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October 2008, Wellington, New Zealand | ISSUES PAPER 10

# REVIEW OF THE LAND TRANSFER ACT 1952

IN CONJUNCTION WITH  
LAND INFORMATION NEW ZEALAND



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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

**The Commissioners are:**

Right Honourable Sir Geoffrey Palmer – President

Dr Warren Young – Deputy President

Emeritus Professor John Burrows QC

George Tanner QC

Val Sim

The General Manager of the Law Commission is Brigid Corcoran

The office of the Law Commission is at Level 19, HP Tower, 171 Featherston Street, Wellington

Postal address: PO Box 2590, Wellington 6001, New Zealand

Document Exchange Number: sp 23534

Telephone: (04) 473-3453, Facsimile: (04) 471-0959

Email: [com@lawcom.govt.nz](mailto:com@lawcom.govt.nz)

Internet: [www.lawcom.govt.nz](http://www.lawcom.govt.nz)

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## Why this review?

There have been calls for amendment and review of the Land Transfer Act 1952 for many years now. The 1952 Act is, to a large extent, a re-enactment of earlier Land Transfer Acts going back to 1870, and much of the language remains as it was in the nineteenth century. There have been significant additions to the Act throughout the twentieth century but never a fundamental review of the whole Act. There are also now stand-alone amendments, such as the Land Transfer Amendment Act 1963 and Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 (the 2002 Act).

A number of provisions are obsolete or at least obsolescent in part. The Land Transfer Act 1952 (LTA) needs modernisation, and clarification in many areas. There are uncertainties and ambiguities in the language as well as technical and operational problems. In addition, significant issues have emerged over the years that have taxed the minds of academics and the judiciary, not all of which have been resolved.

Finally, the LTA was drafted at a time when the registry system was paper based and it needs to be read with the 2002 Act, which heralded the introduction of the computer based registry and conveyancing systems.

The Law Commission has been asked to lead a review of the LTA, involving the active co-operation of Land Information New Zealand (LINZ) and the Ministry of Justice, and to produce a draft Bill for a reformed Act.

This issues paper aims to focus on the main issues that have been drawn to the attention of the Commission and those technical details in the present Act that LINZ has identified as requiring review. The first part of the paper covers conceptual issues, and the second part focuses on sections of the LTA that are operationally problematic. All chapters contain options for reform and questions for submitters. Responses to these options and questions will assist in making the policy decisions and drafting recommendations for a new Act.



*Geoffrey Palmer*

President

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The following have given their time generously during the research phase:

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New Zealand Law Society Property Law Section – Land Titles Committee (convenor, Kim Oelofse);

Stephanie Ng, Legal Policy Officer, Department of Justice, Melbourne;

Sandra Peterssen, Alberta Law Commission;

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Duncan Terris, solicitor, Christchurch;

The Hon Justice Williams, formerly Chief Judge of the Māori Land Court, and their Honours Deputy Chief Judge Isaac and Judge Ambler, Māori Land Court.

The legal and policy advisers at the Law Commission who researched and wrote most of Part 1 were Janet November and Julia Rendell, and the student assistant during the early stages of the research was Chantal Grut.

# Call for submissions

Submissions or comments (formal or informal) on this Issues Paper should be sent to Janet November, Senior Legal and Policy Adviser or Julia Rendell, Legal and Policy Adviser, by **19 December 2008**

## **Law Commission**

**PO Box 2590**

**Wellington 6011, DX SP 23534,**

**or by email to [landtransfer@lawcom.govt.nz](mailto:landtransfer@lawcom.govt.nz)**

The Law Commission asks for any submissions or comments on this issues paper on the review of the Land Transfer Act 1952. The submission can be set out in any format but it is helpful to specify the number of the question you are discussing.

There are several questions in each chapter of the paper that pinpoint the queries on which comments would be most valued. Submitters are invited to focus on any of these questions, particularly in areas that especially concern them, or about which they have particular views. It is certainly not expected that each submitter will answer every question.

Alternatively, submitters may like to make a comment about the Land Transfer Act 1952 that is not in response to a question in the paper and this is also welcomed.

The issues paper is available on the Internet at the Commission's website: [www.lawcom.govt.nz](http://www.lawcom.govt.nz).

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## **Official Information Act 1982**

The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Thus copies of submissions made to the Commission will normally be made available on request and the Commission may mention submissions in its reports. Any request for the withholding of information on the grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act.

# Review of the Land Transfer Act 1952

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# Summary

## PART 1 OF THE ISSUES PAPER

- 1 Part 1 of this issues paper covers the main conceptual issues that have emerged from research and preliminary consultation on a review of the Land Transfer Act 1952 (LTA). The paper does not attempt to traverse all the many cases and academic commentary concerning these issues; the chapters are necessarily a summary of the law and the commentary. Readers who wish to comment on an issue are encouraged to refer to the authoritative texts on the topics where possible.

### Chapter 1 – Introduction: the Torrens system of land transfer

- 2 After a brief historical introduction about the Torrens system of land registration and its objectives, chapter 1 summarises the aims of the Torrens system as follows:
  - title should be as far as possible indefeasible;
  - the purchaser should not need to go behind the register to investigate the “root” of title;
  - there should be adequate compensation where an innocent owner has suffered loss due to the system;
  - the register should reflect as accurately as possible the true state of title to land with all encumbrances, so that persons who propose to deal with land can discover all the facts relative to the title (the “mirror” principle).

### Chapter 2 – Indefeasibility of title under the Torrens system

- 3 Chapter 2 of the issues paper looks at the concept of “indefeasibility” and its qualifications. Do we need a statutory definition of the term and its exceptions? The chapter considers relevant New Zealand provisions, somewhat scattered in the LTA, the limits on indefeasibility and the debate concerning “immediate” and “deferred” indefeasibility are considered. This debate reflects the tension between transactional ease (favouring the purchaser obtaining an indefeasible title, whether or not the instrument of transfer is void) and security of title (favouring the person in possession and occupation where a transfer is void). Australasian law currently supports the purchaser and immediate indefeasibility: *Frazer v Walker* [1967] AC 569 (with the exception of the case where there is fraud by a “fictitious person”). The issues paper considers approaches and proposals in other land registration jurisdictions; most proposals favour deferred or discretionary indefeasibility, as being more just when there has been fraud.

- 4 Submitters are asked to consider the following options:
- immediate indefeasibility – *Frazer v Walker* could be specifically enacted but with the anomaly addressed (that is, the non-existent “registered proprietor” not obtaining an indefeasible title);
  - immediate indefeasibility with a judicial discretion in favour of an original owner where this is necessary in the interests of justice, in limited circumstances specified in the LTA;
  - deferred indefeasibility – the legislation would provide that where an instrument of transfer is void (a forgery or some other invalidation) the registered title so obtained is defeasible inter partes (O – original owner – and A – purchaser or mortgagee) but would ensure that a bona fide purchaser or mortgagee (B) from A, relying on the register, obtains a good title;
  - immediate indefeasibility with statutory exceptions (for example, where there has been an unlawful exercise of statutory authority, or a purchaser or mortgagee has substantially contributed to a fraudulent registration); or, the Queensland approach of providing for a statutory duty by a mortgagee to confirm the identity of the mortgagors could be considered. A breach of such duty would mean the mortgagee does not obtain an indefeasible title.

### Chapter 3 – Land transfer fraud

- 5 Chapter 3 looks at the lack of clarity as to the meaning of Torrens fraud, in respect of unregistered interests and in respect of fraud against a previous registered proprietor, and asks whether the meaning should be clarified in the new legislation. The chapter also asks whether or not “supervening” fraud and “agency” fraud should be clarified. It poses two statutory options:
- a definition based on New Zealand or Australian case law (the latter being less protective of unregistered interests unless notice has been given by a caveat); or
  - one based on Canadian legislation.

### Chapter 4 – In personam claims

- 6 Chapter 4 addresses in personam claims, sometimes treated as an exception to indefeasibility. In personam claims, however, are concerned with personal obligations rather than defeasibility of registered title. Causes of action in personam (both well-established and evolving) that have effectively defeated registered titles are considered, including breaches of contract and trusts (*Barnes v Addy* (1874) LR 9 Ch App 244, *Barclays Bank v O’Brien* [1994] 1 AC 180) and restitution. Submitters are asked to comment on options, including:
- defining in personam claims as an exception to indefeasibility in the legislation, as it is to some extent in some Australian legislation; or
  - leaving development of this area to the courts.

### Chapter 5 – Registrar’s powers of correction

- 7 Chapter 5 looks at the Registrar’s powers of correction and in particular the interpretation to be given to section 81 of the LTA. First, the chapter considers the Registrar’s power under section 81 to correct a title where the entry in the

register was “wrongfully” obtained and whether such a power could cause conflict with the indefeasibility provisions. Secondly, the chapter discusses what level of discretion the Registrar should have under section 81. Submitters are invited to consider the following options:

- to retain the current interpretation of section 81, but clarify that the Registrar’s powers are limited; or
- to adopt a provision which gives the Registrar a broader discretion to exercise powers of correction as the Registrar has in Queensland, for example.

## Chapter 6 – Unregistered interests

- 8 Chapter 6 covers unregistered interests – that is, those not yet registered but capable of being registered, those contained in unregistrable instruments, and those currently incapable of registration (such as private trusts). The issue of protecting unregistered interests is covered – including the extent to which they can be caveated or notified on the register. Such notification accords with the “mirror” principle, that the register should reflect everything that is material to title of a piece of land. The chapter discusses whether the protection given to unregistered interests in New Zealand is adequate.
- 9 The chapter explores possible options, as adopted in other jurisdictions, which could give greater protection to unregistered interests and comply with the Torrens “mirror” principle. These options are:
  - a caveat system which records priorities (as used in certain Canadian provinces and in Singapore);
  - an interest recording system such as the system proposed by the Canadian Joint Land Titles Committee; or
  - the interest recording system of England and Wales, which uses notices or restrictions.

## Chapter 7 – Caveatability of interests

- 10 Chapter 7 is closely related to the discussion in Chapter 6 on unregistered interests. This chapter considers what interests can be protected by a caveat against dealings under section 137 of the LTA. It explores whether an interest must be capable of registration to be protected by a caveat. There has been much case law on this issue; the weight of the authorities in New Zealand and Australia suggest that any equitable interest in property should be caveatable. The chapter also considers whether a registered proprietor should be able to caveat his or her own title. It is suggested that both these issues would benefit from clarification in a new LTA.

## Chapter 8 – Trusts on or off the register

- 11 Chapter 8 considers the position of trusts – many of which are currently “unregistrable interests”. It covers the present provisions in the LTA; examples of the registration of trusts in some Torrens systems; the distinction between registering trusts and noting them on the register (using a system of restriction interest recording, for example), and arguments for and against registering or noting trusts. The former include the protection of beneficiaries and fuller

information for a purchaser; the latter include increased resources that may be required for administration, and potential burdensome consequences for purchasers. Submitters are asked about options of:

- registering trusts (as in Queensland and British Columbia); or
- noting them in an interest recording system (as in England); or
- retaining (but clarifying) the current system.

### Chapter 9 – Overriding statutes

12 Chapter 9 looks at statutes containing provisions that can limit or even override an indefeasible title. Examples include the Property Law Act 2007, Insolvency Act 2006 and Resource Management Act 1991, overriding the LTA usually for justifiable policy reasons. Issues are whether such off-the-register interests are a problem; and, if so:

- whether there might be a process created to alert agencies to the implications of, and need to justify new provisions affecting land ownership; or
- whether future legislation that creates limits on indefeasibility should be signalled in the LTA.

### Chapter 10 – Registration of Māori land

13 Chapter 10 examines two principal issues regarding registration of Māori land. The first issue is the relationship between Te Ture Whenua Maori Act 1993 (TTWMA) and the LTA. Two High Court cases have held that the LTA must override the Maori Affairs Act 1953 (the predecessor of TTWMA). However, TTWMA significantly changed the law relating to Māori land, and the issue of interface between the two Acts has not been reconsidered in light of these changes.

14 The second issue relates to whether the Māori Land Court and LINZ can reconcile their separate title recording systems. A number of practical problems in relation to this issue are discussed. Suggestions from submitters are sought but it should be noted that it is not part of the terms of reference to recommend solutions to these issues.

### Chapter 11 – The compensation provisions

15 Chapter 11 gives a detailed overview of the compensation provisions contained in the LTA. The chapter considers the procedure for using claims, in particular for small claims. It also considers exceptions to the right to compensation, both within and outside the LTA. The cost of the compensation regime is considered. Other issues raised include:

- how damages are measured under section 172 and whether this is appropriate;
- whether the limitation period contained in section 180 is appropriate;
- contributory negligence, the application of the Contributory Negligence Act 1947 and whether this is consistent with the idea of immediate indefeasibility;
- whether the existence of private title insurance in New Zealand is indicative of problems or gaps in the compensation scheme; and

- generally, and in light of the above discussion, whether the scope of the compensation scheme should be altered.

## Chapter 12 – Revising the Land Transfer Act

- 16 Chapter 12 discusses issues relating to the structure, organisation and drafting of a new LTA. It considers principles to guide reform. Three possible models of reform for the consideration of submitters are suggested:
- a modernised version of the current Act incorporating the 1963 and 2002 stand-alone amendment Acts;
  - a structure based on the Queensland Land Title Act 1994; or
  - a structure based on the principle-based Canadian Model Land Recording and Registration Act (which was recommended but never enacted).

### PART 2 OF THE ISSUES PAPER

- 17 Part 2 of this issues paper raises technical issues about the operation of the LTA, and the ambiguity of the language in certain provisions. The following is a brief summary of the areas covered but there are too many issues and questions to usefully summarise the content of each chapter. Readers who are interested in particular topics will need to turn to the relevant chapters.
- 18 Chapter 13 looks at manual and electronic lodgement and registration of instruments and merging the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 into a new LTA, whilst still catering for both formats in the future. It also examines what sort of titles or computer registers will be needed to support this. Provisional registration and the need to preserve some form of qualified title are also discussed.
- 19 Chapter 14 covers transmissions (vesting by operation of law) and includes statutory vesting and court vesting orders, and asks whether the scattered provisions in the LTA could be consolidated. Chapter 15 deals with aspects relating to mortgages – variation of priority and mortgagees’ consents. The chapter suggests improvements to the current law.
- 20 Chapter 16 covers leases and life estates. In particular, the chapter deals with acquisition of the fee simple by lessees (with possible improvements); bringing forward encumbrances on registration of a lease in renewal or substitution (gaps or anomalies are identified); extensions of lease by variation (possible rationalisation is raised); noting the register on expiry of leases and other time-bound interests (a new process is suggested); and life estates (suggestions are made for modernising the current LTA provisions).
- 21 Chapter 17 examines redundant easements and implied covenants in instruments. Submissions are invited on what implied rights, powers and covenants should be included in the new legislation.
- 22 Chapter 18 looks at different aspects of caveats and notices of claim: what particulars need to be provided; what should the effect of a caveat against dealings be? Lapsing of caveats (the current sections 145 and 145A of the LTA) is examined and enhancements are considered. Second caveats are discussed and solutions are suggested to overcome existing difficulties. The role of the Registrar in receiving caveats is scrutinised as are the provisions relating to Registrar’s caveats.



- 23 Chapter 19 looks at applications to acquire title by adverse possession for land already under the LTA and examines the rationale for adverse possession and various issues and options. The English legislation is compared with the New Zealand legislation. Some process changes are put forward for consideration.
- 24 Chapter 20 discusses bringing land under the LTA and examines the relevance of the current provisions in dealing with the most frequent application, which is based on adverse possession rather than ownership. The need to retain the compulsory application procedure is questioned and possible changes to the Deeds Registration Act 1908 are canvassed.
- 25 Chapter 21 considers Part 7A of the LTA (Flat and office owning companies) and asks whether this little-used type of ownership is still relevant. If it is to be retained some suggested improvements are put forward. Share titles are also briefly discussed.
- 26 Chapter 22 examines the process for obtaining title to access strips in Part 4A of the LTA and identifies the problems and issues with the current legislation. Potential improvements are put forward for comment. Finally, Chapter 23 suggests that the Statutory Land Charges Registration Act 1928 could be incorporated within the new LTA, because it deals solely with registration of charges.



# Part 1

## CONCEPTUAL ISSUES



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# Chapter 1

## Introduction: the Torrens system of land transfer

### BRIEF HISTORY OF THE INTRODUCTION OF THE TORRENS SYSTEM IN NEW ZEALAND

- 1.1 Early systems of transfer of land in Australasia were based on the conveyancing system of Great Britain. This involved the investigation of title to land by lawyers who searched through all prior deeds, instruments and other documents of conveyance of the parcel of land to be transferred, checking for their validity. As Robert Torrens put it graphically:<sup>1</sup>

The ancestral line of parchments must be perused by the gentlemen of the long robe, and a fresh genealogical tree, . . . drawn at full length from the root to the last leaf of its parchment foliage every time that a new title link is born into the family.
- 1.2 There were two major disadvantages to this “deeds system”. First, if any instrument of conveyance was not valid the whole chain of title was broken and the transferee could not obtain a clear and secure title. Secondly, conveyancing was complicated, burdensome, lengthy and consequently very expensive.
- 1.3 In 1830, the Second Report of the Real Property Commission in England had recommended a system of registration of deeds by way of reform of the “deeds system”. However, there were several proponents of registration of titles to land, including Henry Sewell,<sup>2</sup> later to be an important player introducing registration of titles in New Zealand.<sup>3</sup> Professor Whalan notes that “the legend persists that the genius of Robert Richard Torrens alone was responsible for originating the eponymous system of registration of title to land that was developed in South Australia and adopted elsewhere”.<sup>4</sup> He states that, although Torrens was no doubt the driving force behind the Act, it is clear that others were involved and

1 Robert R Torrens *A Handybook on the Real Property Act of South Australia* (Adelaide, printed at the Advertiser and Chronicle Offices in about 1862) 6.

2 Sewell was the author of a pamphlet advocating the adoption of a system of registration of titles to land in England in 1844: (1870) 9 NZPD 198, Rt Hon Mr Fox (2nd reading).

3 This section is indebted to DJ Whalan “The Origins of the Torrens System and its Introduction into New Zealand” in GW Hinde (ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971) 1–32.

