General a plan (being, where the Registrar-General so specifies, a plan of survey) of the relevant land, together*

with such number of copies of the plan, if any, as the Registrar-General may specify, or

(e) to obtain registration or recording, under Division 3 of Part 23 of the Conveyancing Act 1919, *of such a plan.*

36. The Applicants made a separate allegation that the Respondent's boundary determination was incorrect so far as concerns the rear portion of the boundary (ie in the vicinity of Augusta Road and Augusta Lane). This allegation was unconnected with Mr Mudge's opinion of there existing "*excess land*".
37. The evidence of Messrs Surveyors Job and Wallis satisfies me that the determination is also sound and accurate. The Applicants claim that adoption of the determination will create a minor encroachment upon their land by a newly constructed garage at the rear of No 33 Kangaroo Street.
38. Notwithstanding the opinion of Mr Mudge I am satisfied that the Respondent's determination is accurate and reliable in all respects.

D. CONCLUSIONS AND ORDERS
39. My acceptance (for the reasons given) of the evidence adduced by the Respondent leads me to the conclusion that I should adopt the Respondent's determination of the boundary between Nos 35 and 37 Kangaroo Street, Manly.
40. In adopting it, I am satisfied that it relevantly is a determination of the **common boundary** between those properties.
41. The properties are adjoining properties and prima facie the boundary determined by the Respondent is the "*common boundary*" between those properties. As I have consistently noted, there has been no challenge by the Applicants that the determination is relevantly of the northern boundary of No 35. Given that the properties are obviously adjoining properties, and the fact that I have not been persuaded of the correctness of Mr Mudge's opinion that there exists between the two properties a slither of "*no man's land*", I am satisfied that the Respondent's determination relevantly determines the position of the common boundary.
42. Accordingly I make the following orders-

1. Appeal dismissed.

2. The determination of the common boundary between Nos 35 and 37 Kangaroo Street, Manly made by the Registrar-General as notified to the Applicants on 15 January 2002 is adopted by the Court as the determination by the Court of the position of that boundary.

3. Exhibits be returned.

4. Question of costs reserved.

New South Wales
Court of Appeal

CITATION :	**Westfield v Registrar-General of NSW [2003] NSWCA 343**
HEARING DATE(S) :	14 November 2003
JUDGMENT DATE :	15 December 2003
JUDGMENT OF :	Handley JA at 1; Sheller JA at 2; Tobias JA at 3
DECISION :	Appeal dismissed with costs
CATCHWORDS :	REAL PROPERTY - Determination of common boundary between two properties - ND
LEGISLATION CITED :	Real Property Act 1900, s 135B Land and Environment Court Act 1979, s19(c), s7(1), s135B, s135J(5), s135E, s135H, s135I, s135K(1), s135L(2), s39(2) and (3)
CASES CITED :	London Passenger Transport Board v Moscrop [1942] AC 332 Workers Compensation (Dust Diseases) Board v Veksans Workers' (1993) 32 NSWLR 221 National Trustees Executors and Agency Co of Australasia Ltd v Hassett [1907] VLR 404 Melwood Units Pty Limited v The Commissioner of Main Roads [1979] AC 426 at 432 Maurici v Chief Commissioner of State Revenue (2003) 77 ALJR 727 Beale v Government Insurance Office of New South Wales (1997) 48 NSWLR 430
PARTIES :	Mark Westfield and Anne-Maria Westfield Registrar-General of New South Wales
FILE NUMBER(S) :	**CA** 40087/03
COUNSEL :	A: Mr Ross Dalgleish R: Mr Peter Walsh
SOLICITORS :	A: Mr Ross Dalgleish R: Kenneth Charles Hall, Registrar-General Legal Services
LOWER COURT JURISDICTION :	Land & Environment Court
LOWER COURT FILE NUMBER(S) :	L&E 30008/02
LOWER COURT JUDICIAL OFFICER :	Bignold J

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40087/03
L&E 30008/02

HANDLEY JA
SHELLER JA
TOBIAS JA

Monday 15 December 2003

MARK WESTFIELD and ANNE-MARIA WESTFIELD v REGISTRAR-GENERAL OF NEW SOUTH WALES

Judgment

1 **HANDLEY JA**: I agree with Tobias JA.

