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O N A P P E A L

FROM THE FULL COURT OF THE SUPREME COURT OF

SOUTH AUSTRALIA

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B E T W E E N :

SOUTHERN CENTRE OF THEOSOPHY INCORPORATED

(Plaintiff)  
Appellant

- and -

10 THE STATE OF SOUTH AUSTRALIA

(Defendant)  
Respondent

CASE FOR THE RESPONDENT

RECORD

1. This is an appeal from a judgment of the Full Court of the Supreme Court of South Australia (King, C.J., Zelling and Wells JJ.) dated the 29th day of May, 1979, allowing the Respondent's appeal from a judgment of Walters J. in the Supreme Court of South Australia dated the 7th day of August, 1978, whereby it was declared:-

p. 74, l. 1

p. 48, l. 1

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- (a) that the high water mark of Lake George (fixed in 1977 by the Government Surveyor, Robert Andrew Chalklen) forms the eastern boundary

of the land comprised and described in Crown Lease Perpetual No. 11887 Crown Lease Register Book Volume 584 Folio 12, and

- (b) that the area of accretions forms part of the land comprised and described in Crown Lease Perpetual No. 11887 Crown Lease Register Book Volume 584 Folio 12.

2. The questions for decision involve:-

- (a) the construction of Crown Lease Perpetual No. 11887 Crown Lease Register Book Volume 584 Folio 12 and of Hundred Plan No. 162 deposited in the Land Office at Adelaide on the 28th day of March, 1906, and 10
- (b) the applicability of the doctrine of accretion to the land comprised and described in the said lease.

3. The points raised by this appeal are:-

- (a) Whether, upon the true construction of Crown Lease Perpetual No. 11887, the eastern boundary of the land therein described, is the high water mark of Lake George as it is from time to time or is the boundary delineated by the line appearing on Hundred Plan No. 162 deposited in the Land Office at Adelaide on the 28th day of March, 1906. 20

(b) Whether Lake George is an inland lake and, if so, whether the doctrine of accretion may apply to land formed on the edge of such a lake.

(c) Whether the doctrine of accretion may apply to the said land in view of the fact that both the land covered by the lake and the land from which the lease is taken have, at all material times, been held by the Crown as allodial property.

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(d) Whether the Appellant may succeed in its claim that there has been an accretion to its land as a consequence of a change in the location of the high water mark of Lake George, in the absence of evidence of the location of the high water mark at the time that the lease was granted.

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(e) Whether the doctrine of accretion may apply to land formed by the encroachment into Lake George of sand forming part of a wind driven sand-hill.

(f) Whether on the facts proved, the formation of the land on the edge of

the lake was slow and imperceptible and thus capable of constituting an accretion.

4. The Appellant is the registered proprietor of an estate as Lessee from Her Majesty The Queen in that piece of land situate in the Hundred of Lake George County of Grey, being Section 16SW containing 500 acres or thereabouts, and being the whole of the land comprised and described in Crown Lease Perpetual No. 11887 Crown Lease Register Book Volume 584 Folio 12.

Ex. 1

5. Section 16SW in the Hundred of Lake George County of Grey was originally the subject of Crown Lease Register Book Volume LXXXII Folio 30 with Right of Purchase No. 198. The lease ran for 21 years from the 1st day of April, 1889, with a right of renewal for a further term of 21 years and was over a piece or parcel of land of approximately 500 acres being the Section No. 16SW in that Hundred and County "as the same is delineated in the public maps deposited in the Land Office in the City of Adelaide".

Ex. 3

Ex. 2

6. The lease was surrendered and in lieu thereof the present Crown Lease Perpetual No. 11887 was issued on the 27th day of September, 1911, being deemed by its terms to run from the 1st day of April, 1910. The description of the land comprised in the present lease is the same as the description of the land comprised in the earlier lease, viz: "... Section No. 16SW in the Hundred of Lake George County of Grey as the same is delineated in the public maps deposited in the City of Adelaide".