4 *Ibid*, 3.

influential, including Dr Hubbe, a lawyer from Hamburg, and GM Waterhouse who was to play a significant part in the introduction of the system to New Zealand.<sup>5</sup>

- 1.4 In 1856, a draft Real Property Amendment Bill was published in South Australia at the instigation of Robert Torrens. The draft introduced the concept of a system of registration of title to land in South Australia and stirred a spate of debate similar to that in England after the 1830 report. Torrens claimed the system was based on the principles that regulate the transfer of shipping property under the Merchant Shipping Act 1854 (Imp).<sup>6</sup> Recent research suggests that the system was influenced partly also by other systems of registration of title,<sup>7</sup> and by the report of the English Royal Commission in 1857.<sup>8</sup> However, there is plenty of evidence that the implementation of the system in South Australia in 1858 was essentially due to Torrens' grasp of, and enthusiasm for, the registration of title concepts, and his drive and energy.<sup>9</sup>
- 1.5 Registration of title would remove the need for investigation of the documents or deeds, which made up the chain of title to land, by establishing and maintaining a register that would constitute a conclusive record of legal title to the land described therein. The guiding principle was to be that registration would vest and divest title to land. As Torrens put it: "The entry on the folium of the Register alone passes the property, creates the charge or lesser estate, discharges or transfers it".<sup>10</sup> The system should therefore create both a relatively simple and inexpensive conveyancing system and more certainty of ownership than the system of title by deeds (under which an invalid document could destroy a root of title).
- 1.6 The South Australian Bill went through several drafts and eventually passed in January 1858. It was the revised Act of 1861, with the legislation much changed, that was the foundation of the Torrens system in the other Australian states and in New Zealand.<sup>11</sup>

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5 Ibid, 3–12.

6 Ibid. Antonio Esposito has argued that Anthony Forster, the editor of the *South Australian Register* in the 1850s and 1860s, made an important contribution at an early stage: see Antonio Esposito "A New Look at Anthony Forster's Contribution to the Development of the Torrens System" (2007) 33 UWAL Rev 251.

7 Ibid, and see A Esposito "A Comparison of the Australian ('Torrens') System of Land Registration of 1858 and the Law of Hamburg in the 1850s" (2003) 7 Aust J Leg Hist 193, whose thesis that it is quite probable that the Hamburg system was the chief model for the South Australian system, publicised in South Australia by Dr Hubbe.

8 *Report of the Commissioners Appointed to Consider the Subject of Registration of Title with Reference to the Sale and Transfer of Land* (1857, C 2215).

9 See G Taylor "Is the Torrens System German?" (2008) 29 Jnl of Legal History 253 for a view contesting Esposito's theory that the Hamburg system was (probably) the chief model for the South Australian legislation.

10 Torrens, above n 1, 8.

11 Whalan, above n 3, 11–13. An important change was the omission of the registration of trusts. Previously, under the 1858 Act, legal ownership would vest in trustees but subject to the trust for the beneficiaries: s 60.

- 1.7 In New Zealand, there had been a system of registration of deeds since 1842 and, in 1860, influenced by the 1857 English Royal Commission Report, the Land Registry Act was passed. For several reasons (in part because of the Māori land wars, economic travail and survey difficulties) this Act was a failure. In 1870, a Bill almost identical to the South Australian Real Property Act of 1861 was introduced by Sewell. He later proposed three major amendments (including registering trusts) all strongly opposed by men such as Waterhouse. These were defeated and the Act passed in very similar form to the South Australian 1861 Act.

### Land Transfer Act 1870 (NZ)

- 1.8 The 1870 Act had 148 sections. The first sections concerned the appointment of the Registrar-General of Land, the District Land Registrars and other officers, and their powers, including to correct errors in certificates of title and to enter caveats. Then followed provisions about application to bring land under the operation of the Act, the establishment of a Land Assurance Fund Account, the keeping of the Register Book and provision for certificates of title and their duplicates.
- 1.9 Section 39 provided that the certificate of title was conclusive evidence that the person named in the certificate was possessed of the estate or interest described in it. That person was deemed to be the registered proprietor (section 40). As to registration being the act that vested title, section 45 provided that no instrument would be effective to pass any estate or interest in land under the Act until registration; section 46 provided that the estate of the registered proprietor was paramount, subject only to fraud and encumbrances noted on the register, prior certificates of title to the same land, omissions or misdescriptions of easements or rights of way, and wrong descriptions of parcels or boundaries or the land (see section 62 of the Land Transfer Act 1952).
- 1.10 There followed provisions about the memorandum of transfer; registration of leases (exceeding three years), and mortgages (not to operate as a transfer but as a charge against the land, and providing for a power of sale in case of default in payment); abbreviated forms of covenants in leases; and transmission by bankruptcy or due to death.
- 1.11 Section 88 and those following provided for the lodgement of caveats in the case of trusts or claims under unregistered instruments, and their lapse. Then came provisions for joint ownership, remaindermen, attestations and proof of instruments, for map deposit, title searches and licensed land brokers.
- 1.12 Section 119 protected transferees dealing with a registered proprietor by providing that no person dealing with the registered proprietor would need to inquire into the manner in which they became registered or be “affected by notice direct or constructive of any trust or unregistered interest . . . and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud”. This reflects the current language of section 182 of the Land Transfer Act 1952 (LTA).
- 1.13 There followed provisions for rights of mortgagees and landlords to possession where there has been default.

- 1.14 Section 130 provided for compensation (by way of damages or from the Assurance fund) in certain cases, such as a person having been deprived of land in consequence of fraud, or by the registration of another as proprietor or through errors or misdescription.
- 1.15 Section 139 provided that a certificate of title was to be void if any person was in possession and rightfully entitled adversely against the registered proprietor. The final provisions concerned wrongful acts and stated that forgery was to be a felony.
- 1.16 The Act was firmly established by the 1880s once survey difficulties had been sorted out mainly by developing a system of provisional registration. Although there was initially some resistance by the legal profession, lawyers “apparently accepted the inevitability of the Act’s success and commenced to operate under its beneficial provisions”.<sup>12</sup>
- 1.17 Several amendments were made to the 1870 Act that were consolidated into the Land Transfer Act 1885, which was the basis for the 1915 Act and also for the present Act of 1952. The 1885 Act had 225 sections and was divided into parts with headings, such as “Applications to bring Land under the Act”, “Registered Proprietors”, “Certificate of Title”, “Trusts”, “Leases”, “Mortgages”, “Caveats”, “Surveys”, “Assurance Fund”, “Execution of Instruments”, “Protection of Purchaser”. These are areas still covered by most, if not all, modern “Torrens” Acts.

## PRINCIPLES AND AIMS OF THE TORRENS SYSTEM

- 1.18 Torrens’ aims were to blend “Certainty, Economy, Simplicity and Facility” as he put it in an election speech.<sup>13</sup> The first leading principle for Torrens was abolition of the costly, insecure system of retrospective titles, the second was that registration alone should give validity to land transactions and the third was simplicity and economy such that “any man of ordinary sense and education may transact his own business without the necessity of applying to a solicitor except in complicated cases of settlements or entails, which are unusual in this colony”.<sup>14</sup>
- 1.19 In 1870, introducing the Torrens System by way of the Real Property Bill to the New Zealand Parliament, the Hon Mr Sewell listed the “leading principles” of the system:<sup>15</sup>

The first great principle on which all these systems agree, is that of providing means by which title to land may be judicially declared to be perfect – by which what is termed an indefeasible title may be created ... The second leading principle is, that it

12 Whalan, above n 3, 24.

13 *South Australian Register*, 1 June 1857 in R Torrens *Speeches of Robert R Torrens* (Adelaide, 1858) 7; copy received courtesy of the Federal Court of Australia.

14 R Torrens (speech delivered in the Legislative Assembly on the Introduction of his Bill for Amending the Law Relating to the Transfer of Real Property, Adelaide, 4 June 1857) in R Torrens *Speeches of Robert R Torrens* (Adelaide, 1858) 11. At the second reading on 11 November 1857, Torrens rephrased the principles as: “1st, That henceforth every estate or interest in land should pass, not by execution of any deed . . . but by the act of registering the transaction... The 2nd great principle of the Bill was – that registered titles, except in cases where registration was procured by fraud, should be absolutely indefeasible. The 3rd principle was – That on each transfer of the fee-simple the existing title should be surrendered to the Crown, and a fresh title issued from the Crown to the transferee or purchaser. All lesser estates or interests should hang upon the title of the holder of the fee in the nature of limitations or encumbrances, the existence of which should be notified by memoranda endorsed on the grant or certificate of title and in the Registry Book”. *Ibid*, 13.

15 (27 July 1870) 8 NZPD 92–94.

establishes a public record of all transactions affecting registered land:... so that everyone dealing with the land may know exactly what he is dealing with; and not only that, but by which the rights of incumbrancers and other persons holding derivative interests in land – trustees, mortgages and others – may have a guarantee for the security of their incumbrances.

- 1.20 The third leading principle enumerated by Mr Sewell was that the title registered was to be the fee simple, the fourth was that the land be indicated distinctly by local maps and the fifth, the establishment of a central administration. Finally, there was the point:<sup>16</sup>

[T]hat if, by accident, the result of the registration of title should be to exclude from their rights persons who have interests in property, and so to work injustice, the persons damnified may have a remedy against the public, in return for which, and by way of compensation, in order to recoup the public revenue, there is established what is called an assurance fund. That is, every person who registers his title is bound to pay a certain contribution towards the assurance fund . . .

- 1.21 Mr Fox, introducing the second reading, referred to the two objects of the Bill as:<sup>17</sup>

To confer a more secure title upon property, a more easily recognizable title, and also to confer facilities of transfer, which is the most desirable ingredient in the possession of property.

- 1.22 One of the first Torrens statutes, the 1866 Act for Victoria, provided that the aims of the legislation were:<sup>18</sup>

- to give certainty to the title to estates in land, and to facilitate the proof thereof; and also
- to render dealings with land more simple and less expensive.

- 1.23 A century later, GW Hinde has said that three of the fundamental principles of the Torrens system are:<sup>19</sup>

- (a) that it should not be necessary to investigate the history of the registered proprietor's title;
- (b) that everything which can be registered should give, in the absence of fraud, an indefeasible title;
- (c) that an interest in land which is registered under the system should either be secure, or else monetary compensation for that interest should be paid.<sup>20</sup>

16 Ibid.

17 (23 August 1870) 8 NZPD 194.

18 *Gibbs v Messer* [1891] AC 248, 251 (PC) Lord Watson.

19 GW Hinde "Indefeasibility of Title since *Frazer v Walker*" in GW Hinde (ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971) 33, 35–36.

20 George Hinde said similarly that the aims of the Torrens system were: "First, to provide a complete and reliable register of titles, which will disclose all the facts relevant to each registered proprietor's title; secondly, to afford protection against the losses which, under common law systems of conveyancing, can result from defects in a vendor's or a mortgagor's title; and thirdly, to give a State guarantee of each registered proprietor's title.": GW Hinde "Preface" in GW Hinde (ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971) vii, vii. See also, GW Hinde "The Future of the Torrens System in New Zealand" in J F Northey (ed) *The A G Davis Essays in Law* (Butterworths, London, 1965) 77, 78 where these are set out in further detail.

- 1.24 The first of these principles (which was also Richard Torrens' main aim) has been achieved to the extent that conveyancing under the Torrens system eliminates the need for the historical investigation of a vendor's title required by the deeds system, and is therefore radically simpler in this respect. The second principle (indefeasibility or certainty of title) has only to some extent been achieved. Inevitably, title to land is not "indefeasible" in many respects. "Indefeasibility" is an ideal that has a number of exceptions, even in the Act itself, as will be discussed in the next chapter.
- 1.25 Nor is the register a complete reflection of all the interests relating to a particular piece of land; the register does not always enable "everyone dealing with the land [to] know exactly what he [sic] is dealing with", (as Mr Sewell has predicted) which is sometimes known as the "mirror" principle. Similarly, Professor Whalan has suggested that the ultimate aim of a system of land titles registration should be "to organise land records so that it will be possible to discover in the one register every detail of proprietorship and every benefit or liability accruing to or adhering to every parcel of land".<sup>21</sup>
- 1.26 The third of Professor Hinde's enumeration of the Torrens' principles (above) relates to Mr Sewell's final point, that in the event of unjust loss to an interest holder due to the registration system, the state (through landowners) should provide compensation. State compensation certainly exists; the extent to which it is adequate and compensates for unjust losses will be considered in chapter 11 of this issues paper.
- 1.27 In 1990, the Canadian Joint Land Titles Committee said:<sup>22</sup>
- A land titles and conveyancing system should have two purposes. One is to provide security of ownership, that is, it should protect an owner against being deprived of ownership except by his or her own act or by the specific operation of a legal process such as expropriation or debt collection. The other purpose is to provide facility of transfer, that is, it should enable anyone, particularly a purchaser, to acquire ownership easily, quickly, cheaply and safely. Unfortunately, a measure designed to achieve one of these purposes is likely to militate against achieving the other.
- 1.28 This highlights the tension between security of ownership and facility of transfer in a Torrens registration system. This tension led to the longstanding judicial and academic debate about so-called "deferred indefeasibility" and "immediate indefeasibility" discussed in the next chapter. In principle and in practice, however, it should be possible to aim for a relatively easy, cheap, speedy and certain transfer system, while also providing maximum security of ownership.

21 DJ Whalan "The Torrens System in New Zealand – Present Problems and Future Possibilities" in GW Hinde (ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971) 258, 293 cited in R Sackville "The Torrens System – Some Thoughts on Indefeasibility and Priorities" (1973) 47 ALJ 526, 543.

22 Joint Land Titles Committee (Alberta, British Columbia, Manitoba, The Council of Maritime Premiers, Northwest Territories, Ontario, Saskatchewan, Yukon) *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (Edmonton, 1990) 6.



- 1.29 The objectives of the Torrens system of land registration have been successful to a large extent; in 2001 L Griggs described the system as “extraordinarily successful”.<sup>23</sup> There seems to be no question about the main principles of the system, as listed above by Professor Hinde. There appears to be a consensus that:
- title should be as far as possible indefeasible;
  - the purchaser should not need to go behind the register to investigate the “root” of title;
  - there should be adequate compensation where an innocent owner has suffered loss due to the system.
- 1.30 There is also agreement with Professor Whalan and others that:
- the register should reflect as accurately as possible the true state of title to land with all encumbrances so that “persons who propose to deal with land can discover all the facts relative to the title”, the “mirror” principle.<sup>24</sup>
- 1.31 The question is, assuming these aims are still appropriate: does the Land Transfer Act 1952 provide sufficiently and clearly for their achievement?

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23 Lynden Griggs “In Personam, *Garcia v NAB* and the Torrens System: Are they Reconcilable?” [2001] QUTLJJ 76.

24 GW Hinde, above n 20, 78.

# Chapter 2

## Indefeasibility of title under the Torrens system

The expression [indefeasibility of title], not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which the registered proprietor enjoys. The conception is central in the system of registration.<sup>25</sup>

- 2.1 As noted in the Introduction, the aims of the New Zealand Land Transfer Acts were to create a register of land titles reflecting the estates in land throughout New Zealand and their encumbrances; an “indefeasible title” in the absence of fraud, with specific exceptions; as well as a public record of land transfers; a simpler, less costly system of conveyancing than the deeds system, and a means whereby compensation for loss of title due to the system could be granted by the state.

### WHAT DOES INDEFEASIBILITY OF TITLE MEAN?

- 2.2 The starting point can be the well-cited dictum of Edwards J in *Fels v Knowles*:<sup>26</sup>
- The object of the [Land Transfer] Act was to contain within its four corners a complete system which any intelligent man could understand, and which could be carried into effect in practice without the intervention of persons skilled in the law.
- ... The cardinal principle of the statute is that the register is everything, and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorised by the statute. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is authorised, as in the case of easements or incorporeal rights, to the right registered.

25 *Frazer v Walker* [1967] AC 569, 580–581 (PC) Lord Wilberforce. Note that the term “indefeasible” is used in the Land Transfer Act 1952, ss 54 and 199.

26 *Fels v Knowles* (1906) 26 NZLR 604, 620 (CA) Edwards J.

- 2.3 However, the concept that the registered proprietor has “an indefeasible title against all the world” except in cases of actual fraud, while it might be an ideal aim, is misleading. Learned commentators and judges such as GW Hinde, DJ Whalan and Justice Thomas,<sup>27</sup> have said that “indefeasibility” is a misnomer. A registered title to land is not secure against all claims. There are a number of exceptions both in the Land Transfer Act 1952 (LTA) itself (and the equivalent statutes in Australia and other Torrens jurisdictions) and otherwise. Many of these are addressed in later sections of this issues paper.
- 2.4 If “indefeasibility” is a misnomer, as it certainly is in any absolute sense, should we discard the concept or the phrase “indefeasibility of title”? The term “indefeasible” is used in only two sections of the Act: section 54 (application of the Act to provisional registration) and section 199 (application of the Act to limited certificates of title). But the term is ingrained in the case law.
- 2.5 Douglas Whalan preferred the phrase “state guaranteed title” to describe a Torrens registered title.<sup>28</sup> Even this could be misleading because a guaranteed title for a transferee can conflict with security of title of a dispossessed registered proprietor. The state cannot guarantee security of title; it can, at most, only guarantee compensation if title is lost without the act or intention of the former registered proprietor. The phrase “certainty of title” suffers from the same limit.
- 2.6 In England, the concept has been referred to as “qualified indefeasibility”.<sup>29</sup> “Indefeasibility of title”, or certainty of title, as a principle is an ideal; in practice indefeasibility is relative or qualified. But this does not mean either the principle or the phrase should be discarded. If retained, however, the limits (and possibly the meaning) of indefeasibility should be clear in the legislation.<sup>30</sup>

### The conclusive register and the “inclusive” register

- 2.7 Related to the concept of “indefeasibility” is the concept of a “conclusive register”, or the paramountcy of the registered proprietor’s title. This is the idea that only the rights and interests in connection with a property title that appear on the register are conclusively binding on a transferee. The doctrine of notice of equitable (unregistered) interests is inapplicable and general law priority rules are also inapplicable. However, the courts have recognised that the doctrine of indefeasibility should not allow registered proprietors to evade “conscientious obligations entered

27 GW Hinde “Indefeasibility of Title since *Frazer v Walker*” in GW Hinde (ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971) 33, 36, citing DJ Whalan *The Land Transfer (Torrens) System of Registration of Titles in New Zealand* (unpublished thesis, University of Otago Library) 330–332; *CN & NA Davies Ltd v Laughton* [1997] 3 NZLR 705, 712 (CA) Thomas J for the Court.

28 Douglas J Whalan *The Torrens System in Australia* (Law Book Co, Sydney, 1982) 296–297.

29 Discussion with Professor Lizzie Cooke, Law Commissioner leading the Property and Trusts team of the English Law Commission, on 25 July 2008. The concept differs in some respects from the Torrens version of indefeasibility. Unregistered interests that override the register include, generally, the interests of persons in actual occupation. See too, E Cooke “E-conveyancing in England: Enthusiasms and Reluctance” on the English version of indefeasibility in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 277, 281. For a fuller account of the English version, see E Cooke *The New Law of Land Registration* (Hart Publishing, Oxford and Portland, Oregon, 2003) chapter 6.