2 **SHELLER JA**: I agree with Tobias JA

3 **TOBIAS JA**: Mark Westfield and Anne-Maria Westfield (the appellants) are the registered proprietors of Lot 1 in DP 115714, known as No. 35 Kangaroo Street, Manly (No. 35). The appellants' immediate neighbour to the north is Mr David Murphy, the registered proprietor of Lot 26 DP 456033, which is known as No. 37 Kangaroo Street, Manly (No. 37).

4 After the appellants had purchased No. 35 (in September 1999), a dispute arose with Mr Murphy as to the correct position of the common boundary between the respective properties. That dispute was not resolved and hence the appellants made an application on 2 November 2001 to the Registrar-General pursuant to s 135B of the *Real Property Act* 1900 (the Act) for a determination of the boundary.

5 On 14 January 2002, the Registrar-General made a determination of the position of the northern boundary of No. 35. On the same day he advised the appellants in writing that:

> "The position of the common boundary between Lot 1 in Deposited Plan 115714 and Lot 26 in Deposited Plan 456033 has been determined to be in the position as shown on the attached sketch.
>
> The determination has been based on an exhaustive search of records within this Office as well as marks placed and found in surveys on public record as no original marking could be located. It should be noted that the determination is in agreement with Deposited Plan 69952 (Primary Application 99952)."

The sketch so attached identified the common boundary between the two properties. It depicted the existing house on No. 35 and identified the distance between the wall of the building at its eastern end (nearest to Kangaroo Street) and the boundary as 0.4 metres and that between the wall at the western end and the boundary as 0.465 metres. The effect of this determination was to place the common boundary between the two properties in a position closer to No. 35 than originally thought: the boundary at the north-eastern corner of No. 35 was moved in a southerly direction approximately 0.2 metres. The practical consequence of this determination for the appellants was that the distance between the wall of their house and the boundary was now insufficient to enable a person to pass between them.

6 The appellants challenged the determination in the Land and Environment Court pursuant to s 135J of the Act, seeking a re-determination by that Court of the position of the boundary. That appeal fell within Class 3 of that Court's jurisdiction: *Land and Environment Court Act* 1979, s 19(c). The appeal was heard by Bignold J, who determined on 23 November 2002

that the common boundary between No. 35 and No. 37 was that which had been determined by the Registrar-General and notified to the appellants on 15 January 2002. The appellants appeal to this Court against that decision. This appeal is confined to questions of law: see *Land and Environment Court Act,* s 57(1).

7 Before dealing with the substance of the appeal, I should note that the only party joined by the appellant in the proceedings before the Land and Environment Court was the Registrar-General (who was entitled to be so joined by virtue of s 135J(5) of the Act). Mr Murphy was not joined. However, in my opinion he should have been as he was a person directly interested in the outcome of the proceedings: *London Passenger Transport Board v Moscrop* [1942] AC 332 at 345. Section 135E required that he be given notice of the appellants' application under s 135B and s 135I required that the Registrar-General give him notice of the determination. Most importantly, once the position of the boundary as determined was noted on any plan registered or recorded in the Registrar-General's office pursuant to s 135K(1), Mr Murphy became bound by the determination by virtue of s 135L(2). In these circumstances, he should have been joined as a party to the proceedings before the Land and Environment Court and before this Court. The proceedings, therefore, were irregularly constituted.

8 A search of the relevant file in the Registry of this Court reveals that this irregularity was noted and an explanation was intended to be sought. However, the file does not reveal whether this in fact occurred or what the results of any such inquiries were. As it happened, Mr Murphy was present in court during the hearing of the appeal and indicated that he was content for his interests to be protected by the submissions of the Registrar-General. However, this of itself is unsatisfactory and should not happen in the future. If the adjoining owner does not wish to be actively involved in the proceedings, he or she can avoid any costs by filing a submitting appearance.

