The "road" to adverse possession is not always a smooth one: *Young v Richmond Valley Council*

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In its judgment in *Young v Richmond Valley Council*[1] the New South Wales Court of Appeal (NSWCA) has delivered an important ruling confirming when and how roads subject to the Real Property Act 1900 (NSW) and Old System titled-roads are owned by the local council despite administrative errors and historic road closure processes.

This judgment is the third procedural judgment in a complex claim by Mr Gary Young for a declaration that three parcels of land near the Richmond River at Irvington, NSW (referred to as Wharf Road, River Road and Lot 246) are his property by virtue of adverse possession.

Initially, Mr Young (who is self-represented) commenced his proceedings against the Richmond Valley Council (the Council) alone. The Council, asserting that all three properties the subject of Mr Young's claim are public roads and, therefore, not capable of having title extinguished through adverse possession filed a Notice of Motion seeking summary dismissal of his proceedings.

In the hearing on the Council's Notice, Mr Young asserted that he intended to amend his Statement of Claim including by asserting that the Council never owned the claimed land. At that time, the certificate of title for one of the properties, Lot 246 stated that title was vested in the Crown and not the Council. The remaining parcels are Old System-titled roads and do not have certificates of title for them.

In its judgment in *Young v Richmond Valley Council*,[2] the Supreme Court of New South Wales determined not to summarily dismiss the proceedings "at least at this stage"[3] due to:

- the lack of clarity concerning the ownership of Lot 246; and
- the fact that the precise nature of Mr Young's claim had not been adequately identified.

In dismissing the Council's Notice, the Court granted leave to Mr Young to file and serve an Amended Statement of Claim but in so doing stated:

> [t]he Court urges Mr Young to promptly seek appropriate legal representation. It is highly desirable that he receive advice about what, if any, claims may be reasonably arguable and, if there are such claims, receive assistance in preparing a pleading. I apprehend that Mr Young would find it very difficult, if not impossible, to produce any acceptable pleading on his own. If he nonetheless seeks to proceed in that fashion, there is every chance that another application of the type currently before the Court will be brought.[4]

Mr Young filed his Amended Statement of Claim on 8 July 2020 naming the Council as the first defendant and the State of New South Wales as the second defendant. On 2 February 2021, the State filed a Notice of Motion seeking the dismissal of Mr Young's proceedings against it.

In his Amended Statement of Claim, Mr Young (who was, once again, self-represented) asserted that all three land parcels were owned by the Crown and, in respect to Wharf Road and River Road, they were never vested in the Council, that they were closed in 1963 and title remained vested in the Crown and not the Council.

In its judgment in *Young v Richmond Valley Council (No 2)*[5] the NSWSC summarily dismissed Mr Young's case against the State and, in doing so, made the following findings:

- Lot 246 was vested in the Council and the certificate of title produced in the first hearing contained an error which was subsequently corrected by Land Registry Services.
  Evidence was produced to the Court that, on 1 April 2020 (during the course of the first application), the registered proprietor of Lot 246 was changed from the Crown to the Council administratively by Land Registry Services.
  Neither the Court, the Council or Mr Young were notified of this correction. The correction was made as a result of evidence depicting that Lot 246 was a part of a public (or parish) road created by notice in the Government Gazette on 2 October 1885 and had not been closed since.

Accordingly, title in Lot 246 vested in fee simply in the Council (then the Tomki Shire Council) on 1 January 1920 pursuant to the Local Government Act 1919 (NSW). When this title was converted to Torrens Title in 2021, the registered proprietor should have been recorded as the Council pursuant to ss 7(4) and 145(3) of the Roads Act 1993 (NSW).

- In terms of Wharf Road and River Road, Mr Young asserted that they were owned by the Crown, they never vested in the Council and, when they were closed as public roads in 1963, they remained vested in the Crown. In making these assertions, Mr Young relied upon Gazette notices published on 31 May 1963 and 21 June 1963.
  The Court found that the Gazette notices referred to did not record the closure of the roads. They each stated an intention to close the roads under the Roads Act 1902 (NSW) unless valid objections exist. No formal notice of closure of the roads was subsequently Gazetted, meaning that the closures were never effected.
  The Court found that the roads vested in the Council in fee simple on 1 January 1920 by virtue of s 232(4) of the Local Government Act 1919 (NSW) despite the fact that these parcels are Old System-title. The Court also found that the Council is entitled to be registered as the proprietor of those roads under the provisions of the Real Property Act 1900 (NSW).
- In addition to finding that Mr Young's claim to have possessory title of any of the parcels are untenable against the State because the State did not own them, the Court also noted the formidable barriers to his claims as a result of s 13.1 of the Crown Land Management Act 2016 (NSW) and its predecessors, and, in relation to Lot 246, s 45D of the Real Property Act 1900 (NSW).

Mr Young appealed this decision to the NSWCA, alleging a number of defects in the decision of the NSWSC.

In refusing to grant leave to Mr Young (who remained self-represented), the NSWCA determined that:

- it was entirely appropriate for the NSWSC to proceed on documentary evidence alone and not to require an evidentiary hearing. Property ownership details are documentary in nature and nothing could have been gained by an evidentiary hearing with cross-examination of witnesses;
- the action taken by Land Registry Services to correct the registered proprietor details for Lot 246 on the certificate of title was lawful. Mr Young contended that this action was an "action" as defined in ss 11 and 27(1) of the Limitation Act 1969 (NSW) and was, therefore, barred as limitation period for this action had expired. The NSWCA rejected this argument, concluding that the term "action" within the meaning of s 27(1) could not extend to administrative action taken by Land Registry Services to correct an error on a certificate of title; and that
- each parcel of land remained public roads despite the 1963 Gazette notices and each vested in the Council under s 232 of the Local Government Act 1919 (NSW).

The matter will now proceed to a full hearing in the NSWSC.[6]

Whilst the outcome remains to be seen, given that Mr Young:

- has now lost two procedural appeals;
- has two adverse costs orders imposed against him;
- has been twice urged by the NSWSC to seek legal representation, with the latter judgment stating at [19] "Mr Young should consider whether the matter should so proceed, having regard to the conclusions reached in this judgment, and the earlier judgment of 8 May 2020",

it does not seem likely that his ultimate claim for adverse possession will be successful, meaning that the current legal position that public roads are essentially immune from adverse possession actions in NSW will remain intact.

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Footnotes

1. *Young v Richmond Valley Council* [2021] NSWCA 255; BC202110253.
2. *Young v Richmond Valley Council* [2020] NSWSC 514; BC202003805.
3. Above, at [20].
4. Above n 2, at [24].
5. *Young v Richmond Valley Council (No 2)* [2021] NSWSC 525.
6. Above, at [19].