

Putty Hall and the Putty Community Association Inc

- 1 By a memorandum of transfer dated 2 July 1918 and registered A392482, William Wells Robinson, Solicitor, transferred to George Henry Gibbs, William Fraser and Wilfred Cobcroft, all of Putty, Graziers, as joint tenants, a parcel of land at Putty having an area of 2 roods, being that part of the land comprised in Crown Grant Volume 1284 Folio 108 shown in the plan annexed to the transfer.
- 2 The transfer was for a nominal consideration and was expressed as being made to the transferees –

“upon trust for the use of the residents of Putty for Public Religious and Social gatherings and for such other purposes as the said residents may from time to time determine”

It was expressed to have been made *“at the direction”* of David Stephen Ellis (who seems to have been generally regarded as the donor of the land) and Robert Moss. The precise relationship between Mr Robinson, on the one hand, and Messrs Ellis and Moss, on the other, is not clear.
- 3 A new certificate of title, Volume 2876 Folio 36, was issued by the Registrar General in respect of the land transferred.
- 4 The Registrar General also placed a caveat on the land, dated 2 July 1918, forbidding the registration of any dealing not consistent with the duties of the registered proprietors *“as trustees of a public hall for the use of the residents of Putty for Public Religious and Social gatherings and for such other purposes as the said residents may from time to time determine”*. The Registrar General must have had some other documentation before him as a source of his reference to *“a public hall”*, which is not referred to in the transfer. However, no other documentation, and in particular, no trust instrument setting out the powers and duties of the trustees, seems to have survived.
- 5 The reference to a hall in the caveat also suggests that a hall was erected on the land before the transfer was executed.
- 6 The hall seems to have become a social centre for Putty. However, use of the hall apparently diminished over the years, and by 1986 it was in a condition of disrepair. All of the original trustees had died. The last of them to die, Wilfred Cobcroft, died without leaving a will, and letters of administration of his estate were not taken out. The facts that there was no surviving trustee, and no legal personal representative of the last surviving trustee to die, meant that there was no-one with the power to appoint new trustees under the Trustee Act. There was no available trust deed providing a mechanism by which new trustees could be appointed.
- 7 It seems that in early 1986 Margaret Ferguson circulated a notice among people known to own land at Putty. No copies of the notice seem to have survived, but it apparently drew attention to the urgent need for repairs to the hall, and to the fact that all of the original trustees had died. The notice convened a meeting to discuss these matters.
- 8 That meeting was held at the hall on 8 February 1986. The minutes of the meeting are described in the heading as *“Minutes of the first meeting of the Putty Social Committee”*. The minutes record that 24 community members attended and that 12 others sent apologies. John Laycock was among those who sent an apology. Kendall Ferguson was acting chairman of the meeting and Margaret Ferguson spoke about its purposes. Nominations were called for appointment of new trustees, and an election was held, as a result of which Owen Ellis, Kendall Ferguson and John Laycock were elected as trustees. Officer bearers of the new association were also elected.
- 9 On or about 5 April 1986 John Laycock prepared a memorandum which he presumably submitted to the committee of the new association: the memorandum is held in the Association’s records. In it he pointed out that the appointment of trustees (including himself) by the meeting on 8 February 1986 appeared to be invalid. He was correct in this opinion. Nevertheless, he proceeded to apply to the Registrar General for registration of the three “trustees” as proprietors of the hall land and the Registrar General registered

them. John Laycock's memorandum also notes that the "*original title deeds could not be located*". It seems that the missing certificate of title was found. It was lodged at the Land Titles Office by John Laycock with the application for registration of the three "trustees" as proprietors, and it was returned to John Laycock when registration was completed. No formal trust deed, however, has ever come to light up to the present day.

- 10 In his memorandum of 5 April 1986 John Laycock also suggested incorporation of the Association under legislation which he does not specify but which must be the Associations Incorporation Act of 1984.
- 11 At the "*second annual general meeting of the Putty Community Association*" held on 8 February 1987 a constitution and the new name "Putty Community Association" in lieu of "Putty Social Committee" were adopted.
- 12 During 1986 and 1987 extensive repairs and remodelling of the hall were carried out by members of the new association. Thereafter, the building has been improved, repaired and fitted out as needed from time to time, a toilet block has been constructed, a flagpole and notice board erected and other miscellaneous improvements carried out. All of these improvements, repairs, fittings and additions have been funded by or through the Putty Community Association or its successor incorporated association ("PCA") or from grants obtained by PCA. PCA has planned and arranged these improvements and its members have carried out the necessary work. In addition, PCA has paid all the expenses associated with the hall including insurance premiums for a cover which has at all relevant times included the "trustees".
- 13 On 24 June 2002 the unincorporated association was incorporated under the Associations Incorporation Act 1984 as Putty Community Association Incorporated, and on 30 August 2003 new objects and rules appropriate to the incorporated association were adopted. The objects and rules were registered on 15 April 2004.
- 14 From about May 2003 requests were made to John Laycock for production of the certificate of title to enable the incorporated association to seek registration by the Registrar General as proprietor of the hall land pursuant to the Associations Incorporation Act, which contained provision for all property held on behalf of the unincorporated association to vest in the incorporated association.
- 15 John Laycock initially deferred responding to those requests and finally declined to produce the certificate of title. He has maintained that position up to the present day. In more recent times he has indicated that the reason for his attitude is that although the original trust was expressed to be for the use of "*the residents of Putty*" the Association is not truly representative of the residents.
- 16 On 24 September 2003 an application for registration of PCA as proprietor of the land was lodged with the Registrar General who was asked to proceed without the certificate of title in view of John Laycock's refusal to produce it. The Registrar General gave John Laycock notice to produce the certificate of title but he declined to do so. The Registrar General then rejected the application for registration for want of the certificate of title. It seems clear that if the certificate of title had been produced, the Putty Community Association Incorporated would have been registered as proprietor of the land.
- 17 On 17 November 2005 proceedings were commenced against John Laycock in the Singleton Local Court for an order for the delivery to PCA of the certificate of title.
- 18 John Laycock objected to the proceedings on the basis that the court had no jurisdiction to entertain them. This contention was argued before the Magistrate, who rejected it. John Laycock then appealed against the Magistrate's rejection to the Supreme Court of New South Wales which dismissed his appeal and ordered him to pay PCA's costs of the appeal.
- 19 John Laycock thereafter made several applications in the proceedings before the Local Court:
 - (i) application for an order setting aside the subpoena referred to below;