The relevant statutory provisions

9 The statutory provisions relevant to the disposition of this appeal are as follows:

> "**135B. Application may be made for boundary determination**
> (1) Application may be made to the Registrar-General for the determination under this Part of the position of the common boundary of adjoining lands.
>
> ...
>
> **135C. Boundaries to which Part applies**
> This Part authorises the determination of the position of a boundary between adjoining parcels of land, whether or not each parcel is under the provisions of this Act.
>
> ...
>
> **135F. Procedure in determining boundaries**
> (1) In determining the position of a boundary under this Part, the Registrar-General must consult with a surveyor registered under the *Surveyors Act* 1929.
>
> ...
>
> **135G. Determination of other boundaries**
> (1) If as a result of considering an application under this Part in respect of a boundary of land, the Registrar-General becomes aware that there is doubt as to the position of another boundary of that or other land, the Registrar-General may determine the position of that other boundary.
>
> ...
>
> **135H. Basis of determination**
> The Registrar-General is to determine the position of a boundary on the basis of all the evidence available to the Registrar-General but, if that evidence is inconclusive, may determine it on the basis of what appears to

the Registrar-General to be just and reasonable in the circumstances."

The proceedings before the primary judge

10 Mr Surveyor Mudge and Mr Surveyor Green gave expert survey evidence before the primary judge on behalf of the appellants. Mr Surveyor Wallis and Mr Surveyor Job gave evidence on behalf of the Registrar-General. The latter were experienced officers of the Registrar-General and the determination of 14 January 2002 was made by Mr Wallis based upon the investigations of Mr Job.

11 The essence of the dispute between the surveyors can be stated as follows. According to Mr Mudge, Mr Wallis had only determined the northern boundary of No. 35 (which he accepted had been correctly determined) and not the position of the common boundary between No. 35 and No. 37. This was said to be due to the fact that the northern boundary of No. 35 as determined did not correspond to the southern boundary of No. 37 and hence was not a determination of the common boundary between the two properties. It was Mr Mudge's opinion that there existed an "*excess*" or "*no-mans land*" between the two, comprising a small wedge-shaped area of approximately 5m2 which was 0.2 metres wide at the Kangaroo Street boundary alignment, reducing to zero approximately two thirds of the way along the common boundary. According to Mr Mudge, this excess was available for allocation between the properties by way of the Court determining the common boundary on the basis of what appeared to be "*just and reasonable*" within the meaning of s 135H of the Act.

12 Mr Mudge had reached this result by: firstly, commencing at the southern boundary of Lot 2 in DP 531005; secondly, adapting what was referred to in the evidence as the "*old angle*" of Kangaroo Street shown on File Plan 936406 of 0.445 metres; and finally, laying back a distance of 11.76 metres (being the title deed dimension along the eastern boundary of No. 37 to the south of that angle). According to Mr Mudge, the point reached was 0.2 metres north of the agreed position of the north-eastern corner of No. 35 (as determined by Mr Wallis) and hence there was said to be an "*excess*" of undistributed or unallocated land.

13 In response to evidence of Mr Job to which I shall shortly refer, Mr Mudge summarised his position as follows:

> "The dimension of 11.76m being the frontage of Murphy's property to the south of the bend in Kangaroo Street should be taken from the original bend as defined by the alignment plan field notes and not from the bend defined by DP531005 since there is some doubt as to survey information within DP531005. It is noted that there is disagreement of the common boundary between Lot 2 DP531005 and DP 936406. The dimension of 0.445m in DP936406 agrees with the bend in Kangaroo Street as per the alignment plan field notes and further a distance of 10.21 DP456033 together with a distance of 1.55 DP936406 determines the position of the south-east corner of DP936406. The determination of the south-west corner of DP 936406 should be determined from title dimensions of DP531005 along Sheridan Place from the north-eastern most corner of Lot 1 DP531005."

14 DP936406 referred to by Mr Mudge is the same as FP936406 to which I have referred in [12] above. The plan shows the original dimensions of No. 37 and depicts the "*old angle*" of Kangaroo Street as having a dimension of 1' 6½" (0.445 metres) along the eastern boundary of No. 37.

15 DP531005, which was prepared in 1968 by Mr Surveyor Stoddart, is a subdivision plan of two allotments immediately to the north of No. 37. It depicts the boundary between Lot 2 in DP531005 and Lot 26 in DP936406 (of which No. 37 forms part - it was later re-subidivided), which is immediately to the south of Lot 2. The northern boundary of DP936406 is the northern boundary of No. 37. DP531005 identifies what is referred to as the "*new angle*" of Kangaroo Street as having a dimension of 2' 3½" (0.7 metres). However, the

evidence before the primary judge was that DP531005 was unreliable insofar as it purported to fix the southern boundary of Lot 2 in that plan and the northern boundary of Lot 26 in DP936406. The reason for this was that there were no reliable physical or other survey marks that could be taken as fixing the intersection of that boundary with the old alignment of Kangaroo Street.