30 Professor Hinde has also noted other terms used such as unimpeachable, unexaminable, unassailable, which all have the same limitation. See Hinde, above n 27, 36, footnote 20.

into by them”.<sup>31</sup> The in personam jurisdiction continues in parallel with the in rem Torrens jurisdiction.<sup>32</sup> The LTA does not generally replace equitable rights, concepts (such as trusts) and equitable causes of action, although these sometimes sit uneasily alongside a Torrens system of registration.<sup>33</sup> So, unregistered rights and interests may sometimes bind a registered proprietor.

- 2.8 A conclusive register (reflecting the actual interests in a certain parcel of land) is thus an ideal aim of the system, but, like indefeasibility, it can never be absolute. In a system of title by registration, the register should be as inclusive, as complete and accurate as possible to ensure maximum certainty, efficiency of conveyancing and accuracy of records. But even if everything that could be registered was to be registered, exceptions (such as trusts in many Torrens systems) and interests that override the register by virtue of other statutes, would remain.
- 2.9 In summary, despite the minimal legislative use of the term, the principle of indefeasibility is acknowledged as central to the aims of the Torrens system of land transfer. But Torrens indefeasibility is not absolute, the register cannot be absolutely inclusive or conclusive, and equitable estates and interests outside the register may be recognised. So the term is not strictly accurate. But it has been in use, particularly by judges, for well over a century. It is a convenient shorthand for the relative certainty of title that a registered proprietor acquires.

### Option for reform

- 2.10 One option for reform might be to define what is meant by indefeasibility in the Act. This has been done in some Australian jurisdictions. For example, section 40 of the Land Titles Act 1980 (Tas) provides that for the purposes of the section “indefeasible”, in relation to the title of a registered proprietor of land, means subject only to such estates and interests as are recorded on the folio of the Register or registered dealing evidencing title to the land. Subsections 3 and 4 then list about 15 main exceptions to the indefeasible title of the registered proprietor. These include the case of fraud; periodic tenancies or leases for not more than three years; equitable easements, except where a bona fide purchaser for value without notice has lodged a transfer for registration; land erroneously included in the registered title; and money charged on the land.

31 *Barry v Heider* (1914) 19 CLR 197, 213 (HCA) Isaacs J; *Frazer v Walker*, above n 25, 580–581 Lord Wilberforce; and see now *CN & NA Davies Ltd v Laughton* [1997] 3 NZLR 705 (CA), *Duncan v McDonald* [1997] 3 NZLR 669 (CA) and *Nathan v Dollars & Sense Finance Ltd* [2007] 2 NZLR 747 (CA).

32 *Frazer v Walker*, above n 25; S Robinson *Transfer of Land in Victoria* (Law Book Co, Sydney, 1979) 357. Commentators have claimed that it makes serious inroads into the indefeasibility principle as discussed later.

33 The Hon Justice WMC Gummow AC “Equity and the Torrens System Register” in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 51; Samantha Hepburn “Concepts of Equity and Indefeasibility in the Torrens System of Land Registration” (1995) APLJ 8. The equitable meaning of “fraud” has been modified for purposes of the LTA as will be seen.

- 2.11 Section 38 of the Queensland Land Title Act 1994 (Meaning of indefeasible title) provides that “the indefeasible title for a lot is the current particulars in the freehold land register about the lot”, and under the heading “Indefeasibility” section 185 gives a list of exceptions to such indefeasible title.<sup>34</sup>
- 2.12 As indefeasibility is relative, or qualified, for the purposes of registered title under the LTA, it is probably only useful to define it in relation to its exceptions or limitations, in the paramountcy or indefeasibility of title provisions of the Act.<sup>35</sup> There are many exceptions to indefeasibility in the LTA, most of which are covered in the next section, but, as will be seen, they are scattered in the Act. At the least, there is a case for consolidating them.

Q1 Assuming indefeasibility of title is a cardinal principle of the LTA, should this concept be defined in the Act? If so, is either the Tasmanian Act or Queensland Land Title Act (listing the main exceptions or limitations) a useful model?

Q2 Or is the term “indefeasibility of title” misleading? If so, what might be a better term? Or is it unnecessary to refer to the concept in the new LTA?

## THE INDEFEASIBILITY PROVISIONS AND LIMITS TO INDEFEASIBILITY IN THE LTA

- 2.13 The main indefeasibility provisions of the LTA are sections 62, 63, 64, 182 and 183,<sup>36</sup> which also contain the Act’s main exceptions to indefeasibility. They are found in two separate parts of the Act. Sections 62 to 64 are in Part 3, “Registration”. Sections 182 and 183 are in Part 11, “Guarantee of Title”.<sup>37</sup>

### Section 62 of the LTA

- 2.14 Section 62 provides:

#### **Estate of registered proprietor paramount**

Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held

- 34 There are nine main exceptions: including an equity arising from the act of the registered proprietor; and the interests of: a lessee under a short lease; a person entitled to the benefit of an easement if its particulars have been omitted from or misdescribed in the register; a person in adverse possession but entitled to be registered as owner of the lot; another registered proprietor making a valid claim under an earlier title for all or part of the lot; another registered owner where there has been a wrong description of land; a petroleum authority under a prior, binding access agreement under the Petroleum and Gas (Production and Safety) Act 2004; a mortgagee who has not taken reasonable steps to verify the identification of mortgagors where the mortgage instrument was executed by a person other than the person who was or was about to be the registered owner of a lot.
- 35 Most jurisdictions studied have a list of exceptions or limitations on indefeasibility in their Torrens Acts, somewhat longer than in the LTA, including short-term leases, various charges, taxes and liens (see British Columbia, Victoria, Tasmania, Queensland, Northern Territories and South Australia, for example). These are described as “overriding interests” in England and Wales.
- 36 These sections are listed as playing “a part in creating the quality which has come to be called ‘indefeasibility’” by Professor Hinde, above n 27, 37, footnote 24. See too, The Rt Hon Justice Peter Blanchard “Indefeasibility under the Torrens System in New Zealand” in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 29, 30–32.
- 37 Note that the language in these sections is largely unchanged since the early Acts and needs updating, as does much language in the 1952 Act. For example, references to the “certificate of title” should be to the “computer register”.

to be paramount or to have priority, but subject to the provisions of Part 1 of the Land Transfer Amendment Act 1963, the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register constituted by the grant or certificate of title of the land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever,—

- (a) Except the estate or interest of a proprietor claiming the same land under a prior certificate of title or under a prior grant registered under the provisions of this Act; and
- (b) Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and
- (c) Except so far as regards any portion of land that may be erroneously included in the grant, certificate of title, lease, or other instrument evidencing the title of the registered proprietor by wrong description of parcels or of boundaries.

### *Section 62(a) – a prior certificate of title*

- 2.15 In respect of a proprietor claiming the same land under a prior certificate of title (section 62(a)), Whalan has suggested that all Australian states should follow the wording of the equivalent Tasmanian provision, which makes clear that the title that was first brought under the Act defeats the subsequent title.<sup>38</sup>

### *Section 62(b) – “omitted” easements*

- 2.16 Does section 62(b) apply only to easements created before the relevant land was brought under the LTA? In *Sutton v O’Kane* the Court of Appeal held that section 62(b) did not apply to equitable easements created after the servient land was brought under the Act.<sup>39</sup> But in *Millns v Borck* Bisson J considered that the section applied both to legal rights of way or easements subsisting at the time the servient land was brought under the Act, and also to any created subsequently, but omitted from the register.<sup>40</sup> Similarly, equivalent sections have been applied to protect easements created after land has been brought under the Torrens system in Australia.<sup>41</sup> Clarification of the meaning of “omitted” easements is needed: in the equivalent provision of the Property Law Act 1900 (NSW), section 42(1)(a1) is clear that omitted easements may have been created both before or after the land was brought under the Act.

38 Whalan *The Torrens System in Australia*, above n 28, 319. In practice, the prior title is almost invariably the first title brought under the Act, but Land Information New Zealand (LINZ) has pointed out that there could be a rare case where land brought under the Act could go back into Crown ownership, and then be alienated a second time, so it may not be wise to follow the Tasmanian provision.

39 *Sutton v O’Kane* [1973] 2 NZLR 304 (CA).

40 *Millns v Borck* [1986] 1 NZLR 302, 307 (HC) Bisson J: a new certificate of title omitted a previously registered easement and the purchaser was held to be bound despite lack of notice.

41 See for example *James v Registrar-General* (1967) 69 SR (NSW) 361 (easement accidentally omitted from new title by registrar); *Pryce & Irving v McGuinness* [1966] Qd R 591 (application to an easement of necessity).

*Section 62(c) – land erroneously included in a title*

- 2.17 In *Denham v Wellington City Council*, the court accepted that section 62(c) would not cover the situation of a title issued on application to bring land under the LTA to which the applicant had no title.<sup>42</sup> This case also held that section 62(c) is subject to sections 182 and 183 of the LTA if a bona fide purchaser for value has subsequently acquired the land. In 1989, the Queensland Law Reform Commission had suggested that the equivalent exception should be limited to errors in relation to registration.<sup>43</sup> The authors of Hinde McMorland & Sim's *Land Law* state that the section is concerned with surveyors' errors, and Professor Butt would agree, interpreting the equivalent section in New South Wales.<sup>44</sup>

**Section 63 of the LTA**

- 2.18 Section 63 provides:

**Registered proprietor protected against ejectment**

- (1) No action for possession, or other action for the recovery of any land, shall lie or be sustained against the registered proprietor under the provisions of this Act for the estate or interest in respect of which he is so registered, except in any of the following cases, that is to say:
- (a) The case of a mortgagee as against a mortgagor in default:
  - (b) The case of a lessor as against a lessee in default:
  - (c) The case of a person deprived of any land by fraud, as against the person registered as proprietor of that land through fraud, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud:
  - (d) The case of a person deprived of or claiming any land included in any grant or certificate of title of other land by misdescription of that other land, or of its boundaries, as against the registered proprietor of the other land, not being a transferee or deriving from or through a transferee thereof bona fide for value:
  - (e) The case of a registered proprietor claiming under the instrument of title prior in date of registration, under the provisions of this Act, in any case in which 2 or more grants or 2 or more certificates of title, or a grant and a certificate of title, may be registered under the provisions of this Act in respect to the same land.
- (2) In any case other than as aforesaid, the production of the register or of a certified copy thereof shall be held in every Court of law or equity to be an absolute bar and estoppel to any such action against the registered proprietor or lessee of the land the subject of the action, any rule of law or equity to the contrary notwithstanding.

42 *Denham v Wellington City Council* (2006) 5 NZ Conv C 194,268 accepting the views expressed in Hinde McMorland & Sim *Land Law in New Zealand* (loose leaf, LexisNexis, Wellington, 2005) para 9.032. See Struan Scott and others *Adams' Land Transfer* (loose leaf, LexisNexis, Wellington, 2007) para S62.7.

43 Queensland Law Reform Commission *A Working Paper on a Bill in Respect of an Act to Reform and Consolidate the Real Property Acts of Queensland* (QLRC WP 32, Brisbane, 1989) 44.

44 Hinde McMorland & Sim, above n 42, para 9.032; Peter Butt *Land Law* (5 ed, Lawbook Co, Sydney, 2006) 784.

2.19 The section protects the security of a registered proprietor except in the listed circumstances. Subsection (2) makes the register conclusive (except in those cases listed). So it would seem that an action for possession of the land can only be taken against a registered proprietor (or lessee) by:

- a mortgagee where the mortgagor registered proprietor is in default; or lessor where a lessee is in default;
- a previous registered proprietor (O) deprived of the land by fraud where (A) was registered as proprietor through the fraud,<sup>45</sup> or where B has derived the land from A, unless B was a bona fide transferee for value;
- a previous registered proprietor (O) who has lost land by misdescription to another registered proprietor (A), unless that land has been transferred to B, a bona fide purchaser for value;
- a registered proprietor (A) who was registered prior to another (B) who was also later registered as proprietor of the same land in a separate title.

### Section 64 of the LTA

2.20 Section 64 provides:

#### **Title guaranteed to registered proprietor**

Subject to the provisions of Part 1 of the Land Transfer Amendment Act 1963, after land has become subject to this Act, no title thereto, or to any right, privilege, or easement in, upon, or over the same, shall be acquired by possession or user adversely to or in derogation of the title of the registered proprietor.

2.21 Prior to 1963, despite the wording of section 64, there were exceptions.<sup>46</sup> The Land Transfer Amendment Act 1963 specifically allows claims in adverse possession to a registered proprietor. This Act, and the rationale for adverse possession as an exception to indefeasibility, is discussed in chapter 19.

### The protection of purchaser sections

2.22 Sections 182 and 183 of the LTA are in Part 11 of the Act entitled “Guaranteed title”. Section 182 provides that a person dealing with a registered proprietor shall not be affected by notice of any trust or unregistered interest regarding the estate, except in the case of fraud. The fraud exception is discussed in detail in chapter 3. Section 182 states:

#### **Purchaser from registered proprietor not affected by notice**

Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire into or ascertain the circumstances in or the consideration for which that registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase money or of any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.

<sup>45</sup> But note that this has been interpreted as fraud by A or his or her agents: see chapter 3.

<sup>46</sup> See Land Transfer Act 1952, ss 73 and 199(3), for examples regarding limited certificates of title.



- 2.23 Section 182 makes it clear that a transferee does not need to investigate the “root of title” of previous registered proprietors; nor is a purchaser to be affected by notice of unregistered interests. Section 183 provides more specifically for protection of purchasers and mortgagees. Where their vendor or mortgagor might have been registered through fraud or error, or under a void or voidable instrument, the bona fide purchaser or mortgagee for value from such a vendor is protected from an action for damages or possession.

**No liability on bona fide purchaser or mortgagee**

- (1) Nothing in this Act or the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 shall be so interpreted as to render subject to action for recovery of damages, or for possession, or to deprivation of the estate or interest in respect of which he is registered as proprietor, any purchaser or mortgagee bona fide for valuable consideration of land under the provisions of this Act or the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 on the ground that his vendor or mortgagor may have been registered as proprietor through fraud or error, or under any void or voidable instrument, or may have derived from or through a person registered as proprietor through fraud or error, or under any void or voidable instrument, and this whether the fraud or error consists in wrong description of the boundaries or of the parcels of any land, or otherwise howsoever.
- (2) This section shall be read subject to the provisions of sections 77 and 79 hereof.
- 2.24 There is an implication in section 183 that the title of registered proprietor (A) is not indefeasible against the previous registered proprietor (O) if registered through fraud or error or under any void or voidable instrument. But a bona fide purchaser or mortgagee (B) from A is protected from an action for damages or possession. This has been an interpretation by eminent jurists<sup>47</sup> but is not the current interpretation of the section, as will be discussed later.<sup>48</sup> At the least, the section needs redrafting.

*Protection of bona fide volunteer*

- 2.25 References to a bona fide purchaser for value in subsections 63(1)(c) and (d) suggest that a volunteer is not entitled to the same protection as a purchaser, as does section 183. However, sections 62 and 182 make no distinction between volunteers and purchasers. In *Boyd v Mayor of Wellington*<sup>49</sup> Sim J stated that, following *Assets Co v Mere Roihi*, any person who is registered as a proprietor, without fraud, has an indefeasible title, although not a purchaser for value or even a purchaser at all. The New South Wales Court of Appeal in *Bogdanovic v Koteff*<sup>50</sup> held that a beneficiary’s registered title was indefeasible so that a prior equitable interest was not binding on him. The Supreme Court of Victoria has taken the contrary view.<sup>51</sup> It has been said that *Bogdanovic* must be of high persuasive authority in New Zealand

47 See Salmond J in *Boyd v Mayor of Wellington*, above n 49, 1201–1215; and Dixon CJ in *Clements v Ellis* (1934) 51 CLR 217 (HCA), discussed below. Note that s 45(2)(b) of the Real Property Act 1900 (NSW), amended in 1970, has significantly different wording, which would avoid this interpretation. For further discussion of the section, see Alston and others *Brooker’s Land Law* (loose leaf, Brookers, Wellington, 1995) paras 1-515–1-518; *Adams’ Land Transfer* above n 42, S182.4–S183.4.

48 See *Frazer v Walker*, above n 25, discussed below.

49 *Boyd v Mayor of Wellington* [1924] NZLR 1174, 1190 (CA) Sim J following *Assets Co Ltd v Mere Roihi* [1905] AC 176. The purchaser in Boyd’s case was Wellington Corporation and the land became vested in the Corporation by Proclamation for the purposes of a tramway.

50 *Bogdanovic v Koteff* (1988) 12 NSWLR 472 (CA).

51 *King v Smail* [1958] VR 273; *Rasmussen v Rasmussen* [1995] 1 VR 613.

because it is “a return to the basic simplicity of Torrens principles”.<sup>52</sup> Sim J’s dicta in *Boyd* is also highly persuasive although the case was not concerned with a volunteer.<sup>53</sup> If New Zealand courts do follow *Bogdanovic*, a registered volunteer has an indefeasible title, subject to other claims under section 63(1).<sup>54</sup> Queensland and the Northern Territories give the same “indefeasibility” protection to bona fide volunteers as to bona fide purchasers for value.<sup>55</sup> The main example of a volunteer would be a beneficiary under a will, so this is not simply an academic issue.

### Other LTA provisions limiting indefeasibility

2.26 Other sections of the LTA that impinge on the principle of indefeasibility include sections 80 to 85 which give powers to correct the register. These powers impact upon the conclusiveness of the register and are discussed in chapter 5. Other sections overriding indefeasibility to some extent are sections 54 (provisionally registered titles), 77 (unauthorised inclusion of public roads or reserves in certificates of title), 79 (adverse possession where person was rightfully entitled when the land was brought under the Act), 199 (limited certificates of title) and Part IVA (extinguishment of title by acquisition of title to an access strip by adjoining owners). The paramount title of the registered proprietor is also specifically subject to short-term tenancies in possession in most Australian jurisdictions, and this should apply to leases for less than one year under the LTA.

2.27 Supportive of the conclusive register are sections 34 and 35 of the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, which provide for the conclusive evidentiary effect of the computer register title.

Q3 Should the indefeasibility sections be reworded to reflect their current interpretation or an interpretation more consistent with the objectives of the LTA? If so, how could they be rewritten?

Q4 Should a volunteer be entitled to the same protection as a purchaser for value?

### LIMITATIONS ON INDEFEASIBILITY OUTSIDE THE LTA

2.28 Limitations on the indefeasibility principle outside the LTA are covered in detail in other chapters. They include:

(a) Other statutory provisions that override the LTA.<sup>56</sup> These are discussed in chapter 9.

52 B Hayes “Indefeasibility of Title: *Bogdanovic v Koteff*” (1989) 5 BCB 79, 80.

53 *Boyd v Mayor of Wellington*, above n 49.