Ex. 1

Ex. 2

7. The eastern boundary of section 16SW is shown on Hundred Plan No. 162 deposited in the Land Office on the 28th March 1906 as a line fixed by reference to the high water mark for Lake George as determined by Government Surveyor Stephen King in 1888. The high water mark of the Lake, taken as the furthest point to which the level of the water commonly rises, has retreated since 1888 and in 1977 had reached a position ascertained by a survey conducted by Government Surveyor Robert Andrew Chalklen.

p. 37 ll. 28-3  
40-4

Ex. 7

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8. Lake George is a large inland lake containing water of a salty or brackish nature which is navigable by small craft. The lake is affected from time to time by tidal influences arising from currents on the lake and by the inflow of tides which intermittently ebb and flow into the lake from the waters of Rivoli Bay, by means of a channel of communication from Lake George to Rivoli Bay first constructed in or about 1913 and remodelled in 1963.

p. 37 ll. 49-5

p. 38 ll. 1-1

p. 8 ll. 1-2

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9. This action is brought by the Appellant as Plaintiff, against the Respondent as Defendant, to secure a declaration that (a) the high water mark of Lake George forms the eastern boundary of the land comprised and described in Crown Lease Perpetual No. 11887 Crown Lease Register Book Volume 584 Folio 12 and (b) the area of accretion

p. 3, l. 15- forms part of the land comprised and described in Crown  
p. 4, l. 28- Lease Perpetual No. 11887 Crown Lease Register Book Volume  
584 Folio 12. The Appellant's Statement of Claim was dated  
the 30th day of September, 1975, and the Respondent's  
Defence (as amended) was dated the 12th day of May, 1978.

p. 3, ll. 38-40 The Appellant claimed to be entitled to the declaration  
sought on the grounds that "the eastern boundary of (the  
Appellant's land) adjoins Lake George. Since the said land  
p. 4, ll. 1-3 was first leased there has been a gradual accretion of land  
to the east of the original boundary by reason of wind-swept 10  
sand, and/or long shore sanddrift and/or the change in the  
level of the lake".

10. Evidence for the Appellants was given by Christopher  
Charles Von Der Borch, a Marine Geologist, who stated that a  
large area of mobile sand is currently accreting into the  
northern end of Lake George, fed by the drift of dunes which  
are rapidly advancing on the lake. Some portion of this sand  
has been transported in a clockwise direction from its  
origin in the foremost dune to an area of the Appellant's  
lease north of that dune. Some portion of this sand, in 20  
moving clockwise around the lake shore, has slowly built out  
the shore line forming an "accretionary prism" which  
advances continuously at a rate of between 10-45 centimetres  
each year into the lake. He further state that a second area  
of extension to the boundary of the Appellant had taken  
place in the manner put forward by Mr. Donald Armstrong, a  
witness for the Respondent.

11. Evidence for the Respondents was given by Donald Armstrong, a Government Geologist, that the eastern boundary of the Appellant's property had been added to by the movement of sand dunes into the shallow waters at the edge of the lake at the south-western end of the subject land. This movement is readily detectable insofar as at certain wind velocities the dunes can move as much as one yard each day. On some occasions the forward movement of any dune can be detected within a period of one hour by means of the observation of a peg placed at the nose of the dune.

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12. Further evidence for the Respondents was given by Alfred Gordon Chambers, a lifetime resident of the area, who stated that in 1913 a drain was dug in between the eastern most edge of Lake George and Rivoli Bay opening the lake to the sea. Between the date of first excavation and 1963 the drain was blocked every year and was, on occasions, allowed to remain blocked for several years at a time. In 1963, however, the drain was substantially remodelled with the result that there is more frequent connection with the sea although during the last 3 years it has been closed for approximately 7 months of each year.

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13. On the 7th day of August, 1978, Walters J. gave judgment for the Appellant and declared:-

(1) that the high water mark of Lake George (fixed in 1977 by the Government Surveyor Robert Andrew Chalklen) forms the eastern boundary of the land comprised and described in Crown Lease Perpetual No. 11887 Crown Lease Register Book Volume 584 Folio 12, and

(2) that the area of accretion forms part of the land comprised and described in Crown Lease Perpetual No. 11887 Crown Lease Register Book Volume 584 Folio 12.