16 Although Mr Mudge accepted that there were no physical reference points or survey marks on the ground which could be used for the purpose of fixing the "*old angle*" of Kangaroo Street, nevertheless he considered that the original angle could be determined by reference to the field notes of the 1880 alignment of Kangaroo Street which, he asserted, confirmed the position of that angle within approximately 15mm. On the other hand, Mr Job considered that on the available survey information and titling evidence there was some doubt as to the accuracy of the survey information to the north of the common boundary between No. 35 and No. 37. He fixed the common boundary between those properties, being the northern boundary of No. 35 and southern boundary of No. 37, by redefining the southern boundary of DP69952 from DP449903 and DP120177 and by adopting the eastern boundary dimension of No. 35 from the title deed to that property.

17 Mr Wallis gave evidence to the effect that DP531005 purported to establish the northern boundary of DP936406 and possibly created a new bend in Kangaroo Street. However, he concluded that the common boundary between No. 35 and No. 37 could not be determined by reference to the northern boundary of DP936406 (being the southern boundary of Lot 2 in DP531005) as it was an unreliable starting point for any such determination. In his opinion, there was no "*triangle or no-mans land*" as asserted by Mr Mudge. According to Mr Wallis, if there was a surplus it did not lie between No. 35 and No. 37 but probably existed between the northern boundary of No. 37 and Lot 2 in DP531005.

18 Furthermore, Mr Wallis was firm in his view that the northern boundary of No. 35 coincided with the southern boundary of No. 37 and that if there was any problem it occurred, as I have observed, on the northern boundary of No. 37 rather than the southern boundary as asserted by Mr Mudge. He disagreed that there was a hiatus or no-mans land because of the inability to fix the corner of the "*old angle*" in order to be able to lay back the distance of 11.76 metres along the frontage of No. 37 to the south of the angle as shown on its title deed.

19 In Mr Wallis' opinion, that corner could not be fixed because there was no evidence on any plans or on the ground as to where the original angle was located. He accepted that there was some information which could be gleaned from the field notes of the 1888 alignment of Kangaroo Street, which gave a calculated distance to the angle, but asserted that there was no other evidence and that the notes were insufficient. As he said:

> "If we could go out there and find the original peg in the ground, we'd lay back 11.67 and that would be the boundary, there's no question about that".

20 Mr Wallis also expressed the view that the available evidence was conclusive to enable the determination of the common boundary between No. 35 and No. 37 and that this was because the approach adopted by himself and Mr Job had been to determine the north-east corner of No. 35 and the south-east corner of No. 37 by reference to DP2482 in which both parcels of land were located. He said:

> "When we get hiatuses between blocks of land it is when they are out of separate DPs, so you'll have one four figure DP here and another one on the other side of it. That's when you get a hiatus. When it all comes out of the same based DP there cannot be a hiatus between the land".

21 In answer to a question from the primary judge, he agreed that this was the case here, namely, that his determination had been based on the same deposited plan, whereas that of Mr Mudge had relied on adjoining but separate plans. Accordingly, in the circumstances and given the limited physical survey or other reference points, his methodology was, in his opinion, more reliable than that adopted by Mr Mudge.

The primary judge's decision

22 The primary judge first considered the Court's function in its approach to the appeal. After noting that the proceedings fell within Class 3 of the Court's jurisdiction and that the Court's powers in relation thereto were provided in s 39(2) of the *Land and Environment Court Act,* his Honour said:

> "18. As the Applicants have properly submitted, the Court in hearing and determining the appeal does so by way of re-hearing, where fresh evidence may be given (the *LEC Act* **s 39(3)** and not by way of appeal in the strict sense against the Respondent's decision.
>
> 19. Nonetheless, I am of the clear opinion that having regard to the clear purpose of the statutory regime operating under the *RP Act*, **Part 14A** and to the particular functions conferred upon the Registrar General, having regard to his and his Office's special expertise in matters pertaining to land title, that I should, in exercising the jurisdiction "*to determine the position of the boundary*" accord due respect and deference to the determination made by the Registrar-General: especially in the light of the fact that in making that determination, the Respondent was well aware of, and considered, the views of Mr Surveyor Mudge (upon whose opinion the Applicants principally rely in the presence case).
>
> 20. However, the court's approach of according due deference to the Respondent's determination **does** not mean that the court is, in any way, abdicating or neglecting its statutory function "*to determine the position of the boundary*" upon the basis of the evidence adduced before it (which included that of three officers of the Registrar-General's Office) in litigation where the Respondent has actively participated in defending or justifying his determination, according to his entitlement under the *RP Act*, **s 135J(5)**."