54 See further discussion regarding the position of a volunteer in Hinde McMorland & Sim, above n 42, paras 9.079–9.081; and Struan Scott “Indefeasibility of Title and the Volunteer” (1995) 7 BCB 113.

55 See Queensland Land Title Act 1994, s 180, for example. This is more consistent with *Frazer v Walker* [1967] AC 569.

56 Such overriding statutes have been seen as a real risk to persons acting on the faith of the register: The Hon Sir Anthony Mason “Indefeasibility – Logic or Legend” in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 3; see also: GW Hinde “The Future of the Torrens System in New Zealand” in J F Northey (ed) *The A G Davis Essays in Law* (Butterworths, London, 1965) 77, 79, citing TBF Ruoff *An Englishman Looks at the Torrens System* (Law Book Co, Sydney, 1957) 18.

- (b) In personam claims against registered proprietors, for example, where they have contractual obligations to perform, or trusts are involved. Such claims have been seen as an exception to the indefeasibility principle. This developing area of the law is discussed in chapter 4.

### Limits of indefeasibility for covenants in mortgages or leases

- 2.29 Although a registered mortgage is effective to grant an immediate title (as will be discussed below), whether void or not, not all rights in such an instrument will be protected by the indefeasibility principle. The courts have held that only those rights that are an integral part of the estate or interest are generally protected.<sup>57</sup>
- 2.30 In *Duncan v McDonald* Blanchard J noted that: “It is important to remember that registration does no more than confer a title to an interest in land – in favour of a transferee, lessee or mortgagee – and that where an otherwise void instrument becomes part of the register, it is effective so far only as is necessary to uphold and protect the title but no further.”<sup>58</sup> A mortgage over land is:<sup>59</sup>
- ... intended to give the mortgagee an interest in the land for, and only for, a particular purpose – in order that in the event of default, the mortgagee may have recourse to the land to satisfy the obligation secured by the mortgage ... Upon default, the mortgagee can recover the money by exercising the power of sale and recouping the advance from the proceeds. But if the proceeds are insufficient, the mortgagee cannot pursue the mortgagor for the balance in reliance on the forged covenant to pay.
- 2.31 Justice Blanchard has stated that a registered mortgage consists of a covenant to pay and other supporting covenants by the mortgagor and a charge to secure their performance. Where the mortgage would otherwise have been a nullity, registration protects the charge. In that situation the covenants are effective to enable the charge to operate and the moneys owing to be recovered, but they are not enforceable against the mortgagor separately from the right of recourse by means of proceeding to recover the debt.<sup>60</sup> Similarly in *Chandra v Perpetual*

57 *Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance Ltd* [1984] 2 NZLR 704, 713–714 (HC) Barker J; *Whenuapai Joinery (1988) Ltd v Trust Bank Central Ltd* [1994] 1 NZLR 406, 411 (CA). See also *CN and NA Davies v Laughton* [1997] 3 NZLR 705.

58 *Duncan v McDonald* [1997] 3 NZLR 669, 681 (CA) Blanchard J for the Court.

59 *Ibid*, 682. See also, *Grgic v Australia and New Zealand Banking Group* (1994) 33 NSWLR 202.

60 Associate Professor Struan Scott has said that on this approach, registration creates a debt to the value of the land, but he argues that the charge is quite distinct from the debt: S Scott “Indefeasibility and the Forged Mortgage” [1998] NZ Law Rev 531. In his view, if there is no obligation to repay a debt (because of a forgery, or repayment of a yet to be discharged mortgage) a failure to do so cannot constitute a default, so the charge secures nothing. Compare: Jeremy Stoljar “Mortgages, Indefeasibility and Personal Covenants to Pay” (2008) 82 ALJ 28, who supports the “Duncan” approach. See too, *Westpac Banking Corporation v Clark* BC200862702 (5 September 2008) CA 172/06, Court of Appeal, following *Duncan v McDonald* and approving Stoljar’s approach.

*Trustees Victoria Ltd*<sup>61</sup> (a forged mortgage case) the Supreme Court of New South Wales held that the charge of the debt on land is an estate or interest in the land, whereas the personal covenant to pay the debt is not, even though it is necessary to understand the personal covenant to see what is charged on the land.

- 2.32 A covenant in a lease may also be not enforceable where the lease itself is void but effective because registered,<sup>62</sup> although a covenant in a lease is more readily seen to be part of the estate or interest in land than a personal covenant to pay a debt in a mortgage. Such covenants, setting forth the conditions upon which the leasehold interest is held, are intimately related to the title under the Act created by its registration, as Blanchard J said in *Duncan v McDonald*.<sup>63</sup>

### Limits on indefeasibility in Māori freehold land registered titles

- 2.33 Although it was envisaged that all Māori freehold land would be registered under the Land Transfer Acts, not all Māori land is registered under the Act. The Māori Land Court has developed a system of recording ownership and other dealings with Māori land by court orders.<sup>64</sup> This means that title to Māori freehold land may be found either on the land transfer register; or incompletely on that register but not updated, with updated owners recorded in the Māori Land Court records; or solely in orders of the Māori Land Court. Thus the land transfer registers could be out of date so that the register cannot be relied upon. Chapter 10 sets out issues and current attempts to solve the problems, but full discussion and proposals for solutions are not part of the terms of this reference.

#### IMMEDIATE OR DEFERRED INDEFEASIBILITY?

- 2.34 The concept of immediate indefeasibility derives from the doctrine that the “cardinal principle of the statute is that the register is everything” (subject to specific statutory exceptions). Thus a bona fide purchaser who relies on the register in dealing with the registered proprietor, and registers a transfer, should thereby obtain a clear and valid title. Registration cures any voidness or invalidity immediately, except in the case of fraud by the purchaser or mortgagee or their

61 *Chandra v Perpetual Trustees Victoria Ltd* [2007] NSWSC 694, citing Giles J in *PT Ltd v Maradona Pty Ltd* (1992) 25 NSWLR 643, 679 who said: “That which is attained by registration is ... an estate or interest in land. Registration does not validate all the terms and conditions of the instrument which is registered. It validates those which delimit or qualify the estate or interest or are otherwise necessary to assure that estate or interest to the registered proprietor”. See also *Sabah Yazgi v Permanent Custodians Ltd* [2007] NSWCA 240, finding that the terms of the particular mortgage were not such as to impose liability on a wife whose husband had forged her signature on a loan agreement. It was accepted that the effect of registration does not give an indefeasible title in general terms: this depends on the meaning of the agreement in question. See also *Perpetual Trustees Victoria Ltd & Anor v Tsai* (2004) NSWSC 745. Compare *Queensland Premier Mines Pty Ltd v French* (2006) 82 ALJR 115, confirming that registration of a transfer of a Torrens title mortgage over land in Queensland does not of itself transfer the mortgagee’s rights to sue a third party under the collateral loan agreement: personal obligations under a loan agreement are legally separate and distinct from the obligations arising “under the mortgage”. See P Butt “Transfer of Mortgage does not Transfer Rights to Sue under Collateral Agreements” (2008) 82 ALJ 75.

62 See *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1, 17 (HCA) and *Mercantile Credits Ltd v Shell Co of Australia Ltd* (1976) 136 CLR 326, 343.

63 *Duncan v McDonald*, above n 58, 682.

64 Discussions with Professor Richard Boast, and with Shane Gibbons, March 2008. They estimate that around 5 percent of the land in New Zealand is Māori land. See also, Rt Hon Sir Thaddeus McCarthy (chair) *Royal Commission on the Māori Land Courts* [1980] IV AJHR H 3.

agents.<sup>65</sup> It does not otherwise matter that the transfer instrument is void for fraud or forged or invalid in some other way, except, it seems, in the case of a forgery by a person who, it turns out, is non-existent.<sup>66</sup>

- 2.35 The “immediate indefeasibility” view has been challenged in the past by supporters of so-called “deferred indefeasibility”. “Deferred indefeasibility” means that where a purchaser or mortgagee (A) becomes (innocently) the “registered owner” of land, relying on a document that is invalid or void (because, for example, of a fraud on the previous registered owner (O)) such a registration can be defeated by O – but only until such time as the land is on-sold to a bona fide purchaser for value (B).

### Deferred indefeasibility: the main cases and section 183 of the LTA

- 2.36 It is appropriate in the context of this review to discuss authoritative views on this concept, but it should be said at the start that, unless good reasons are found for doing so, the Law Commission does not favour its adoption.
- 2.37 An early case expressing the deferred indefeasibility interpretation of the principles behind the Land Transfer Acts, in the New Zealand Court of Appeal, was *Ex parte Davy, District Land Registrar, Wellington: In re the Land Transfer Act*, where Williams J said that:<sup>67</sup>

In the present case the instrument being a forgery was absolutely void, and it would require the clearest expression of the intention of the Legislature before we could hold that the person claiming immediately under such an instrument obtained, by virtue of its wrongful registration, an indefeasible title in himself.

- 2.38 *Gibbs v Messer*<sup>68</sup> was an appeal from the Supreme Court of Victoria concerning a fraudster who transferred Mrs Messer’s property into the title of a fictitious person, and then mortgaged the property, the fictitious registered proprietor becoming the apparent mortgagor. The Privy Council’s advice was that there was no valid transfer either in favour of the fraudster (under the name of the fictitious person) nor in favour of the mortgagees, and the register must be rectified in favour of the true owner, Mrs Messer.
- 2.39 The Privy Council said that those who derive a registered title bona fide and for value from a (genuine) registered owner need not investigate the root of title of such an owner for they are not affected by its infirmities. But they must ascertain at their own peril the owner’s existence and identity, the authority of any agent to act for him or her and the validity of the deed under which they claim. If the

65 *Frazer v Walker*, above n 25.

66 *Gibbs v Messer* [1891] AC 248 (PC), discussed further under the next heading.

67 *Ex parte Davy, District Land Registrar, Wellington: In re the Land Transfer Act* (1888) 6 NZLR 760, 764 (CA) Williams J.

68 *Gibbs v Messer*, above n 66. See discussion as to the various interpretations of the ratio of this case in Tom Bennion and others *New Zealand Land Law* (Brookers, Wellington, 2005) para 2.2.04. The narrow ratio accepted since *Frazer v Walker*, above n 25, is that registration of an instrument executed by a forger using a fictitious name that the forger has previously designed to be on the register does not confer an indefeasible title.

fictitious person had been real, their Lordships said that his title would have been liable to cancellation (because the transfer was void for fraud) by Mrs Messer, but a mortgage in favour of a bona fide mortgagee would have been valid.<sup>69</sup>

2.40 *Boyd v Mayor of Wellington* concerned a proclamation issued by the Governor-General that took land from a registered proprietor, Boyd, and vested it in the City of Wellington for purposes of a tramway. The proclamation was registered. The three majority judges held that even if the proclamation was void, because requisite consents had not been obtained, the registration was effective. Salmond J, one of the two minority judges, disagreed. He considered that a purchaser needs to ascertain the registered proprietor's existence and identity, and the validity of the transfer document.<sup>70</sup> In his view, registration of a void instrument cannot confer an indefeasible title.<sup>71</sup> The instrument remains void inter partes (O as original owner and A as purchaser) and the register can be defeated as to the registration of the purchaser (A). However, if the invalidity is not discovered or the purchaser then on-sells to another bona fide purchaser (B), title will pass to B by a valid transfer and the infirmities in A's title will not affect B. Thus B's title is indefeasible.

2.41 Salmond J relied on section 198 of the LTA 1915, now section 183 of the LTA 1952 (as Williams J relied on the equivalent section in *Ex parte Davy*). Salmond J said that this section assumes that a vendor or mortgagor may have been registered under any void or voidable instrument (or by fraud or error) and gives special protection to a purchaser or mortgagee (B) from such vendor or mortgagor who might be otherwise in danger of having their titles cancelled. For:<sup>72</sup>

... if, as has been contended, a void instrument becomes conclusively valid by registration ... it would have been absurd and unnecessary to provide expressly that it should be valid in the hands of a subsequent purchaser. Section 198 involves by implication the proposition that a void instrument remains void even though registered, until a subsequent valid instrument has been registered in succession to it.

2.42 In Australia, the High Court in *Ellis v Clements* upheld Lowe J in the Victorian Supreme Court and found that a forged discharge of a mortgage was a nullity and its registration did not give it any validity in favour of an immediate party. Dixon J analysed the above cases to reach his conclusion that:<sup>73</sup>

... a prior registered estate or interest, for the removal of which from the register there is no authority but a forged or void instrument, is not destroyed unless afterwards a

69 Ibid, 255. Lord Watson said: "Although a forged mortgage, which is void at common law, will, when duly entered on the register, become the root of a valid title, in a bona fide purchaser by force of the statute, there is no enactment which makes indefeasible the registered right of the transferee or mortgagee under a null deed." Ibid, 257-258.

70 *Boyd v Mayor of Wellington*, above n 49, 1202-1203.

71 Salmond J also was of the view that *Assets Co Ltd v Mere Roihi* [1905] AC 176, was not authority for immediate indefeasibility. His Honour cited Lord Lindley's dictum at 202: "A registered bona fide purchaser from a registered owner whose title might be impeached for fraud has a better title than his vendor".

72 *Boyd v Mayor of Wellington*, above n 49, 1212 Salmond J. This interpretation was also upheld by North P in the Court of Appeal in *Frazer v Walker* [1966] NZLR 331, 348 (CA) after discussion of the above authorities. The President was of the opinion "that on the present state of the authorities, the second respondents, upon registration of their mortgage, did not immediately acquire an indefeasible title to their interest as mortgagees in so far as the mortgage affected the position of the appellant". This opinion was overturned by the Privy Council on appeal.

73 *Clements v Ellis*, above n 47, 237.

person, who, according to the existing condition of the register is entitled to do so, gives a registrable instrument which is taken bona fide for value and registered.

- 2.43 This case was influential in Australia for over 30 years. It is of interest that section 69II of the Real Property Act 1886 (SA) has been interpreted as providing for deferred indefeasibility even into the 1990s. Section 69II provides that where registration has been obtained by forgery, or by means of insufficient power of attorney or from a person under a legal disability, the registration shall be void “provided that the title of a registered proprietor who has taken bona fide for valuable consideration shall not be affected by reason that a certificate or other instrument of title was obtained by any person through whom he claims title from a person under disability, or by any of the means aforesaid”. In *Rogers v Resi-Statewide Corporation Ltd*, von Doussa J considered the purpose of the provision was to prevent a person taking under a forged instrument from obtaining an indefeasible title.<sup>74</sup> Von Doussa J quoted the Attorney-General’s explanation for the clause in the South Australian Parliamentary Debates of 1886. As the Attorney-General had said: “The person whose signature was forged had no means of protecting himself, whilst the person who took the forged signature had the opportunity of satisfying himself of its genuineness”.<sup>75</sup>
- 2.44 However, in *Arcadi v Whitem*<sup>76</sup> the majority of the Full Court of the South Australian Supreme Court concluded that the correct construction of the proviso to section 69II was that only a person who gained title from a person under a legal disability was susceptible to deferred indefeasibility; title obtained by forgery or insufficient power of attorney was immediately indefeasible upon registration.<sup>77</sup>

#### Immediate indefeasibility: *Frazer v Walker*

- 2.45 The immediate indefeasibility interpretation of the Australasian Land Transfer Acts was confirmed by the Privy Council in *Frazer v Walker*<sup>78</sup> in 1967. Mrs Frazer, purporting to act for her husband and herself, mortgaged their farm property in favour of the Radomskis. No payments were made under the mortgage by the Frazers (Mr Frazer being in complete ignorance of the mortgage) so the Radomskis exercised their power of sale and sold to Mr Walker, a bona fide purchaser. The Privy Council held that the interest of the mortgagee was immediately indefeasible, despite the mortgage being obtained by the forgery of Mrs Frazer.<sup>79</sup> Their Lordships affirmed the majority decision of *Boyd v Mayor of*

74 *Rogers v Resi-Statewide Corporation Ltd* (1991) 29 FCR 219, discussed in D Wright “Forgery and the Real Property Act 1886 (SA)” (1994) 16 Adel LR 227. See too, *Chasfield Pty Ltd v Taranto* [1991] 1 VR 225, since overruled in *Pyramid Building Soc (in liq) v Scorpion Hotels Pty Ltd* [1998] 1 VR 188.

75 (1886) SAPD 141–142 cited in *Rogers v Resi-Statewide Corporation*, *ibid*.

76 *Arcadi v Whitem* (1992) 167 LSJIS 217.

77 This was strictly obiter because it was held that there was no forged signature of the registered proprietor in the case. The minority judge concluded that the *Rogers* interpretation was right because the second reading speech clearly indicated that, with regard to forgery, deferred indefeasibility was to operate and section 69 deals with forgery separately to fraud and therefore intended different results to be reached. See: Wright, above n 74, 236. Wright would agree, but suggests that the definition of forgery be limited to that of a forged signature of the registered proprietor as suggested by the majority in *Arcadi*.

78 *Frazer v Walker*, above n 25.

79 There was thus no question but that Mr Walker obtained an indefeasible title – as he would have done had the deferred indefeasibility approach been accepted.

Wellington,<sup>80</sup> that a person who, without fraud, becomes the registered proprietor of land, has an indefeasible title although the documents that form the basis of the registration are absolutely inoperative. *Frazer v Walker* has now been followed by decisions too numerous to list for 40 years.<sup>81</sup> However, the Privy Council distinguished *Gibbs v Messer*<sup>82</sup> on the grounds that that case was concerned with a “purchase” from a fictitious registered person, not a real registered proprietor.

- 2.46 In *Breskvar v Wall* the Australian High Court upheld the authority of *Frazer v Walker* for Australia. Sir Garfield Barwick noted that:<sup>83</sup>

The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration.

- 2.47 Immediate indefeasibility is now settled law in New Zealand and Australia, despite earlier controversial decisions not following *Frazer v Walker*.<sup>84</sup>

## PROPOSALS FOR POSSIBLE CHANGE

- 2.48 The main problems with immediate indefeasibility arise where a fraudster has transferred a registered proprietor’s interest to a third party. Registration means that the third party acquires a good title even if the instrument of transfer is forged and would otherwise be void.

### New Zealand proposals: presumption of immediate indefeasibility with a judicial discretion?

- 2.49 As Professor Hinde said in “Indefeasibility of Title since *Frazer v Walker*”:<sup>85</sup>

Neither immediate indefeasibility nor deferred indefeasibility can produce a satisfactory result in every case.

- 2.50 Professor Hinde’s suggestion was that the court have a discretion to depart from the general rule of immediate indefeasibility and either order the former registered proprietor’s (original owner’s) name be restored to the register, or declare the title of the proprietor who registered the void instrument indefeasible. The circumstances in which a discretion could be exercised would need to be carefully defined and the court given guidance as to the factors to be taken into

80 *Boyd v Mayor of Wellington*, above n 49.

