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UPDATE 116

APRIL 2025

LAND TITLES LAW AND PRACTICE

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Material Code 42725304

Print Post Approved PP255003/00333

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UPDATED COMMENTARY

Dr William Dixon and Professor Anne Wallace have updated the existing annotations to the *Land Title Act 1994* (Qld).

The following paragraphs have been updated by Professor Anne Wallace:

Erem v Moussa [2024] NSWSC 641 is noted in the commentary on whether severance of a joint tenancy can be resisted. It provides an example of a successful application to set aside a severance of a joint tenancy on the grounds of an equitable estoppel. *Goyal v Chandra* [2006] 68 NSWLR 313 also noted in the commentary on the same point, see [5.433].

New commentary has been added on capacity to sever a joint tenancy, including a discussion of the following cases: *Gibbons v Wright* (1954) 91 CLR 423; [1954] HCA 7; *Hamill v Wright* [2018] QSC 197 and *Erem v Moussa* [2024] NSWSC 641, see [5.436].

The decision in *McMahon v Tasmania* [2024] TASSC 79 has been included in the commentary to s 185(1)(g) – wrong description of land as an exception to indefeasibility. In 2002 the State of Tasmania owned land at 5 Morrisby Street, Rosebery on which was built eight flats used as teacher accommodation. The State decided it was surplus to its needs and decided to sell the property. As it was Crown land a survey plan was obtained and the land brought under the *Land Titles Act 1990* (Tas). The survey plan incorrectly included the land next door which was separately fenced and contained the headmaster's cottage. The plan incorrectly specified the area for 5 Morrisby Street as 1012 sqm rather than the correct measurement of 607 sqm.

The block of flats was sold to the Schulzes in 2002. They intended to buy the flats only and had no intention of buying the cottage. They were unaware of the error on the plan. In 2005 the flats were sold to the McMahons, who similarly intended only to buy the flats. In 2017 the McMahons engaged a surveyor to prepare a strata title plan for the flats and discovered the error. They claimed ownership of the cottage and gave the headmaster notice to quit the cottage. They sought a declaration that the cottage belonged to them. The State counterclaimed seeking orders to correct the title to 5 Morrisby Street.

The Supreme Court of Tasmania dismissed the application by the McMahons and held that the case clearly fell within the exception to indefeasibility in s 40(3)(f) Land Titles Act (Tas), the equivalent of s 185(1)(g). It was clear on the evidence that the State only intended 5 Morrisby Street to be included in the plan. The Schulzes and the McMahons only intended to buy 5 Morrisby Street. Applying s 40(3)(f), title is not defeasible in regard to any portion of land erroneously included in the certificate of title by a wrong description of parcels or boundaries: (at [41]-[47]). The legal estate to the land erroneously included in the title remains with the original owner. Accordingly, the State retained ownership of the cottage.

The McMahons claim was dismissed and they were ordered to take such action as necessary to excise the disputed land from the title to 5 Morrisby Street.

The court also expressed the view that there was no impediment to relying on extrinsic material to determine that there is a mistake on the register. Otherwise s 40(3)(f) would be a dead letter and there would be no basis for any investigation into the possibility of error on the face of a certificate of title: (at [45]), see [10.3650].

The decision of the Court of Appeal of New South Wales in *JEA Holdings (Aust) Pty Ltd v Registrar-General of New South Wales* [2024] NSWCA 255 is noted in the commentary to ss 189(1)(j) and (k) which exclude compensation by the State for the omission or misdescription of an easement, see [10.5897].

The following annotations have been updated by Dr William Dixon:

- Notice to start a proceeding, adding *Liu v Su* [2024] QSC 304, regarding paths to an unwanted caveat, [7.3110].
- Application to the Supreme Court, adding *Irfan & Amin (No 3)* [2024] FEDCFAMC1F 712, regarding the power of the Federal Circuit and Family Court of Australia to order a party to remove a caveat, see [7.3530].
- Supreme Court may make order “on the terms it considers appropriate”, adding *Nelson v Greenman* [2024] VSC 704, regarding when costs may be awarded on an indemnity basis, see [7.3650].