23 The primary judge then observed that it was the appellants' case that although no challenge was made to the Registrar-General's determination of the position of the **northern** boundary of No. 35, there was a challenge to the determination operating to relevantly locate the position of the common boundary between it and No. 37. His Honour then noted the appellants' submission that the attempt to establish the southern boundary of No. 37 revealed that that boundary did not correspond with the northern boundary of No. 35 and fell short of it, so that it was necessary to conclude that there was a sliver of "*no mans land*". Accordingly, it was submitted that the evidence was inconclusive within the meaning of s 135H of the Act, thereby enlivening the power of the Court to determine the position of the common boundary "*on the basis of what appears to be just and reasonable in the circumstances of the case*".

24 The primary judge then observed that the appellants' case depended entirely upon the acceptance of the opinions of Mr Mudge that firstly, it was possible to establish that the southern boundary of No. 37 did not correspond with the unchallenged determination of the northern boundary of No. 35 and secondly, that there existed a sliver of "*no mans land*" between the two properties. His Honour referred to the evidence of Mr Mudge on these issues and the responses thereto of Messrs. Job and Wallis. In particular, he referred to the evidence of Mr Wallis that he had identified discrepancies in the details of the original field notes of the 1880 alignment plan of Kangaroo Street (upon which Mr Mudge had relied) and to the fact that, according to Mr Wallis, DP 531005 raised "*doubt in determining the boundary from the angle in Kangaroo Street and using the dimensions shown in DP531005*".

25 The primary judge held that the detailed evidence of Messrs. Wallis and Job satisfied him that the Registrar-General's boundary determination was "*sound and accurate*". He rejected the competing opinions of Mr Mudge in the following terms:

> "30. ...In particular, I do not think his reliance upon the detail shown in DP 531005 of the apparent realignment of Kangaroo Street as it affects the north-western corner of No. 37 and upon the detail shown in the field notes

> of the 1880 alignment plans for Kangaroo Street, is justified in his quest of establishing any relevant datum point situate to the north of No. 35 Kangaroo Street. Because of that finding, it follows that I have not been persuaded that the southern boundary of No. 37 falls short (ie it is situate to the north) of the position of the northern boundary of No. 35 as determined by the Respondent (and which is not challenged by the Applicants or by Mr Mudge).
>
> 31. Nor have I been persuaded by Mr Mudge's opinion that there exists a slither of "*no-mans land*" between the properties (Nos 35 and 37)."

26 Even if there did exist some "*excess land*" (that is, land in excess of the title dimensions of the relevant lots) in this part of Kangaroo Street, the primary judge expressed doubt as to whether the present proceedings provided an appropriate forum for the distribution of any excess land among the existing property owners. Rather, the existence of any such excess would, according to his Honour, appear to justify an appropriate survey plan by re-definition as suggested by Mr Surveyor Green in a report relied upon by the appellants. He then said this:

> "33. The possibility of there being a need for a re-definition survey provides a further reason corroborating the wisdom of the approach adopted by Messrs Surveyors Job and Wallis of not seeking to ultimately verifying from a datum point situate to the north of No. 35 their boundary determination, which was **solely** based upon an accurate and reliable datum point situate to the **south** of No. 35."

27 The appellants had also challenged the determination of the Registrar-General as to the location of the north-western corner of No. 35, which was accepted as coinciding with the south-western corner of No. 37. Mr Wallis had determined this point in 1989 by reference to a concrete kerb on the northern side of Augusta Road, which he opined was in a similar, if not identical, position as the original stone kerb, part of which was still in existence. He saw no reason to change it for the purpose of the present determination.

28 On the other hand, Mr Mudge had fixed the north-western corner of No. 35 and the south western corner of No. 37 by adopting as his datum point the south-eastern corner of No. 33 Kangaroo Street and then taking a bearing as shown on DP449903 to determine the south-western corner of that property. He then laid back the title dimensions of Nos. 33 and 35 to the north along the Augusta Lane boundary of those properties to determine the north-western corner of No. 35. The difference between the surveyors was that the point fixed by Mr Wallis as the north-western corner of No. 35 was approximately 0.06 metres to the south of the point fixed by Mr Mudge, which had the effect of creating an encroachment on No. 35 by the existing garage on No. 33.