81 Some of these include *Merbank Corporation Ltd v Cramp* [1980] 1 NZLR 721 (SC); *Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance Ltd*, above n 57; *Jessett Properties Ltd v UDC Finance Ltd* [1992] 1 NZLR 138 (CA); *Registrar-General of Land v Marshall* [1995] 2 NZLR 189 (HC); *Duncan v McDonald*, above n 58; and other cases cited in Tom Bennion and others *New Zealand Land Law* (Brookers, Wellington, 2005) 56.

82 *Gibbs v Messer*, above n 18, and see *Frazer v Walker*, above n 25, 584.

83 *Breskvar v Wall* (1971) 126 CLR 376, 385–386 (HCA) Barwick CJ.

84 See above n 74.

85 Hinde, above n 27, 73.



account (for example, whether the land was vacant or improved, whether either party has an established home on the land and the length of time the party who registered with a void instrument had been in possession).<sup>86</sup>

- 2.51 The New Zealand Property Law and Equity Reform Committee produced a report on “The Decision in *Frazer v Walker*” in 1977.<sup>87</sup> The Committee proposed a solution that would give the courts a discretion, in cases where a void instrument had been registered, either to order that the former registered proprietor’s name be restored to the register, or to declare the title of the person next registered indefeasible. After receiving 13 submissions on its working paper, most of which favoured retention of immediate indefeasibility, the Committee decided there was no compelling case for changing the law as stated in *Frazer v Walker*, subject to abolishing the *Gibbs v Messer* anomaly and legislation giving effect to court discretion in the case of void instruments. Such legislation has not been forthcoming, and *Gibbs v Messer* has not been overruled.

### The recommendations of overseas Law Reform Commissions: presumption of deferred indefeasibility with judicial discretion

#### *Law Reform Commission of Victoria report: The Torrens Register Book*<sup>88</sup>

- 2.52 The Law Reform Commission of Victoria (LRCV) recommended a general presumption of deferred indefeasibility, that the interest of a victim of forgery whose title is altered by registration of a forgery should prevail against an innocent party whose interest is registered on the basis of the forgery. However, the court should be entitled to reverse this result in the case of demonstrated hardship to the innocent third party.<sup>89</sup> Reasons for preferring deferred indefeasibility in forgery cases were that: otherwise community expectations were undermined; the ancient principle that forgery was legally ineffective would be overturned; and also original owners might have long personal association with their land, so should be entitled to retain it. The LRCV recommendations have not been implemented.<sup>90</sup>

#### *Joint Land Titles Committee (Canada) proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada*<sup>91</sup>

- 2.53 Under the title registration provisions of the Joint Land Titles Committee’s proposed Model Act, a registration which is not based upon a valid transaction between O, the original owner, and A, the transferee, (for example, one based upon a forged or unauthorised transfer) can be set aside. But if the transferee (A) is a bona fide purchaser, the court will be able to award the ownership to either A or the displaced registered owner (O) and compensation to the other,

86 Ibid, 76.

87 Property Law and Equity Reform Committee *The Decision in Frazer v Walker* (Report, Wellington, 1977).

88 Law Reform Commission of Victoria *The Torrens Register Book* (LRCV R 12, Melbourne, 1987).

89 Ibid, paras 16–17.

90 Email correspondence, 5–20 May 2008, with Stephanie Ng, Legal Policy Officer in the Department of Justice, Melbourne, who kindly supplied a table of recommendations from the Law Reform Commission of Victoria, *ibid*, that have been implemented.

91 Joint Land Titles Committee (Alberta, British Columbia, Manitoba, The Council of Maritime Premiers, Northwest Territories, Ontario, Saskatchewan, Yukon) *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (Edmonton, 1990).

with a presumption in favour of restoring the displaced registered owner and compensating the transferee. However, if the property has been on-transferred to an innocent successor (B), B will obtain an indefeasible registered title (deferred indefeasibility).

- 2.54 The Joint Committee’s reasoning was that “it will usually be fairer and cheaper to restore O’s [the original owner’s] registration and to compensate A [the innocent transferee]”.<sup>92</sup> As the facts are likely to come to light fairly soon, O’s loss of the land would normally be harsher and greater than that of A. But it may sometimes be just and equitable or less expensive to grant title to A and to compensate O.
- 2.55 The Canadian proposals coin the term “discretionary indefeasibility” giving the courts the power and guidelines to replace the presumption of deferred indefeasibility with immediate indefeasibility where it is considered more just and equitable. Circumstances to consider would be:
- the nature of the ownership and the use of the property by either of the parties;
  - the circumstances of the invalid transaction;
  - the special characteristics of the property and their appeal to the parties;
  - the willingness of one or both of the parties to receive compensation;
  - the ease with which the amount of compensation for a loss may be determined;
  - any other circumstances that, in the opinion of the court, make it just and equitable for the court to exercise or refuse to exercise its powers.
- 2.56 The Alberta Law Reform Institute has recommended the same approach.<sup>93</sup> In its opinion, too, the *Frazer v Walker* (immediate indefeasibility) approach of giving the land to the purchaser, is too rigid and likely to have unfair results.<sup>94</sup>
- 2.57 Of other Canadian jurisdictions, no provinces have to date adopted the Joint Land Titles Committee’s draft legislation in full. However, Ontario legislation now endorses the recommendation for “deferred indefeasibility”.<sup>95</sup> New Brunswick’s Land Titles Act<sup>96</sup> “creates a window of opportunity for title to be restored to the defrauded owner”.<sup>97</sup> Section 71 of that Act provides:

The title register shall not be rectified so as to affect detrimentally the title of the registered owner who is in possession unless:

92 Ibid, 25.

93 Alberta Law Reform Institute *Proposals for a Land Recording and Registration Act for Alberta* (Report 69, Vol 1, Edmonton, 1993) 47: “Our view is that it will be usually fairer and cheaper to restore O’s registration and to compensate A”.

94 However, immediate indefeasibility was “probably” the law in Alberta and the Torrens based provinces at the time (1993) and at least until 2006: Alberta Law Institute, *ibid*, 146, repeated in Manitoba Law Reform Commission *Private Title Insurance* (a joint project with the Law Reform Commission of Saskatchewan) (MLRC R 114, Winnipeg, 2006) 18, footnote 65 (regarding Alberta).

95 Legislation was passed in 2006 to provide that a fraudulent instrument has no effect on the title register, but instruments registered subsequent to a fraudulent instrument are deemed effective. See Land Titles Act RSO 1990, ss 155 and 157. See too, *Lawrence v Maple Trust Co & Wright* [2007] ONCA 74 (Ontario Court of Appeal held in favour of a defrauded home owner rather than an innocent mortgagee).

96 Land Titles Act SNB 1981 c. L-1.1.

97 See Sandra Petersson “Fraud by Forgery” (Alberta Law Reform Institute, 2005).

- (a) such owner had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud, or mistake or substantially contributed to it by this [sic] act;
  - (b) the immediate disposition to him was void, or the disposition to the person through whom he claims otherwise than for valuable consideration was void; or
  - (c) for any other reason, in any particular case it is considered that it would be unjust not to rectify the register against him.
- 2.58 In 2005, British Columbia amended its Land Title Act 1996 in favour of immediate indefeasibility so that a bona fide purchaser for value of the fee simple is protected even if the conveyancing instrument is void, but for other transferees (a mortgagee, for example) a void instrument would not be validated.<sup>98</sup> Saskatchewan legislation is similar.<sup>99</sup>

*Scottish Law Commission Discussion Paper on Land Registration: Registration, Rectification and Indemnity (2005)*<sup>100</sup>

- 2.59 The Scottish title registration system was based on the English Land Registration Act 1925, which modern research has shown to have been influenced by early registration systems in Germany. There are essential similarities between the English, German and Torrens land registration systems and their successors.<sup>101</sup>
- 2.60 Terminology is different in Scotland but the proposed solutions are essentially the same as those noted above. The discussion paper notes that: “Few would disagree that the acquisition of land should be as safe, simple and as cheap as possible and, equally, that a title, once acquired, should be secure against future challenge”.<sup>102</sup> The paper then discusses the problem of the protection of the “acquirer” (A, the purchaser/transferee) versus the protection of the “true owner” (O, the original registered proprietor) where there has been a fraud. This is framed as a choice between transactional ease (for a purchaser or acquirer) and security of title (for a registered proprietor), which apparently is made on the basis of who is in possession under the Scottish Act. However, the innocent party not in possession should obtain compensation for a cancelled title.<sup>103</sup>

98 See *Private Title Insurance*, above n 94, 18, footnote 65; and Land Title Act RSBC 1996 c 250, s 25.1. For a discussion of this provision, see DC Harris “Indefeasible Title in British Columbia: A Comment on the November 2005 Amendments to the Land Title Act” (2006) 64 *The Advocate* 529.

99 Land Titles Act SS 2000 c.L-5.1, ss 13, 15, 16 and 54(3). In *CIBC Mortgages Inc v Saskatchewan (Registrar of Land Titles)* (2006) 9 WWR 556 (QB) a mortgagee had advanced funds to a fraudster who registered forged documents transferring title to one Doerksen, and then posed as Doerksen to get the mortgage. The court held that the bank had not been dealing with the actual registered owner but with an imposter, so the mortgage was not valid; in effect this was a *Gibbs v Messer* approach.

100 *Scottish Law Commission Discussion Paper on Land Registration: Registration, Rectification and Indemnity* (DP 128, The Stationery Office, Edinburgh, 2005).

101 See P O’Connor “Registration of Title in England and Australia: A Theoretical and Comparative Analysis” in E Cooke (ed) *Modern Studies in Property Law* (vol 2, Hart Publishing, Oxford, 2003) 81, 98; cited in *Scottish Law Commission Discussion Paper on Land Registration: Void and Voidable Titles* (DP 125, The Stationery Office, Edinburgh, 2004) 4–5; also George L Gretton “Land Registration Reform” (unpublished, obtained from the author, May 2008).

102 *Discussion Paper on Land Registration: Registration, Rectification and Indemnity*, above n 100, 1.

103 *Ibid*, 1–3. In England and Wales, the registered proprietor in possession is protected (unless he or she by fraud or lack of care caused or substantially contributed to a mistake of registration): see the Land Registration Act 2002, Sch 4, clause 3(2)(c). But the interests of persons in actual occupation generally override registered dispositions: see Sch 3, cl 2. For detailed discussion see E Cooke *The New Law of Land Registration* (Hart Publishing, Oxford and Portland, Oregon, 2003) chapter 6.

- 2.61 The Scottish Law Commission (SLC) proposes a distinction between “register error” (the responsibility of the Keeper of the Register) and “transactional error”. The former is an inaccuracy in the register when a bona fide purchaser does a title search, an inaccuracy that goes to the integrity of the register. The latter is an inaccuracy that arises as a result of a transaction – for example, the entering of acquirer A’s name on the register on the basis of an instrument that is forged or otherwise void.<sup>104</sup>
- 2.62 The proposal is to give increased protection to the true owner (O) and less to the acquirer because it is the acquirer (A) who has “voluntarily assumed the risk of a transaction in land”.<sup>105</sup> The true owner should keep the property (or have the right to return of the property) but A should obtain compensation. However, if before the true owner asserted his or her right, the acquirer transferred to a second acquirer, the second acquirer (B) would be awarded the property (providing the true owner had lost possession for a significant period, such as a year) because the error would now become a “register error” on the basis of the integrity of the register principle.<sup>106</sup> Thus security of title would give way to transactional ease and conclusiveness of the register only where there was no alternative. This is the deferred indefeasibility concept of the Torrens system. Their proposals found favour with their consultees, and the SLC remains convinced that deferred indefeasibility is the right solution.<sup>107</sup>
- 2.63 The SLC differentiates between a positive system of land registration where the act of registration confers title without regard to the validity of the deed, and a negative system where no right can be conferred by a deed that is invalid (as under normal property law). The SLC argues that a positive system is inflexible and irrational, often leaves ownership in the wrong place and imports bijuralism (two different sets of law), and it recommends a negative system for Scotland.<sup>108</sup>

## SHOULD THERE BE ANY CHANGE?

### Arguments in favour of immediate indefeasibility

- 2.64 Arguments in favour of immediate indefeasibility include, most importantly, its current acceptance in New Zealand and Australia. There is also the fact that immediate indefeasibility allows certainty of title upon transfer (or at least more certainty than deferred indefeasibility) and is closer to the concept of the conclusive register.
- 2.65 For conveyancing purposes, the practical effect of adopting immediate indefeasibility is that the bona fide purchaser does not have to make enquiries into the validity of the instrument of transfer where it appears on its face to be in order.<sup>109</sup> It also protects the newly acquired title of a bona fide registered

104 *Discussion Paper on Land Registration: Registration, Rectification and Indemnity*, above n 100, 2.

105 *Ibid*, 3.

106 *Ibid*, 2–3. This is Salmond J’s interpretation of section 183 in *Boyd v Mayor of Wellington*, above n 49.

107 See note from Professor George Gretton, Scottish Law Commission, emailed to New Zealand Law Commission, 8 May 2008.

108 Scottish Law Commission, above n 100, 3–4.

109 Professor Sackville has said that this is the most convincing argument for immediate indefeasibility: Ronald Sackville “The Torrens System – Some Thoughts on Indefeasibility and Priorities” (1973) 47 ALJ 526, 531.

proprietor by transactional certainty, although it does not protect the security of that title if the registered proprietor is later a victim of a fraudulent or void transfer not “brought home to” the transferee.

- 2.66 A number of land law experts supported immediate indefeasibility in the debate and following *Frazer v Walker* as being in accordance with the essential “pro-purchaser” aim of the Torrens system, notably Douglas Whalan<sup>110</sup> and John Baalman,<sup>111</sup> who argued that it is lynch pin of the legislation. However, Whalan would allow specific exceptions to immediate indefeasibility to be set out in the legislation, as noted below.

### Arguments in favour of deferred indefeasibility

- 2.67 Arguments in favour of deferred indefeasibility are essentially those of the law reform bodies, that it is usually fairer and cheaper to restore O’s registration and to compensate A. Further, eminent authorities such as Justice Williams, Sir John Salmond and Sir Owen Dixon found it was the intention of the legislature that an instrument void for fraud should not transfer title (interpreting the wording of the present sections 63(1)(c) and 183 of the LTA (NZ)). The principle of deferred indefeasibility is adopted in some Torrens jurisdictions, such as Malaysia,<sup>112</sup> and in some Canadian provinces. The concept also has had the support of several commentators.<sup>113</sup> Warrington Taylor criticised *Frazer v Walker* for leaving the “gate wide open” to in personam claims and the Registrar’s powers of correction, and for tending to encourage careless conveyancing, and finally, for treating all types of invalidity the same way.<sup>114</sup> Deferred indefeasibility also avoids a divergence from the common law in respect of void instruments. In cases of a fraudulent or void transfer it may be just to apply the common law principle that property does not pass where the transfer is invalid.

### Arguments in favour of discretionary indefeasibility

- 2.68 *Frazer v Walker* has now been the law for about 40 years and to overturn it would radically change the law. However, the issue of doing justice between an original innocent registered proprietor who is defrauded and an innocent third party transferee is still very much alive. Fraudsters still exist. Although a defrauded registered proprietor (O) is entitled to apply for compensation, this may well not be adequate recompense (financially or in other ways) for losing a home.

110 Douglas Whalan “Was Mr Bumble Right or was a Torrens Tangle Untied?” [1967] NZ Law Rev 347; Douglas J Whalan “The Torrens System in New Zealand – Present Problems and Future Possibilities” in GW Hinde (ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971) 258, 276 [“The Torrens System in New Zealand – Present Problems and Future Possibilities”].

111 John Baalman *The Torrens System in New South Wales* (Law Book Co, Sydney, 1951) 133–137.

112 See Malaysian National Land Code 1965 Act 56/65, s 340(2) discussed in Teo Keang Sood “Deferred Indefeasibility of Title and Interests” (1997) Sing J Int’l & Comp L 140.

113 For example: Warrington Taylor “Scotching *Frazer v Walker*” (1970) 44 ALJ 248; who suggests that the main danger of immediate indefeasibility is the risk to security of title (by a forged instrument of transfer); JJ Slade “Indefeasibility of Title” [1968] NZLJ 12; PB Temm “Mr Bumble Right Again” [1967] NZLJ 129.

114 Warrington Taylor, *ibid*, 254.

- 2.69 The Hon Sir Anthony Mason, former Chief Justice of Australia, has suggested that perhaps the time has come to re-examine the established principles of immediate indefeasibility in Australasia, in the light of academic analysis and law reform proposals in other jurisdictions that suggest a more discretionary approach is indicated.<sup>115</sup>
- 2.70 A presumption in favour of immediate indefeasibility with a judicial discretion to reverse this where it would be in the interests of justice, taking into account circumstances specified in the legislation, might be a fairer and more flexible option than the present law.

### Legislative amendment – options

- 2.71 The options described range from immediate to deferred indefeasibility, with “discretionary” indefeasibility or “immediate indefeasibility with specific exceptions”, as more nuanced approaches.

#### *Immediate indefeasibility: Frazer v Walker subject to clarifying Gibbs v Messer*

- 2.72 While there are some persuasive arguments for overturning immediate indefeasibility, the Law Commission’s provisional view is that it is probably wise to adhere to *Frazer v Walker*, but, at the least, clarifying the *Gibbs v Messer* anomaly. In the Real Property Act 1900 (NSW), section 3 now defines fraud to include a fictitious person. In addition, the legislation should be clarified so that there is no possibility of a deferred indefeasibility interpretation, particularly of sections 63(1)(c) and 183 of the LTA.

#### *Frazer v Walker with judicial discretion*

- 2.73 Alternatively, it should be possible to amend the legislation to provide for limited discretionary indefeasibility (with a presumption of immediate indefeasibility). Factors for the judges to take into account could be similar to those listed above by the Canadian Joint Land Titles Committee. Some may not favour judicial discretion however circumscribed. Sir Anthony Mason doubts it would bring sufficient certainty in the short term.<sup>116</sup>

#### *Deferred indefeasibility*

- 2.74 The strongest argument for deferred indefeasibility is that it protects security of title for a proprietor once registered, and is thus often fairer in cases where a fraudster has mortgaged or transferred a registered proprietor’s land without their knowledge. But it would involve a movement away from transactional certainty in favour of individual justice.

#### *Frazer v Walker with specific statutory exceptions*

- 2.75 Another option is immediate indefeasibility with specific exceptions. Professor Whalan “albeit somewhat hesitantly”, preferred exceptions to immediate indefeasibility to be spelt out in the legislation rather than left to judicial

<sup>115</sup> Hon Sir Anthony Mason “Indefeasibility – Logic or Legend?” in David Grinlinton (ed) *Torrens in the Twenty-first Century* (Lexis Nexis, Wellington, 2003) 3, 19.