- (ii) application for an order transferring the proceedings to a Local Court at Parramatta or elsewhere;
- (iii) application for an order that the Magistrate disqualify himself from further hearing the proceedings on the ground of apprehended bias.

20 The first two applications were dismissed. The third was overtaken by events referred to below, and was not dealt with. The defendant also objected to PCA's representation before the court, but this objection was also dismissed. The Magistrate described both the application for a change of venue and the objection to the PCA's representation as "totally unjustified and a time-wasting exercise".

21 A subpoena was taken out by PCA and served on John Laycock, requiring him to produce the certificate of title to the Local Court. If the subpoena had been complied with, the certificate of title would have been held by the Local Court until the proceedings had been concluded (see p.4 of the judgement of Stephen Jackson, Magistrate, dated 24 February 2009).

22 After his unsuccessful attempt to have the subpoena set aside, John Laycock declined to produce the certificate of title as required by the subpoena on the basis that the document was not in his possession. He maintained this position despite being advised by the Magistrate that, for the purposes of the subpoena, possession of the certificate by a third party on his behalf was equivalent to possession by him.

23 On 31 October 2006 the Magistrate directed that John Laycock produce the certificate of title to the Court on 22 November or show cause why he should not be dealt with for contempt of court.

24 Despite that direction John Laycock collected the certificate of title from the person who was apparently holding it for him, that afternoon, and lodged it on 15 November with the Department of Lands together with three dealings affecting the land. In breach of the terms of the subpoena and of the Magistrate's direction, he failed to produce the certificate of title to the Court on 22 November.

25 The Department rejected two of the dealings, but gave notice to PCA's solicitor, who did not pass on that notice to PCA, that he intended to register the third, a notice of the death of Owen Ellis.

26 On 23 June 2008 the notice of death was registered. The fact of registration did not come to PCA's attention until two working days before the proceedings were to come back before the Court, on 23 July 2008.

27 An effect of registration of the notice of death under the new computerised system recently adopted by the Department of Lands was that the original certificate of title, to the delivery of which the proceedings were specifically directed, was cancelled, and a new certificate was issued in its place. The proceedings before the Court were accordingly rendered futile. If the certificate of title had been produced to the Court in accordance with the subpoena and the Magistrate's direction, this outcome would not have occurred and the proceedings could have continued to a final conclusion. The Magistrate said of the defendant's conduct which led to this outcome:

"The Court is of the opinion that the defendant has acted quite unreasonably in this matter. He failed to produce the certificate of title although it was obviously in his possession or under his control. His failure to do so was, in the opinion of the Court, calculated to give as much time as possible for his documents to be considered in the Land Titles Office with the possibility of a new certificate of title being issued and the plaintiff's proceedings being neutered....He was attempting to circumvent the due administration of justice."

28 In view of the cancellation of the certificate of title, PCA was obliged to seek leave to discontinue the proceedings, and to seek an order for costs against the defendant. In view of its inability to give adequate notice of the course it intended to take, it was obliged to accede to the defendant's application for an adjournment of the proceedings on 23 July 2008, and to an order granting him his costs of that day.

- 29 On 3 December 2008 the issue of discontinuance by PCA and its application for a costs order against the defendant, despite that discontinuance, was argued before the Magistrate.
- 30 On 26 February 2009 the Magistrate handed down his decision, granting PCA leave to discontinue the proceedings, and ordering the defendant to pay its costs for the period from 31 October 2006 until July 2008 (subject only to the defendant's costs of the day on 23 July 2008 assessed at \$875.00). The discontinuance of the Local Court proceedings did not impair in any way PCA's entitlement to commence fresh proceedings, corresponding to the original proceedings, but directed to the new certificate of title issued upon cancellation of the original one.
- 31 It is appropriate to note here the nature of the "trustees" title to the land. There is a difference between legal title and beneficial or equitable title. When trustees hold property under a trust, they hold the legal title, but not the beneficial or equitable title. Their ownership of the property and their right to enjoy it or realise it is subject to the terms of the trust. The land was vested in Messrs Ellis, Ferguson and Laycock on no basis other than as trustees. They have never held the beneficial or equitable title. For these reasons it is misleading to describe KF and JL as simply "the owners" of the hall land.
32. The absence of any trust deed is important in two respects in particular:
- (i) no express powers of management are conferred on the trustees:
 - (ii) no machinery is provided for the appointment of new trustees.

The second of these matters led to the invalidity of the 1986 appointments, and is a continuing problem. That invalidity was not cured by the registration of the 1986 appointees as proprietors: the fact is that they were accorded registration as trustees and on no other basis (declarations as to their election as trustees were lodged with their application for registration) and the person who applied for their registration (being himself one of the trustees) did so knowing that their status as trustees was invalid (see paragraph 9 above). Accordingly, the title to the land is worse than uncertain. The problems would have been overcome if John Laycock had made the certificate of title available in support of PCA's application for registration under the Associations Incorporation Act."

Putty Community Association Inc.
10 January 2011