29 The primary judge disposed of this issue in the following terms:

> "36. The Applicants made a separate allegation that the Respondent's boundary determination was incorrect so far as concerns the rear portion of the boundary (ie in the vicinity of Augusta Road and Augusta Land). This allegation was unconnected with Mr Mudge's opinion of their existing "*excess land*".
>
> 37. The evidence of Messrs. Surveyors Job and Wallis satisfies me that the determination is also sound and accurate. The Applicants claim that adoption of the determination will create a minor encroachment upon their land by a newly constructed garage at the rear of No. 33 Kangaroo Street.
>
> 38. Notwithstanding the opinion of Mr Mudge I am satisfied that the Respondent's determination is accurate and reliable in all respects."

The submissions on the appeal

30 The appellant submitted that the primary judge had erred in law in the following respects:

(a) As the evidence established that the southern boundary of No. 37 could not be determined from a datum point commencing on or about the northern boundary of that property, it followed as a matter of law that the evidence available to the Registrar-General to determine the common boundary between No. 35 and No. 37 was inconclusive within the meaning of s 135H of the Act;

(b) By according "*due respect and deference to the determination made by the Registrar-General*", his Honour misdirected himself as to the proper function of the Court in an appeal to which the provisions of s 39(3) of the *Land and Environment Court Act* applied;

(c) By taking into account the possibility of there being a need for a re-definition survey as a reason corroborating his acceptance of the approach adopted by Messrs. Wallis and Job, his Honour took into account an irrelevant consideration;

(d) By failing to taking into account the history of the prior occupation of No. 35 and its physical characteristics (including the position of the dividing fence between it and No. 37), his Honour failed to take into account a relevant consideration;

(e) In rejecting the appellants' challenge to the determination by the Registrar-General of the location of the north-western corner of No. 35, his Honour failed to provide proper or adequate reasons for that rejection.

Determination of the issues

The first argument

31 The appellants submitted that upon the true construction of s 135H of the Act, if any of the evidence available to the Registrar-General was inconclusive, he was required to determine the position of the common boundary on the basis of what appeared to be just and reasonable in the circumstances. Accordingly, it was irrelevant that Mr Wallis considered that the available evidence was conclusive to the point that he was able to determine that boundary by reference to a starting or datum point to the south of No. 35; s 135H applied because Mr Wallis regarded the evidence relied on by Mr Mudge as unreliable and therefore inconclusive.

32 In my opinion, s 135H cannot be so construed. The provision requires the Registrar-General to determine the position of the relevant boundary on the basis of "*all the evidence available*" and it is only if "*that evidence is inconclusive*" that he or she is empowered to determine the position of the boundary on the basis of what appears to him or her to be just and reasonable in the circumstances. In other words, the provision is only enlivened where the totality of the available evidence is inconclusive. Accordingly, if the evidence enables the position of the relevant boundary to be determined on the civil onus it will not be inconclusive and s 130H will have no application.

33 As I have recited in [20] above, Mr Wallis expressed the view, accepted by the primary judge, that the available evidence was conclusive such as to enable him to determine the common boundary between No. 35 and No. 37. Mr Wallis' opinion was that the northern boundary of No. 35 and the southern boundary of No. 37 were coincident and thus formed the common boundary between the two properties and that if there was any "*excess*" or "*surplus*" of land as envisaged by Mr Mudge, it was not at the interface between No. 35 and No. 37 but was on or beyond the northern boundary of No. 37.

34 In my opinion, the evident purpose of s 135H is to provide for the situation where the available evidence is so doubtful that a determination cannot be made as a matter of probability. It does not require that that evidence be such as to enable the determination to be made to any higher degree of certitude such as beyond reasonable doubt.

35 In my opinion, it was open to the primary judge to accept the approach of Mr Wallis and to determine the common boundary in accordance therewith. Acceptance of Mr Wallis' approach and the evidentiary basis for it did not, therefore, involve any error of law. It follows that the appellants' first argument should be rejected.