<sup>116</sup> *Ibid*, 18.

discretion.<sup>117</sup> In his view, this should include an exception to prevent a registered proprietor being deprived of his or her estate or interest by a purported but unlawful exercise of statutory authority.<sup>118</sup> The Singapore Land Titles Act 1994, section 46, has such a provision.<sup>119</sup> The exceptions in section 69II of the South Australian Real Property Act 1886, noted above, may also be considered.

- 2.76 Sir Anthony Mason has endorsed the suggestions of Sharon Roderick for steps to reduce the risk of forged or fraudulent mortgages, including adoption of the English provisions in the Land Registration Act 2002, whereby the register may be rectified in circumstances that are wider than fraud. This refers to section 65 and Schedule 4 of the Land Registration Act 2002, providing that the register can be rectified in cases of fraud or lack of proper care or substantial contribution to a mistake by a registered proprietor, or if for any other reason it would be unjust not to rectify.<sup>120</sup>
- 2.77 An option that might assist registered proprietors whose signatures have been forged on a mortgage could be the imposition of statutory duties under the LTA on mortgagees to confirm the identity of the mortgagor, similarly to sections 11A and 11B of the Land Title Act 1994 (Qld). A failure to do so means that the mortgagee does not obtain an indefeasible title (under section 185 of the Land Title Act 1994). More extreme is the British Columbian Land Title Act 1996, section 25.1 of which protects a bona fide purchaser for value of the fee simple even if the conveyancing instrument is void, but for other transferees (a mortgagee, for example), a void instrument would not be validated.
- 2.78 Professor Hinde suggested adding specific sections to the Land Transfer Act “sparingly” to cover those situations where immediate indefeasibility would produce hardship.<sup>121</sup> However, Professor Hinde is clear that:<sup>122</sup>

Whatever amending legislation may ultimately be proposed, it is submitted that the one principle which should never be lost sight of is that no person who has acquired a registered estate or interest in land in good faith and for value after diligently carrying out the appropriate conveyancing procedures should be deprived of that estate or interest by any means whatever without full monetary compensation.

Q5 Which of the above options do you consider would be most in line with modern Torrens principles and practice?

117 “The Torrens System in New Zealand – Present Problems and Future Possibilities”, above n 110, 276.

118 See *Boyd v Mayor of Wellington*, above n 49.

119 The paramount estate of a registered proprietor is subject to, inter alia, the right of any person to recover from a proprietor land acquired by him unlawfully in purported exercise of a statutory power or authority: Land Titles Act 1994, s 46 (2)(e).

120 Sir A Mason, above n 115, 19, citing Sharon Roderick’s suggestions in “Forgeries, False Attestations and Imposters: Torrens System Mortgages and the Fraud Exception to Indefeasibility” [2002] DLR 97. Roderick’s concern is that the high threshold for a finding of land transfer fraud means that there is little incentive on mortgagees to be careful about checking the identity of mortgagors. See chapter 3 for the Australian approach to a finding of fraud.

121 Hinde, above n 27, 75, footnote 12; referring to Professor Whalan’s suggestion that immediate indefeasibility should not extend to title acquired by invalid exercise of statutory authority.

122 *Ibid*, 76.

# Chapter 3

## Land transfer fraud

**FRAUD UNDER THE LTA** 3.1 Fraud is a main statutory exception to indefeasibility of registered title under the LTA.<sup>123</sup> Section 62 of the Act provides on its face that the registered proprietor's title is paramount except "in the case of fraud" and the three specific exceptions listed. The LTA does not provide a definition of fraud. Section 182 of the Act does, however, provide that knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

3.2 A more comprehensive definition of fraud has been developed by the judiciary. Under a Torrens system, fraud has been held to have a special meaning, broader than common law deceit but narrower than constructive or equitable fraud.<sup>124</sup> In practice, the fraud will have been perpetrated against either a previous registered proprietor, or the holder of an unregistered interest.

**JUDICIAL INTERPRETATION OF "FRAUD": LEADING EARLY CASES** 3.3 Fraud is a question of fact that has been approached on a case-by-case basis.<sup>125</sup> A broad and encompassing definition of fraud has been rejected as impossible or even dangerous,<sup>126</sup> given the breadth of its "forms and methods".<sup>127</sup>

3.4 *Assets Co v Mere Roihi*<sup>128</sup> is the foundation case for the interpretation of Torrens title fraud in New Zealand and Australia. The Privy Council in *Assets Co* advised that the notion of equitable or constructive fraud is not appropriate in a system of Torrens title, and that fraud under the LTA must be "actual fraud". Actual fraud involves dishonesty. It includes deliberate ignorance upon arousal of suspicion, but not genuine ignorance. The Privy Council advised that:<sup>129</sup>

... by fraud in these Acts is meant actual fraud, ie, dishonesty of some sort, not what is called constructive or equitable fraud – an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their

123 Fraud is specifically excepted from the sections said to confer indefeasibility of title on the registered proprietor: Land Transfer Act 1952, ss 62, 63, 182 and 183.

124 *Assets Co Ltd v Mere Roihi* [1905] AC 176 (PC); *Sutton v O'Kane* [1973] 2 NZLR 304 (CA); and see Hinde McMorland & Sim *Land Law in New Zealand* (loose leaf, LexisNexis, Wellington, 2005) para 9.018.

125 *Waimiha Sawmilling Co Ltd (in liq) v Waione Timber Co Ltd* [1926] AC 101, 107–108 (PC) Lord Buckmaster [*Waimiha* (PC)].

126 *Harris v Fitzmaurice* [1956] NZLR 975, 978 (SC) Cooke J.

127 *Stuart v Kingston* (1923) 32 CLR 309, 359 (HCA) Starke J.

128 *Assets Co Ltd v Mere Roihi*, above n 124.

129 *Assets Co v Mere Roihi*, above n 124, 210 Lord Lindley.



Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents ... The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him.

3.5 The case established that the fraud must be by, or brought home to, the challenged registered proprietor or their agent. However, the legislation does not specify that the fraud that defeats registration need be that of any particular person, and this has been judicially acknowledged in a Victorian case.<sup>130</sup>

3.6 In *Waimiha Sawmilling Co v Waione Timber Co*, the Privy Council upheld the Court of Appeal decision and applied the *Assets Co v Mere Roihi* approach:<sup>131</sup>

If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear. It is not, however, necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend upon its own circumstances. The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest.

3.7 New Zealand courts have also consistently applied Salmond J's Court of Appeal judgment in *Waimiha Sawmilling Co v Waione Timber Co*.<sup>132</sup>

The true test of fraud is not whether the purchaser actually knew for a certainty of the existence of the adverse right, but whether he knew enough to make it his duty as an honest man to hold his hand, and either to make further inquiries before purchasing, or to abstain from the purchase, or to purchase subject to the claimant's rights rather than in defiance of them. If, knowing as much as this, he proceeds without further inquiry or delay to purchase an unencumbered title with intent to disregard the claimant's rights, if they exist, he is guilty of that wilful blindness or voluntary ignorance which, according to the authorities, is equivalent to actual knowledge, and therefore amounts to fraud.

3.8 Although this judgment is expressed to be consistent with *Assets Co v Mere Roihi* and the Court of Appeal in *Waimiha Sawmilling* was upheld by the Privy Council, its influence on the New Zealand understanding of fraud has been criticised by some commentators who argue that it refers back to equitable notions, which the Act and the Privy Council had tried to abolish.<sup>133</sup> It includes wilful blindness or voluntary ignorance as the equivalent of actual knowledge.

130 *National Australia Bank Ltd v Maher* (28 January 1994) Supreme Court of Victoria 4112 of 1993, Fullagar J. See too JJ Slade "Indefeasibility of Title" [1968] NZLJ 12, 13 (interpreting sections 63(1)(c) and 183(1) of the Land Transfer Act 1952).

131 *Waimiha* (PC), above n 125, 106–107 Lord Buckmaster.

132 *Waimiha Sawmilling Co Ltd (in liq) v Waione Timber Co Ltd* [1923] NZLR 1137, 1175 (CA) Salmond J [*Waimiha* (CA)].

133 For example, see Rt Hon Justice Peter Blanchard "Indefeasibility Under the Torrens System in New Zealand" in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 29, 43; RP Thomas "Land Transfer Fraud and Unregistered Interests" [1994] NZ Law Rev 218, 227.

Something more than mere knowledge is necessary

- 3.9 It is clear that the knowledge that is a factor in establishing fraud in relation to unregistered interests must be actual knowledge, not constructive notice.<sup>134</sup> It is also clear that such knowledge alone is not sufficient: “it is still a matter of controversy how much more than mere knowledge is required to make a registered proprietor’s conduct fraudulent”.<sup>135</sup>
- 3.10 Following *Assets Co v Mere Roihi*, dishonesty has been established as the “something more” than mere knowledge that makes a purchaser fraudulent. However, an objective interpretation of the meaning of “dishonesty” has proved elusive, and the cases reveal a divergence of opinion amongst judges, which results in inconsistent applications of the fraud exception. This is illustrated by the dissenting judgments in *Sutton v O’Kane*<sup>136</sup> and *Bunt v Hallinan*.<sup>137</sup>
- 3.11 Hallinan became the registered proprietor of a property, part of which was subject to an unregistered lease in favour of Bunt. There was extensive evidence suggesting that Hallinan had full knowledge of Bunt’s interest and notice of an obligation to respect it, but he had also received legal advice suggesting that if he became the registered proprietor he would not be bound by Bunt’s interest. On the facts, the majority came to the conclusion that:<sup>138</sup>

[Hallinan] did not acquire title with a view to depriving the appellants of their rights; on the contrary, he had been advised that they had none. This, then, is not a case of a person whose suspicions have been aroused abstaining from making inquiries for fear of learning the truth. Rather does he seem to have been bent on making full inquiries.

- 3.12 Citing the same legal principles, Eichelbaum J came to the opposite conclusion in interpreting the facts:<sup>139</sup>

As indicated earlier, in my opinion the fact that the purchaser received legal advice that the opposite party had no rights is only one aspect to be taken into account in deciding whether his conduct was dishonest. ...

The Judge could properly reason that Mr Hallinan’s state of mind was this: having failed to obtain the complete assurance he had sought earlier, he was prepared, on the basis of the advice he received, to proceed nevertheless, in the hope that he would prevail.

To summarise, all the signs pointed to the existence of a legal right, yet the enquiries were not pursued to a conclusion. That in my view brought the matter squarely within the passages from *Assets Co Ltd v Mere Roihi* and *Locher v Howlett* quoted earlier.<sup>140</sup>

134 See *Town and Country Marketing Ltd v McCallum* (1998) 3 NZ Conv C 192,698, discussed in Dr DW McMorland “Notice, Knowledge and Fraud” in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 67. This article also canvasses the area of what is equitable notice and what amounts to knowledge in Torrens fraud cases.

135 Rt Hon P Blanchard, above n 133, 31.

136 *Sutton v O’Kane*, above n 124, 316–336 Turner P.

137 *Bunt v Hallinan* [1985] 1 NZLR 450, 463–467 Eichelbaum J (CA).

138 *Ibid*, 462.

139 *Ibid*, 466.

140 See *Locher v Howlett & Ors* (1895) 13 NZLR 584 (SC); also *Merrie v McKay* (1897) 16 NZLR 124 (SC), early examples of the taking of a registered interest with intent to deprive an unregistered holder of their rights, characterised as land transfer fraud.

- 3.13 *Sutton v O’Kane* involved non-recognition of an easement by the Suttons upon realising that it had mistakenly not been registered, and was thus an equitable rather than legal interest. Before registration, the Suttons had full knowledge of the existence of the easement on the ground and believed that they were bound by it. Wild CJ determined that there was nothing dishonest about refusing to recognise the easement once they realised that it was not a legal right of way. It was unneighbourly behaviour but not fraud.<sup>141</sup>

There is no doubt that the Suttons took advantage of the discovery of a mistake, but it was a mistake which had misled all concerned in equal degree and it was certainly not of their making. Their action could certainly be regarded as unneighbourly but I cannot see that it was fraudulent. For a person who has accepted a situation upon an erroneous belief to stand on his rights when he discovers their true nature might well be less than generous but in my view it is not dishonest.

- 3.14 *Turner P, in dissent, disagreed:*<sup>142</sup>

But much more is here shown than the mere knowledge of the existence of an unregistered interest. Not only its existence but its nature and extent, and the fact that it was actually being actively enjoyed by the grantee, with the full recognition of the vendors of the property of his right to use it, and the fact that in reliance of the continuance of such enjoyment the grantee had expended very substantial sums of money on erecting a garage accessible only from the way, which must be completely wasted should that way not continue to receive recognition. These facts are much more than knowledge “of itself” – a mere knowledge – and this case is very different from those in which mere knowledge has been held not to amount to fraud.

- 3.15 *Turner P* said that dishonesty amounts to “dishonour”, and involves taking from somebody what is rightfully theirs by honour, not necessarily rightfully theirs by law.<sup>143</sup> The President followed Salmond J’s *Waimiha Sawmilling Co v Waione Timber Co* judgment and is likewise criticised for being too concerned with equitable concepts. He interpreted section 182 widely, suggesting that knowledge of the nature and extent of an unregistered interest is sufficiently more than “mere knowledge” to make defeating that interest fraudulent. This was directly rejected by Richmond J who saw no difference between knowledge of the existence of an interest and knowledge of its extent.<sup>144</sup>
- 3.16 Some New Zealand judges have been willing to give a wide interpretation to section 182 and find that wilful blindness, or little more than mere knowledge, can make destroying a unregistered interest fraudulent. In *Efstratiou v Glantschnig*,<sup>145</sup> Mrs Glantschnig was living in the family home, which was registered in her husband’s name and held on trust for her. Mr Glantschnig sold the property at half its value to Efstratiou for the purpose of defeating Mrs Glantschnig’s interest in the land. Efstratiou agreed to purchase without having inspected the property and some time after the transfer Mr Glantschnig was living in the house as a tenant. On the basis of these facts, the Court found

141 *Sutton v O’Kane*, above n 124, 314 Wild CJ.

142 *Ibid*, 333 *Turner P*.

143 *Ibid*, 322 *Turner P*.

144 *Ibid*, 346 Richmond J.

145 *Efstratiou v Glantschnig* [1972] NZLR 594 (CA).

Efstratiou was party to the fraud perpetrated by Mr Glantschnig and his agent, determining that Efstratiou had been at the least wilfully blind as to the destruction of Mrs Glantschnig's interest.<sup>146</sup> Arguably there was not sufficient evidence (or such was not made apparent in the judgment) to establish the accusations made against Efstratiou that caused him to lose his registered title.

3.17 There are also a few cases that have moved away from the standard of actual knowledge in interpreting Salmond J's test of fraud, that is, whether the purchaser knew enough about a right to make it his or her duty in honesty to observe that right.<sup>147</sup>

3.18 For example, the High Court stated in *Botros v Clist*:<sup>148</sup>

As the Judge says, in order to come within the fraud exception, there must be a fraudulent acquisition of title and/or knowledge of such fraud on the part of the prospective registered owner prior to purchase. Knowledge in that context includes both actual and constructive knowledge.<sup>149</sup>

3.19 In some recent cases of applications to remove caveats judges have found that there was an arguable case of fraud by the applicants. In two such cases, there were long-term agreements for sale and purchase to a company that had defaulted on its mortgage repayments. The mortgagees wanted to exercise their power of sale, seemingly to obtain more money from a mortgagee sale, in effect intending to defeat the unregistered interests (the agreements for sale).<sup>150</sup>

### *The Australian stricter test of fraud*

3.20 Australian courts have tended to apply the Australian equivalents of section 182 more strictly, with the result that knowledge of an unregistered interest will not make registration fraudulent without breach of some further obligation to the holder of that interest.<sup>151</sup> For example, in *Mills v Stockman* the High Court said that "merely to take a transfer with notice or even actual knowledge that its registration will defeat an

146 Ibid, 600, 603 Turner J for the Court.

147 *Waimiha* (CA), above n 132, 1175 Salmond J.

148 *Botros v Clist* (2004) 6 NZCPR 631, para 53 (HC) France J.

149 Likewise in *Dick v Dick* (1986) NZCPR 511, 521 (HC), Hillyer J stated that fraud is "not limited to cases of actual and certain knowledge. Notice of any trust or unregistered interest may be an element in the establishment of the existence of fraud".

150 See *Lombard Finance & Investments Ltd v Albert Street Ltd & Anor* (14 October 2004) HC AK CIV 2004-404-2120 Keane J; and *Instant Funding Ltd v Greenwich Property Holdings Ltd* (20 December 2007) HC AK CIV 2007-404-006806 Venning J. In the *Instant Funding* case, Venning J came to the view that Instant Funding (IF) was initially content to permit Greenwich (G) to complete the long-term agreement for sale and purchase by assignment of the mortgage to another company. However, IF changed its mind at the request of the receivers for the mortgagor, although it knew that Greenwich had been in possession of the property for some time and had spent money on it. The inference was that IF, with the receivers, had acted to defeat G's interest to enable a more advantageous sale to a third party (taking advantage of the money G had spent).

151 See *Mills v Stockman* (1967) 116 CLR 61; *Munro v Stuart* (1924) 41 SR (NSW) 203; See too Rt Hon P Blanchard, above n 133, 41; and cases listed in Hinde McMorland & Sim, above n 124, para 9.021, footnote 54. Australian cases where there have been forged mortgages have also adopted a strict approach to the meaning of fraud, in that it requires acting with moral turpitude or dishonesty or, possibly, reckless indifference to others' rights: see for example, *Grgic v ANZ Banking Group Ltd* (1994) 33 NSWLR 202 and *Russo v Bendigo Bank Ltd* [1999] 3 VR 376 (CA).

existing unregistered interest is not fraud”.<sup>152</sup> The majority held that the defendant registered proprietors were not bound by the plaintiff’s profit à prendre (in respect of that part of the land that was under the Torrens system), in spite of notice and an agreement between the parties. In *Bahr v Nicolay*<sup>153</sup> the High Court of Australia held that a purchaser who has undertaken to hold title subject to the third party’s right to repurchase is not guilty of land transfer fraud if he or she repudiates the agreement; there must be the designed object to cheat a person of a known existing right.

#### *A suggested test for fraud*

- 3.21 A line of enquiry to follow in order to ascertain whether a purchaser has acted fraudulently has been suggested by Justice Blanchard:<sup>154</sup> has the vendor acted with dishonest intent (intending to cheat the unregistered party)? If so, did the purchaser have actual knowledge of this when contracting to buy the land? If so, the purchaser would appear to have acted fraudulently. If not, did the purchaser understand when contracting that the vendor was acting in a way that would defeat the unregistered interest on registration? If so, was the purchaser intending to take advantage of this conduct? If so, this would amount to fraud.