In addition, the question as to the apportionment of the alluvial land between the adjoining sections was reserved for consideration in chambers with the issue of costs in relation thereto, adjourned, the Respondent in any event being liable to pay to the Appellant its costs of the action to be taxed up to and including the date of the entry of judgment. Walters J. gave the following among other reasons for his judgment. He held that it was the intention of the parties to the Crown Lease Perpetual No. 11887 when the lease was granted "that no matter what may have been the actual circumstances of the level of the high water mark in 1888, the land should be bounded by the actual high water mark of Lake George, as it varied from time to time, so that the grantee should at all times have a lake frontage". As far as the operation of the doctrine of accretion was



concerned, Walters J. determined that it applied to a leasehold estate in Crown Land held in perpetuity and to land bordering inland lakes of the nature of Lake George. He further found that the addition to the Appellant's boundary had taken place slowly and imperceptibly and thus provided a proper foundation for the application of that doctrine.

p. 40, ll. 46-4  
 p. 45, ll. 16-3  
 p. 46, ll. 48-5  
 p. 47, ll. 1 &  
 p. 47, ll. 3-1

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14. The Respondent appealed to the Full Court of the Supreme Court of South Australia (King CJ, Zelling and Wells JJ.). On the 29th day of March, 1979, the Full Court gave judgment upholding the Respondent's appeal with costs. In his judgment, Zelling J., with whom the other members of the Bench agreed, held that the eastern boundary of the land comprised in the lease was fixed as delineated by the line on the public maps deposited in the Land Office in the City of Adelaide and in these circumstances the doctrine of accretion was not applicable.

p. 49, l. 18-  
 p. 61, ll. 46-5  
 p. 62, ll. 1-1

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15. On the 6th day of December 1979 the Full Court made an order granting leave to appeal to Her Majesty in Council.

p. 78, l. 10-

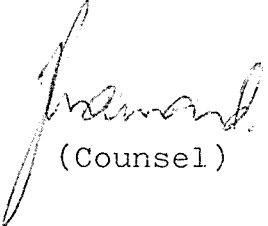
16. The Respondent submits that this appeal should be dismissed with costs for the following amongst other

## REASONS

- (1) Because, as the Full Court of the Supreme Court of South Australia rightly held, upon the true construction of Crown Lease Perpetual No. 11887, the eastern boundary of the land therein described, is delineated by the line appearing on Hundred Plan No. 162 deposited in the Land Office of the City of Adelaide on the 28th day of March, 1906.
  
- (2) Because any ambiguity in the terms of Crown Lease Perpetual No. 11887 should be construed in 10  
favour of the Crown (the respondent) and not in  
favour of the grantee (the appellant).
  
- (3) Because the doctrine of accretion has no  
application as both the land covered by waters  
of Lake George and the land with respect to  
which the Appellants claim have, at all material  
times, been held by the Crown as allodial  
property.
  
- (4) Because the Appellant has failed to prove  
accretion as a consequence of a change in the 20  
location of the high water mark of Lake George,  
there being no evidence of the location of such  
high water mark at the time when the lease was  
granted.

- (5) Because the doctrine of accretion does not apply to land formed by the encroachment into waters of sand forming part of a wind driven sandhill.
- (6) Because on the facts proved, the formation of the land on the edge of the lake was not slow and imperceptible and thus could not constitute an accretion to the leasehold of the Appellant.
- (7) Because the doctrine of accretion has no application to land formed on the edge of an inland lake.

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(Counsel)

IN THE PRIVY COUNCIL

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SOUTHERN CENTRE OF THEOSOPHY  
INCORPORATED

(Plaintiff)  
Appellant

- and -

THE STATE OF SOUTH AUSTRALIA

(Defendant)  
Respondent

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CASE FOR THE RESPONDENT

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