The second argument

36 This argument is based on the observations of the primary judge which I have set out in [22] above. The appellant did not suggest that his Honour had failed to give proper consideration to all the evidence or that he had failed to properly weigh that evidence and to approach it with an open mind. Nonetheless, it was submitted that as the Court was required by s 39(3) of the *Land and Environment Court Act* to determine the appeal by way of re-hearing, it was not open to his Honour to indicate that "*due respect and deference*" should be given to the determination of the Registrar-General notwithstanding his officers' acknowledged expertise in matters pertaining to land title.

37 In my opinion, there is no substance in this submission. Courts of specialised jurisdiction are entitled to give "*due respect and deference*" to the opinions of the expert officers of an authority from whose decision an appeal lies. So much is established by the following passage from the judgment of Handley JA (with whom Sheller JA agreed) in *Workers Compensation (Dust Diseases) Board v Veksans* (1993) 32 NSWLR 221 at 240-241:

> "Although the Compensation Court on an appeal under the Act is bound to form and express its own judgment on the facts and law this does not mean that the decision of the authority is to be ignored. At a time when the High Court still entertained appeals in its original jurisdiction from decisions of the Registrar of Trade Marks and Commissioner of Patents that Court gave "*due weight*" to the opinion of the Registrar or Commissioner "*as that of a skilled and experienced person*" (see *Eclipse Sleep Products Inc v Registrar of Trade Marks* (1957) 99 CLR 300 at 308) especially in cases where there was a conflict of testimony as to technical facts or scientific questions: see *F Hoffman-La Roche & Co AG v Commissioner of Patents* (1971) 123 CLR 529 at 543. In my opinion the same principles should guide the Compensation Court in the exercise of its original jurisdiction in appeals from the authority."

38 In my opinion, these principles apply to the Land and Environment Court. It follows that [19] of the judgment of the primary judge, especially when read in the context of [20] does not disclose any error of law.

The third argument

39 The third argument is based upon the matters which I have set out in [26] above. It was submitted that the primary judge's reference to the possibility of there being a need for a re-definition survey as providing an additional reason for his adoption of the approach advanced by Messrs. Wallis and Job had the consequence of his Honour taking into account an irrelevant consideration or otherwise misdirecting himself in law. In my opinion, this argument fails.

40 The primary judge's reference to the possible need for a re-definition survey as providing an additional or further reason justifying the wisdom of his acceptance of the approach to the determination of the relevant boundary adopted by Messrs. Wallis and Job did not, in my opinion, involve him in taking into account an irrelevant consideration. His Honour was simply saying that the possible requirement for such a re-definition survey (due to the uncertainty related to the absence of a fixed and verifiable datum point to the north of the boundary between No. 35 and No. 37) corroborated or further justified the wisdom of fixing that boundary by reference to a verifiable datum point to the south of No. 35. There is nothing exceptional in his Honour's reasoning process and it does not disclose any error of law.

The fourth argument

41 The foundation for this argument was that "*long and unchallenged occupation*" was capable of providing an appropriate indication of the land to which a grant relates. Accordingly, the principles of surveying required the Registrar-General and the Land and Environment Court on appeal to take account of the history of the occupation of that part of No. 35 determined by Mr Mudge to be an area of surplus land to the north of the determined northern boundary of that property. Reliance was placed upon a passage from the judgment of Sir Leo Cussen in *National Trustees Executors and Agency Co of Australasia Ltd v Hassett* [1907] VLR 404 at 412. However, in the passage cited his Honour determined that there could be no better indication of the land to which a grant relates than long and unchallenged occupation but only in the absence of survey marks. In the present case, verifiable survey marks were available, albeit to the south of No. 35.

42 Reliance was further placed upon the following passage from *Hallmann's Legal Aspects of Boundary Surveying as Applying in New South Wales* (2nd Ed, 1994) [13.3.], which states as follows:

> "The courts have established precedents granting priorities of weight if any two or more of the following boundary features present conflicting evidence in the hearing of the dispute. These are in order of priority:
>
> 1. natural boundaries
> 2. monumented lines,
> 3. old occupations, long undisputed,
> 4. abuttals,
> 5. statements of length, bearing or direction."