#### **Supervening Fraud**

- 3.22 The Act is not clear on whether fraud must occur before contract or before registration, or whether it is possible for a dishonest act of an already registered proprietor to be fraudulent, making their previously indefeasible title defeasible.
- 3.23 Several cases have supported the concept of “supervening” fraud, holding that there is no reason why the timing of fraud should be able to protect the fraudster.<sup>155</sup> Turner P’s dissenting judgment in *Sutton v O’Kane* provides a defence of supervening fraud:<sup>156</sup>

After all, why should it be less culpable, or visited with less grave consequences, to change one’s mind and do a dishonest act *after* registration, than to resolve in the first place, before registration, on the same dishonest act? The question seems to me, simply, *was the act of the purchaser dishonest?*

- 3.24 This is clearly illustrated by the cases in which an agreement to recognise an unregistered interest is later repudiated.<sup>157</sup> In such a case, if it can be shown that the registered proprietor was lying about their intentions to respect the unregistered interest, enabling them to register, then that is a straightforward

152 *Mills v Stockman*, *ibid*, 78 Kitto J; referring to *Friedman v Barrett*, *ex parte Friedman* (1962) Qd R 498, 512 Gibbs J.

153 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 (HCA). The purchaser in the case was bound in personam however.

154 Blanchard, above n 133, 45–46.

155 Cases supporting the concept of supervening fraud under the New Zealand land transfer system include *Merrie v McKay*, above n 140; *Webb v Hooper* [1953] NZLR 111 (SC); Turner P’s dissent in *Sutton v O’Kane*, above n 124; *Botros v Clist*, above n 148; *Tuscany v Gill* (2001) 4 NZ Conv C 193,446; *Centillion Investments Ltd v Hillpine Investments Ltd* (6 December 2006) HC AK CIV-2006-404-006965.

156 *Sutton v O’Kane*, above n 124, 330.

157 For example, *Loke Yew v Port Swettenham Rubber Company* [1913] AC 491 (PC); *Bahr v Nicolay (No 2)*, above n 153.

case of fraud. The argument is that it should not be any different if, at the time of registration, the purchaser meant to honour the interest, but after registration decides to repudiate.

- 3.25 While the above argument has some merit, the title of a purchaser who later repudiates an express agreement will still be vulnerable through the in personam jurisdiction. Some have therefore argued that the concept of supervening fraud is unnecessary.<sup>158</sup> Further, if a stricter approach to the ambit of fraud was taken, the scope of fraud in respect of an unregistered interest would be much more restricted, and cases of supervening fraud falling outside the in personam jurisdiction are less likely to arise.
- 3.26 Several cases dispute the applicability of supervening fraud.<sup>159</sup> The *Waimiha* description of fraud as occurring when “the designed object of a transfer be to cheat a man of a known existing right”<sup>160</sup> suggests that fraud refers to acts prior to and at registration. Richmond J in *Sutton v O’Kane* pointed out an inconsistency between the concept and section 62:<sup>161</sup>

In these circumstances I think that the effect of s 62, according to the ordinary and natural meaning of its language, was to confer on the Suttons a title “absolutely free” from the unregistered interest of Mr O’Kane. It follows, to my mind, that the legislature cannot have intended the exception of fraud to apply to a subsequent decision by the Suttons to rely on their registered title. Otherwise the effect of s 62 would be paradoxical. It would confer a title absolutely free from the unregistered interest so long as the Suttons recognised that interest but defeasible in the event of their ceasing to recognise it.

- 3.27 Supervening fraud could also be seen as inconsistent with the timing provisions of section 182:<sup>162</sup>

The section is concerned with the situation of a person “contracting or dealing with or taking or proposing to take a transfer from the registered proprietor” and, in that context, it seems natural to interpret the words “Except in the case of fraud” as referring to some form of dishonest conduct by the person in dealing with the registered property at a time before he completes his dealing by obtaining registration.

- 3.28 Given the level of uncertainty and disagreement over this issue, the Law Commission considers that it is desirable to clarify whether fraud in the LTA includes supervening fraud. While there are arguments in favour of supervening fraud, in terms of legislative reform it may be clearer and more consistent with the rest of the Act to statutorily reject supervening fraud. If supervening fraud were rejected by statute, the in personam jurisdiction could provide fairness in many cases of “supervening fraud”.<sup>163</sup> This is discussed in chapter 4.

158 Rt Hon P Blanchard, above n 133, 46–47. See also E Toomey “Why Revisit *Sutton v O’Kane*? The Tricky Trio: Supervening Fraud; the In Personam Claim; and Landlocked Land” (2007) 13 *Canta LR* 263.

159 For example, Wilson and Toohey JJ in *Bahr v Nicolay (No 2)*, above n 153; Owen J in *Conlan v Registrar of Titles* [2001] WASC 201; Richmond J in *Sutton v O’Kane*, above n 124. See too, Rt Hon P Blanchard, above n 133.

160 *Waimiha* (PC), above n 125, 106.

161 *Sutton v O’Kane*, above n 124, 344.

162 *Ibid.*, 346.

163 See E Toomey, above n 158.

Q6 Should a court be able to declare an act to defeat an unregistered interest, by a proprietor who had already registered with no apparent intent to defeat that interest, “fraudulent” for the purposes of the new LTA?

Q7 Or should the holder of the unregistered interest rely on an in personam claim where possible?

FRAUD AGAINST  
A PREVIOUS  
REGISTERED  
PROPRIETOR:  
THE AGENCY  
CASES

- 3.29 *Assets Co v Mere Roihi* established that a registered proprietor’s title will be defeasible for fraud by or brought home to their agent.<sup>164</sup> Examples of this category of fraud are those cases where a mortgage has been forged unbeknown to a present registered proprietor, and the agent of the mortgagee has carried out, or had some involvement in, the fraudulent act. Courts have applied agency principles to establish whether the fraud of the agent can be considered the fraud of the registered mortgagee.
- 3.30 In the important recent decision of *Dollars & Sense Finance v Nathan*,<sup>165</sup> Dollars & Sense (D&S) had requested Rodney Nathan to obtain his parents’ signatures to enable D&S to obtain a mortgage in their favour. Rodney, who then obtained the funds, had forged his mother’s signature, and, allegedly, obtained his father’s signature by misrepresentation. The Supreme Court agreed with the trial judge and the Court of Appeal that Rodney was acting as an agent for D&S when he obtained the signatures, and when he uplifted the duplicate certificate of title, obtained insurance details and fulfilled the statutory duties of the lender. The question then was whether Rodney’s forgery came within the scope of the agency, that is, within the scope of the tasks the agent was engaged to perform, such that the fraud could be regarded as the act of the principal, D&S. The Supreme Court followed leading recent agency cases such as *Lister v Hesley Hall Ltd* and the subsequent House of Lords decision in *Dubai Aluminium Co Ltd v Salaam*.<sup>166</sup>
- 3.31 The Supreme Court held that the issue was whether the agent’s acts were so connected to the tasks he was asked to do that they could be regarded as a mode of performing them. If so, it was immaterial that D&S had not anticipated the tasks being performed fraudulently or authorised the specific acts. The Supreme Court agreed with the courts below that the fraud took place to achieve the very thing that Rodney was asked to do as their agent by D&S, that is, obtain the mortgagors’ signatures, the duplicate certificate of title and insurance details. The fraudulent acts of its agent in the course of the agency were so connected with the acts that Rodney was authorised to do that they must be regarded as the fraudulent acts of the principal, D&S, who therefore did not have an indefeasible mortgage.

164 *Assets Co Ltd v Mere Roihi*, above n 124, 210.

165 *Dollars & Sense Finance Ltd v Nathan* [2008] NZSC 20 Blanchard J for the Supreme Court. See a short commentary by Peter Butt “Fraud by Bank’s Agent Infects Registered Mortgage” (2008) 82 ALJ 511.

166 *Lister v Hesley Hall Ltd* [2002] 1 AC 215; *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366.

- 3.32 The Supreme Court held that the cases of *Schultz v Corwill Properties Pty Ltd* and *Cricklewood Holdings Ltd v C V Quigley & Sons Nominees Ltd*,<sup>167</sup> which had held that knowledge of fraud by an agent may not be imputed to the principal unless the agent had actual authority to commit fraud, were inconsistent with the Privy Council's advice in *Assets Co v Mere Roihi*.<sup>168</sup> The liability of the principal depends, not on knowledge, but on the act of forgery; it is not a case of imputing the agent's knowledge to the principal. This will be so in the great majority of cases of this kind.<sup>169</sup>

## SUMMARY

- 3.33 The cases generally indicate that Torrens Act "fraud" has the following characteristics:<sup>170</sup>
- Torrens fraud is narrower than constructive or equitable fraud;
  - there must be subjective dishonesty;<sup>171</sup>
  - it is fraud if the designed object of a transfer is to cheat a person of a known existing right;<sup>172</sup>
  - fraud must be committed by or brought home to the registered proprietor whose title is impeached, or to their agents;
  - in cases of fraud against an unregistered interest holder, there must be more than mere knowledge of the interest;
  - knowledge means actual (not constructive) knowledge, but includes wilful blindness;
  - it is unclear whether fraud can be "supervening";
  - a fraudulent act may be committed by an agent if acting within their actual (or apparent) authority, whether or not the principal knows of the fraud.

CLARIFYING  
THE SCOPE OF  
TORRENS FRAUD:  
THE OPTIONS

- 3.34 The scope of Torrens fraud is currently unclear. Section 182 provides limited guidance. The cases are of more assistance. However, it may be difficult to clarify such a broad and fact-based issue through legislative reform. One option is to let the cases further develop the definition of fraud. Alternatively, the Law Commission suggests two possible options for legislative reform.

167 *Schultz v Corwill Properties Pty Ltd* [1969] 2 NSW 576; *Cricklewood Holdings Ltd v C V Quigley & Sons Nominees Ltd* [1992] 1 NZLR 463.

168 *Dollars & Sense Finance Ltd v Nathan*, above n 165, para 45. The Supreme Court also referred to their inconsistency with *Ex parte Batham* (1888) 6 NZLR 342, where the Court of Appeal determined that a mortgage forged by an agent of an (innocent) mortgagee should be removed from the register. The agent was acting for both parties as in a number of such cases.

169 *Ibid*, paras 44–45. The Supreme Court noted that the rationale of such liability was set out by Holt CJ in *Hern v Nichols* (1701) 1 Salk 289; 90 ER 1154 where the Chief Justice said that "it is more reason that he, that puts a trust and confidence in the deceiver, should be the loser, than a stranger", a similar rationale for deferred indefeasibility where there has been fraud by a third party and a contest between two innocent parties. This decision throws some doubt on the imputed knowledge fraud cases, such as *Burmeister v O'Brien* (2006) 7 NZCPR 440 and *Waller v Davies* [2005] 3 NZLR 814. In *Jessett Properties v UDC Finance* the Court of Appeal said: "All turns on the nature of the agent's engagement", after quoting Lord Halsbury LC in *Blackburn, Low & Co v Vigors* (1887) 12 App Cas 531, 537–538 that whether the agent's acts are the acts of his principal depends on the specific authority he has received.

170 Compare GW Hinde and others *Principles of Real Property Law* (LexisNexis, Wellington, 2007), 9.022–9.023.

171 The Australian cases refer to dishonesty amounting to moral turpitude: see *Stuart v Kingston* (1923) 32 CLR 309, for example.

172 *Waimiha* (PC), above n 125, 106–107.



### Option 1 – an interpretation based on the case law

- 3.35 The current, well-settled aspects of fraud established by the New Zealand cases could be incorporated into legislation, which would provide a greater degree of certainty. It may also be useful to define knowledge to include wilful blindness, but not constructive knowledge.
- 3.36 The most difficult and unclear features of fraud against the holder of an unregistered interest are the meaning of dishonesty and exactly what more than “mere knowledge” of an interest is needed for registration disregarding such an interest to be fraudulent. However, it may be difficult to distinguish between transferring with the designed object of cheating a person of a known existing right, and transferring with the knowledge that the unregistered interest exists and will be defeated. Arguably, a stricter interpretation of fraud is more consistent with a pro-purchaser/mortgagee interpretation of the Torrens scheme. This approach, generally followed in Australia, places the burden on holders of unregistered interests to either register, if possible, or rely on caveats.<sup>173</sup> The New Zealand wider interpretation of section 182 is more sympathetic to holders of unregistered interests and could place a greater burden on the purchaser/mortgagee to act justly.
- 3.37 Fraud against registered proprietors has generated complex and difficult litigation especially in the forged mortgage cases, and where there have been “buy-back” schemes. Options could include those noted at the end of chapter 2.<sup>174</sup>

### Option 2 – an interpretation following Canadian models

- 3.38 The Canadian Joint Land Titles Committee proposed a definition of “fraud” in their Model Titles Act.<sup>175</sup> Section 4 of the Nova Scotia Land Registration Act 2001 is unique in providing a legislative definition of fraud that is based on the Model Titles Act, as follows:<sup>176</sup>
- (1) In this Act, the meaning of “fraud” is subject to this Section.
  - (2) For the purpose of this Act, the equitable doctrines of “notice” and “constructive notice” are abolished for the purpose of determining whether conduct is fraudulent.
  - (3) A person who engages in a transaction with the registered owner of an interest that is subject to an interest that is not registered or recorded at the time of the

173 The differences between the Australian and New Zealand approaches to Torrens fraud arise from the judicial interpretations of the statutes. The equivalent Australian Acts are basically the same as the Land Transfer Act 1952, with no definition of fraud, and (apart from Queensland and Northern Territory) the section 182 proviso.

174 Options are the imposition of statutory duties under the LTA on mortgagees to confirm the identity of the mortgagor, similarly to the Land Title Act 1994 (Qld), ss 11A and 11B; or the Land Registration Act 2002 (Eng), s 65 and Sch 4, providing that the register can be rectified in cases of fraud or lack of proper care, or substantial contribution to a mistake by a registered proprietor, or if for any other reason it would be unjust not to rectify; or the British Columbian Land Title Act 1996, s 25.1 whereby for persons such as mortgagees, a void instrument would not be validated.

175 Joint Land Titles Committee (Alberta, British Columbia, Manitoba, The Council of Maritime Premiers, Northwest Territories, Ontario, Saskatchewan, Yukon) *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (Edmonton, 1990) 34–36, Model Land Recording and Registration Act, s 1.2.

176 Land Registration Act SNS 2001, c 6, s 4.

transaction, other than an overriding interest, in the absence of actual knowledge of the interest that is not registered or recorded

(a) may assume without inquiry that the transaction is authorized by the owner of any interest that is not registered or recorded;

(b) may assume without inquiry that the transaction will not prejudice that interest; and

(c) has no duty to ensure the proper application of any assets paid or delivered to the registered owner of the interest that is the subject of the transaction.

(4) A person obtains an interest through fraud if that person, at the time of the transaction,

(a) had actual knowledge of an interest that was not registered or recorded;

(b) had actual knowledge that the transaction was not authorized by the owner of the interest that was not registered or recorded; and

(c) knew or ought to have known that the transaction would prejudice the interest that was not registered or recorded.

(5) A person does not obtain an interest through fraud if the interest that was not registered or recorded was not enforceable against the person who transferred the interest.

3.39 The Ontario Land Titles Act 1990, section 1, provides definitions of “fraudulent instrument” and “fraudulent person”, as follows:

Section 1: “fraudulent instrument” means an instrument,

(a) under which a fraudulent person purports to receive or transfer an estate or interest in land,

(b) that is given under the purported authority of a power of attorney that is forged,

(c) that is a transfer of a charge where the charge is given by a fraudulent person, or

(d) that perpetrates a fraud as prescribed with respect to the estate or interest in land affected by the instrument; (“acte frauduleux”)

“fraudulent person” means a person who executes or purports to execute an instrument if,

(a) the person forged the instrument,

(b) the person is a fictitious person, or

(c) the person holds oneself out in the instrument to be, but knows that the person is not, the registered owner of the estate or interest in land affected by the instrument; (“fraudeur”).

Q8 What is the appropriate and desirable scope of fraud under a Torrens system? Should it be the equitable approach of New Zealand judges such as Turner P, or the stricter more pro-purchaser stance of the Australian courts, or somewhere in between?

Q9 Should there be a statutory definition of land transfer fraud?

Q10 If so, should the elements of land transfer fraud as developed by the case law be incorporated into the legislation?

Q11 Or, should an interpretation based on the Nova Scotia definition be adopted?

Q12 Or, should a definition be left to be developed further by the case law?

# Chapter 4

## In personam claims

### PERSONAL OBLIGATIONS AND INDEFEASIBILITY

- 4.1 Personal claims against a registered proprietor, which have consequences for their registered title, have been described by some as the “in personam exception” to indefeasible title.<sup>177</sup> Strictly speaking, in personam claims are not an exception to indefeasibility because they are concerned with the personal obligations of proprietors, rather than the quality of their title.<sup>178</sup> The in personam jurisdiction is conceptually a parallel jurisdiction to LTA claims in rem, involving claims against the person on the register, rather than “against” the land.<sup>179</sup> As the Court of Appeal said in *CN & NA Davies Ltd v Laughton*:<sup>180</sup>

[I]ndefeasibility of title does not interfere with the personal obligations of a registered proprietor, and the principle that contracts, trusts, or any personal equity can be enforced against the registered proprietor merely serves to indicate the limits of the doctrine.

- 4.2 This said, an in personam judgment may well lead to a remedy that affects title and impacts on Torrens “indefeasibility”. The quintessential example is specific performance of a contract for sale of land. By entering a contract for sale, the vendor has created a personal, legal obligation to the purchaser to follow through with the agreement. That the vendor has a registered title under the LTA will not relieve him or her of this personal obligation to transfer the land.

177 Unlike the New Zealand LTA, the Real Property Act 1886 (SA), s 71; the Land Title Act 1994 (Qld), s 185(1)(a); and the Land Title Act 2000 (NT), s 189(1)(a) provide to some extent for the existence of the in personam jurisdiction as an exception to the indefeasibility principle. This does not seem to have an impact on how the jurisdiction is interpreted and applied. Adrian Bradbrook and others *Australian Real Property Law* (3 ed, Lawbook Co, Sydney, 2002) 152.

178 Rt Hon Justice A Tipping “Commentary on Sir Anthony Mason’s Address” in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 21, 23; Elizabeth Cooke and Pamela O’Conner “Purchaser Liability to Third Parties in the English Land Registration System: A Comparative Perspective” (2004) 120 LQR 640, 649; Mary-Anne Hughson, Marcia Neave and Pamela O’Conner “Reflections on the Mirror of Title: Resolving the Conflict Between Purchasers and Prior Interest Holders” (1997) 21 MULR 460, 490.

179 See Charles Rickett “Understanding Remedies for Breach of Trust” (2008) 11 Otago LR 603, 617–625 for the difference between in rem and in personam actions; and *The Wik Peoples v Queensland* (1994) 120 ALR 465 (FCA) for a discussion of what amounts to a judgment in rem. See *CN & NA Davies v Laughton* [1997] 3 NZLR 705, 712 (CA), for the view that a claim in personam is not inconsistent with the concept of relative indefeasibility and the aim of protecting people who deal with the registered proprietor.