43 There is some support for the proposition that an error of law is committed where a decision maker for no rational reason rejects as wholly irrelevant evidence which prima facie affords some proof of the matter to be determined. However, the evidence in the present case does not support a finding that the long occupation of the relevant part of No. 35 was ignored for no rational reason: cf *Melwood Units Pty Limited v The Commissioner of Main Roads* [1979] AC 426 at 432; *Maurici v Chief Commissioner of State Revenue* (2003) 77 ALJR 727 at 729. Mr Wallis rejected the relevant dividing fence relied on by the appellant as establishing long undisputed occupation of the area in question upon the basis that at the time of his investigation, the original fence had long since disappeared. Mr Job agreed in his evidence that he had considered the question of occupation and in particular the retaining wall between the two properties, which he accepted was "*quite old*". However, his view was that there was other evidence of a more reliable kind which was determinative of the correct position of the relevant boundary.

44 Mr Mudge, on the other hand, relied heavily on his acceptance that a fence had been located at the top of the retaining wall for some 90 years, but it is clear that he utilised the physical occupation of this part of No. 35 as supporting his view that, pursuant to s 135H, the unallocated "*surplus*" should be allocated, as a matter of what was just and reasonable in the circumstances, to the appellants. Thus he first determined that there was a wedge-shaped "*surplus*" immediately to the north of the northern boundary of No. 35 (as determined by the Registrar-General and with which he agreed). On the basis of what he regarded as a long and undisputed perception of the position of the boundary with reference to different ground heights along the boundary line, the existing retaining wall, the position of the fencing up until December 2001 and the use by the occupants of No. 35 of that wedge-shaped portion, it was his opinion that the portion should be allocated to the appellants, since:

> "When all things are considered their property is in greater need"

45 However, there was nothing irrational in the acceptance by the primary judge of the

approach of Messrs. Wallis and Job and the rejection of that of Mr Mudge and his "*surplus*". His Honour's reasoning process did no more than resolve a question of fact. Accordingly, the fourth argument should be rejected.

The fifth argument

46 The appellants submit that the passages from the primary judge's decision extracted in [29] above, by which he disposed of the challenge to the Registrar-General's determination of the north-western corner of No. 35 (which by common agreement, coincided with the south-western corner of No. 37), did not contain reasons sufficient to avoid the miscarriage of justice referred to by this Court in *Beale v Government Insurance Office of New South Wales* (1997) 48 NSWLR 430.

47 We were informed during the course of the hearing that the primary judge had a lengthy view of the site in the company of the four surveyors, Messrs. Wallis, Job, Mudge and Green, during which each discussed and illustrated their methodologies. In the presence of the judge, they discussed between themselves their reasons for adoption of their respective approaches. We were further informed that these discussions and illustrations included the methodology of each of Messrs. Wallis and Mudge in determining the point where the common boundary between No. 35 and No. 37 intersected with the western boundary of each property.

48 Although the findings of the primary judge in [37] and [38] of his judgment are spare, to say the least, I do not consider that, when taken in the context of the whole judgment, they should be regarded as so inadequate as to contravene the principles conveniently summarised by Meagher JA in *Beale* at 443.

49 However, it did appear during the course of argument that consistency may have required that the determination of the point at which the common boundary between No. 35 and No. 37 intersected with the western boundary of those properties be made by reference to the south-east corner of No. 33, which was also the datum point used by Mr Wallis to determine the north-east corner of No. 35. Whereas Mr Mudge utilised that datum point as his starting point to determine the intersecting point on the western boundary of the property, Mr Wallis relied on his 1989 determination arrived at by adopting the prolongation of the concrete kerb in Augusta Road. However, to the point where it intersected with the western boundary of No. 33, according to Mr Mudge, this kerb was unreliable as a starting or datum point to determine the western end of the common boundary.

50 However, Mr Wallis' evidence was not challenged on this issue as he was not cross-examined to suggest that he had been inconsistent by adopting the south-east corner of No. 33 as his datum point for the purpose of determining the north-east corner of No. 35 and then rejecting that same datum point for the purpose of determining its north-west corner. If he had been cross-examined on this potential inconsistency, then he may have had a rational reason for adopting the approach which resulted in his 1989 determination. In these circumstances, it cannot be said that the primary judge erred in law in accepting the evidence of Messrs Job and Wallis on this issue and rejecting that of Mr Mudge.

Conclusion

51 In my opinion, each of the challenges raised by the appellants to the primary judge's findings should be rejected. I therefore propose that the appeal should be dismissed with costs.

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