180 *CN & NA Davies v Laughton* [1997] 3 NZLR 705, 712 (CA) Thomas J for the Court.

- 4.3 The authority for the continuation of in personam claims alongside a system of Torrens title is often taken from the words of Lord Wilberforce in *Frazer v Walker*.<sup>181</sup>
- [Indefeasibility of title] does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam.
- 4.4 In theory, the in personam jurisdiction is consistent with Torrens principles, as emphasised by Brennan J in *Bahr v Nicolay (No 2)*:<sup>182</sup>
- [The indefeasibility] provisions are designed to protect a transferee from defects in the title of the transferor, not to free him from interests with which he has burdened his own title.
- 4.5 However, as the in personam jurisdiction has grown it has come to be regarded by some as a threat to the principles and scheme of the LTA.<sup>183</sup> Three guidelines have been developed to help ensure that in personam claims remain consistent with the LTA:<sup>184</sup>
- (a) the claim must not undermine the objectives of the Torrens system;
  - (b) there must be unconscionable conduct on the part of the current registered proprietor;
  - (c) in personam claims must encompass only known causes of action.<sup>185</sup>
- 4.6 The first guideline recognises the risk that an in personam claim could interfere with the prohibition on actions for recovery of land, or the protection of bona fide subsequent purchasers granted by the LTA.<sup>186</sup> In personam claims can also create a way around immediate indefeasibility as established by *Frazer v Walker*.<sup>187</sup> A successful in personam claim, where a case of fraud would have failed, may also be seen to undermine the standard set for land transfer fraud, and potentially to undermine the policy of the LTA, including the compensation regime.
- 4.7 The unconscionability requirement is particularly important because an in personam claim could cause one party to lose completely in a situation where an in rem claim might mean both would have received either the title or compensation. In *Duncan v McDonald*, the Court of Appeal described unconscionability as more than mere knowledge of a competing claim by a third party or an irregularity relating to the instrument of transfer. But the registered proprietor's conduct need not involve actual dishonesty towards the in personam claimant.<sup>188</sup>

181 *Frazer v Walker* [1967] AC 569, 580 (PC) Lord Wilberforce.

182 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, 653 (HCA) Brennan J.

183 This will become apparent below where some cases and causes of action are illustrated.

184 *Duncan v McDonald* [1997] 3 NZLR 669, 683–4 Blanchard J; *Dollars & Sense Finance Ltd v Nathan* [2007] 2 NZLR 747, 778 (CA); Hinde McMorland & Sim *Land Law in New Zealand* (loose leaf, LexisNexis, Wellington, 2005) para 9.044. It should be noted that these principles are not acknowledged by all judges.

185 The conduct giving rise to a claim in personam can arise before or after registration. See E Toomey “Why Revisit *Sutton v O’Kane*? The Tricky Trio: Supervening Fraud; the In Personam Claim; and Landlocked Land” (2007) 13 *Canta LR* 263, 271.

186 Land Transfer Act 1952, ss 62, 63, and 183.

187 *Frazer v Walker*, above n 181.

188 *Duncan v McDonald*, above n 184, 683–684 (CA), Blanchard J for the Court.

- 4.8 The third requirement, that an in personam claim must be based on a recognised cause of action, recognises the risk of new causes of action being created by the courts to defeat the application of the statute. The cause of action may be legal or equitable, and a remedy requiring the registered proprietor to transfer the land is equitable.<sup>189</sup> As such, the remedy is subject to equitable principles and judicial discretion.

## ESTABLISHED CAUSES OF ACTION

### Contract

- 4.9 A claim for a breach of contract concerning the sale of land is a well-established and uncontroversial cause of action, in which unconscionability is inherent in the repudiation of an express agreement. An order for specific performance has not been seen as a threat to Torrens principles, even though it may compel the registered proprietor to transfer their title.<sup>190</sup>

- 4.10 A party to a transfer can ask for rectification of the register where the registered title does not reflect the actual agreement entered into by the parties.<sup>191</sup> This is also an uncontroversial remedy where:<sup>192</sup>

It is not the agreement that is rectified but the incorrect manner in which the common intention of the parties has been expressed in the document sought to be rectified.

- 4.11 Equitable estoppel is based on the premise that:<sup>193</sup>

[A] party will not be permitted to deny an assumption, belief or expectation that it has allowed another to rely on where such denial would be unconscionable.

The use of estoppel to compel a registered proprietor to transfer their registered title has been supported by *Tuscany v Gill* and *Smith v Corlett*.<sup>194</sup>

### Trusts

- 4.12 Breach of trust is also a well established cause of action,<sup>195</sup> which is only problematic insofar as a finding that a trust exists may be controversial. In *Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance Ltd* Barker J noted that “setting up the fiction of a trust” would undermine the LTA.<sup>196</sup> But breach of a constructive trust will suffice for a claim.<sup>197</sup> Where the existence

189 Ibid, 683.

190 *Bevin v Smith* [1994] 3 NZLR 648 (CA) Gault J for the Court.

191 Cases involving rectification and Torrens title include: *Taitapu Gold Estates v Prouse* [1916] NZLR 825 (SC); *Conlan v Registrar of Titles* [2001] WASC 201; *Minister for Education and Training v Canham* [2004] NSWSC 274; *Child v Dynes* [1985] 2 NZLR 554 (HC); *Merbank Corporation Ltd v Cramp* [1980] 1 NZLR 721 (SC); *Westpac Banking Corporation v Tanzone Pty Ltd* (2000) 9 BPR 17,521 (NSWCA); *Wellington City Council v New Zealand Law Society* [1988] 2 NZLR 614 (HC).

192 Andrew Butler (ed) *Equity and Trusts in New Zealand* (Brookers, Wellington, 2003) para 26.1.1.

193 Butler, *ibid*, para 16.1.1. See *Westland Savings Bank v Hancock* [1987] 2 NZLR 21 for an examination of the cases.

194 *Tuscany v Gill* (2001) 4 NZ Conv C 193,446 (HC) Chisholm J; *Smith v Corlett* (1988) ANZ Conv R 167 (HC) Jeffries J.

195 For example, *Bahr v Nicolay (No 2)*, above n 182.

196 *Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance Ltd* [1984] 2 NZLR 704, 717 (HC) Barker J.

197 See for example, *Bevin v Smith* [1994] 3 NZLR 648; *Bahr v Nicolay (No 2)*, above n 182;

of the trust is clear, an in personam claim based on breach of trust is usually clear.<sup>198</sup> It is necessary that trustees be personally held to their responsibilities by claims in personam, as the LTA does not give much protection to the equitable interests of a beneficiary of a trust as discussed in chapter 8.

- 4.13 These claims are well-established where they are clearly based on breaches of the personal obligations of the registered proprietor, and satisfy the three requirements set out at para 4.5 above. But there are some blurred boundaries. In *Disher v Farnworth* the Court noted that a constructive trust should not be imposed on the basis of some vague idea of what might seem fair.<sup>199</sup> There has also been debate about the boundary between a constructive trust and an actual trust.<sup>200</sup>

#### RECENT EXTENSIONS TO IN PERSONAM CLAIMS

#### Trusts and Third Parties – *Barnes v Addy*

- 4.14 The 1874 Chancery case of *Barnes v Addy*<sup>201</sup> developed two limbs of liability for third parties to a trust, which are now known as “knowing receipt” or “recipient liability” and “accessory liability”. These equitable causes of action can lead to a remedy of a court-imposed restitutionary constructive trust, obliging the registered proprietor trustee to transfer the title back to the beneficiary.<sup>202</sup> *Equiticorp Industries Group Ltd v The Crown* established that dishonesty and actual knowledge of fraud are necessary ingredients for accessory liability.<sup>203</sup> Such prerequisites are similar to those for land transfer fraud and are consistent with Torrens title. The other limb of knowing receipt is more problematic.
- 4.15 Knowing receipt of trust funds is a cause of action that arises when a third party to a trust “receive[s] and become[s] chargeable with some part of the trust property”.<sup>204</sup> The requirements for this cause of action are not yet clearly established in New Zealand. While accessory liability is based on the dishonest behaviour of the third party, knowing receipt has been characterised as being a restitutionary cause of action based solely on the fact of receipt of trust property.<sup>205</sup> *Westpac Banking Corp v Savin* found that constructive knowledge that the property was held in trust, and that the transfer was a breach of trust, is a sufficient basis for the cause of action.<sup>206</sup> The authors of *Equity and Trusts in New Zealand* suggest that strict liability for the receipt is probably sufficient given the action’s restitutionary basis.<sup>207</sup> Such a restitutionary cause of action raises some potential conflicts with New Zealand’s system of Torrens title. It appears to be contrary to section 182 of the LTA, which provides that knowledge of a trust shall not of itself be imputed as fraud.

198 For examples of a failed trust argument see *Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance Ltd*, above n 196, and *Conlan v Registrar of Titles*, above n 191.

199 *Disher v Farnworth* [1993] NZLR 390, 399.

200 See *Bahr v Nicolay (No 2)*, above n 182, where the majority imposed a constructive trust and the minority found an actual trust.

201 *Barnes v Addy* (1874) LR 9 Ch App 244, 251–252.

202 Butler, above n 192, para 15.1.1.

203 *Equiticorp Industries Group Ltd v The Crown* [1998] 2 NZLR 481 (HC).

204 *Barnes v Addy*, above n 201.

205 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC).

206 *Westpac Banking Corp v Savin* [1985] 2 NZLR 41 (CA).

207 Butler, above n 192, para 15.4.4.

- 4.16 *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd*,<sup>208</sup> involved a fraudulently obtained security over trust property. The bank had no knowledge of K's fraud against Sixty-Fourth Throne, but the fact that the mortgage was over trust property raised an issue of knowing receipt. Tadgell JA, with Winneke P concurring, said that there was no room for claims based on constructive notice or less within a Torrens system.<sup>209</sup> While they did not make any judgment on *Barnes v Addy* claims that are based on dishonesty, they found that claims based only on constructive notice or strict liability were inapplicable as inconsistent with Torrens principles. Ashley AJA, in dissent, said that it was wrong to deny the application of this legitimate cause of action.<sup>210</sup>
- 4.17 On the other hand, the Queensland Court of Appeal in *Tara Shire Council v Garner*<sup>211</sup> found that dishonesty is not a requirement for knowing receipt, as it is for accessory liability, but that knowledge that the property was trust property, and that the conveyance was in breach of trust needed to be actual, as opposed to constructive knowledge.

### Breach of equitable obligations

- 4.18 Claims have been made in personam based on the fact that an instrument of transfer is void, for example, in a number of Australian cases where a mortgage was forged but without the knowledge of the mortgagee. The argument generally is that an equity arises against the mortgagee where the mortgagor did not consent and the mortgagee was reckless or at least careless with regard to the execution of the mortgage.
- 4.19 Several cases have upheld the principle stated in *Palais Parking Station Pty Ltd v Shea* that:<sup>212</sup>

[T]he mere retention of the land after it becomes known that the instrument leading to registration is void, does not found a claim in personam for the retransfer of the land.

- 4.20 Similarly, in *Pyramid Building Society v Scorpion Hotels Pty Ltd*, *Grgic v Australia and New Zealand Banking Group Ltd*, and *Vassos v State Bank of South Australia*,<sup>213</sup> the courts denied that forgery of the instruments of transfer gave rise to any in personam claim against mortgagees who had no knowledge of the forgery and had not acted unconscionably or with any fault.<sup>214</sup> Hayne J in *Vassos* noted:<sup>215</sup>

If, as the plaintiffs contended, the fact of lack of assent of the mortgagor gives an *in personam* right to a discharge, then every mortgagor whose signature was forged

208 *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133 (VSCA).

209 *Ibid*, 156–7 Tadgell JA.

210 *Ibid*, 166 Ashley AJA.

211 *Tara Shire Council v Garner* [2002] QCA 232.

212 *Palais Parking Station Pty Ltd v Shea* (1980) 24 SASR 425; 431 per King J. See too, *Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance Ltd*, above n 196; *Housing Corporation of New Zealand v Maori Trustee* [1988] 2 NZLR 662 (HC) McGechan J.

213 *Pyramid Building Society v Scorpion Hotels Pty Ltd* [1998] 1 VR 188 (VSCA) Hayne JA; *Grgic v Australia and New Zealand Banking Group* (1994) 33 NSWLR 202 (NSWCA); *Vassos v State Bank of South Australia* [1993] 2 VR 316 (VSC) Hayne J.

214 *Grgic v Australia and New Zealand Banking Group*, *ibid*, 222–223 Powell JA.

215 *Vassos v State Bank of South Australia*, above n 213, 332.



would be entitled to compel the mortgagee to discharge the mortgage on the basis that the mortgagee was not entitled to demand any more than had been agreed to be paid and the “mortgagor” had never agreed to pay anything. That flies in the face of indefeasibility of title for without any fault of any kind on the part of the mortgagee he could always be compelled to discharge his security and his title obtained by registration could always be set aside at the suit of the defrauded party.

- 4.21 However, in *Mercantile Mutual Life Insurance Co v Gosper*<sup>216</sup> the New South Wales Court of Appeal found that there was a valid *in personam* claim. Mr Gosper forged his wife’s signature to obtain mortgage security for a business debt over a property owned solely by her. While the mortgagees had no knowledge of the forgery, the Court was highly critical of its attitude to the wife’s clear lack of involvement in the transaction. Kirby P stated that registration did not change the personal equities between the wife and the mortgagees, allowing the Court to favour the wife’s interest on equitable grounds.<sup>217</sup> Mahoney JA framed the *in personam* claim as the bank’s breach of an obligation towards the wife, because they had control of her certificate of title, and used it without her consent to vary her mortgage debt.<sup>218</sup>

In my opinion where the registration of a forged instrument has been produced by such a breach by the new owner, that is sufficient to create, in the relevant sense, a “personal equity” against the new owner. The existence of such an equity does not depend upon any intention on the part of the new owner to contravene the rights of the previous owner. But the obligations of a mortgagee, whether strictly fiduciary or not, are in my opinion such that the mortgagee should not be allowed to retain a benefit procured by an act which constitutes a breach of such obligations.

- 4.22 The New Zealand Court of Appeal has also found that forged mortgage documents can give rise to an *in personam* claim against the non-fraudulent mortgagee.<sup>219</sup> This was established by analogy with *Barclays Bank Plc v O’Brien*,<sup>220</sup> discussed below.

### Undue influence and misrepresentation – *Barclays Bank Plc v O’Brien*

- 4.23 In 1994, the House of Lords addressed a serious problem in suretyship transactions where the party providing the mortgage security (often a wife) and the party receiving the loan (often a husband) are different people.<sup>221</sup> The Lords said that the law needed to recognise that, in reality, many women still left financial decisions to their husbands, and that many wives gave mortgage security to banks through undue influence or misrepresentation on the part of their husbands. In order to place standards on mortgagee institutions to ensure that a wife’s (or other mortgagor’s) consent was genuine, the House of Lords

216 *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32 (CA). For a critique of this decision as “policy motivated relief” see L Griggs “*In personam, Garcia v NAB and the Torrens System – are they reconcilable?*” (2001) QUTLJ 76.

217 *Ibid*, 37, per Kirby P.

218 *Ibid*, 49, per Mahoney JA.

219 *Dollars & Sense Finance Ltd v Nathan*, above n 184.

220 *Barclays Bank Plc v O’Brien* [1994] 1 AC 180 (HL).

221 *Ibid*.

held that if the bank has actual or constructive notice of undue influence or misrepresentation, the wife's equitable interest against the husband to have the mortgage set aside will be enforceable as against the bank.<sup>222</sup> In summary:<sup>223</sup>

(1) the surety obligation will be valid and enforceable by the creditor unless the suretyship was procured by the undue influence, misrepresentation or other legal wrong of the principal debtor;

(2) if there has been undue influence, misrepresentation or other legal wrong by the principal debtor, unless the creditor has taken reasonable steps to satisfy himself that the surety entered into the obligation freely and in knowledge of the true facts, the creditor will be unable to enforce the surety obligation because he will be fixed with constructive notice of the surety's right to set aside the transaction;

(3) unless there are special exceptional circumstances, a creditor will have taken such reasonable steps to avoid being fixed with constructive notice if the creditor warns the surety (at a meeting not attended by the principal debtor) of the amount of her potential liability and of the risks involved and advises the surety to take independent legal advice.

4.24 In *Royal Bank of Scotland Plc v Etridge (No 2)*,<sup>224</sup> the House of Lords said that these considerations apply to all non-commercial suretyship transactions where one party puts up security for another party's debt, and set out the obligations of banks more clearly. *Barclays Bank Plc v O'Brien* and *Royal Bank of Scotland Plc v Etridge (No 2)* were not decided in a comparable Torrens system, so their application in New Zealand is not straightforward. *Barclays Bank Plc v O'Brien* was accepted as applicable in New Zealand in *Wilkinson v ASB Bank Ltd*,<sup>225</sup> however, that case did not deal with the Torrens title issue. In *Hogan v Commercial Factors Ltd* (which also did not address Torrens issues) the New Zealand Court of Appeal suggested that *Royal Bank of Scotland Plc v Etridge (No 2)* would apply, at least regarding banks.<sup>226</sup>

4.25 These cases place a common law responsibility on the bank to guard against undue influence and misrepresentation by debtors against fellow mortgagors or sureties, which, if not fulfilled, can impute the lender with constructive notice of the debtor's wrong and defeat a registered mortgage. The applicability of constructive notice in a Torrens system raises the same issues here as discussed above in the context of knowing receipt of trust property.

4.26 It has been argued that these cases, which apply to undue influence and misrepresentation, should apply equally to cases where a debtor forges the signature of the mortgagor securing their loan. In *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* (facts discussed above) Ashley AJA rejected *Barclays Bank* as a cause of action in forgery cases, seemingly because of the difference between forgery and undue influence.<sup>227</sup> Tadgell JA rejected the applicability of constructive notice in relation to the *Barnes v Addy* argument; he also denied

222 Ibid, 191 Lord Browne-Wilkinson.

223 Ibid, 198–199 Lord Browne-Wilkinson.

224 *Royal Bank of Scotland Plc v Etridge (No 2)* [2002] 2 AC 773 (HL).

225 *Wilkinson v ASB Bank Ltd* [1998] 1 NZLR 674 (CA).

226 *Hogan v Commercial Factors Ltd* [2006] 3 NZLR 618, para 50 (CA) William Young J for the Court.

227 *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd*, above n 208, 173.

that *Barclays Bank* fulfils the requirement of being an established cause of action. He said that *Barclays Bank* was a case of competing interests: the wife's right to have the mortgage set aside, and the bank's right to have its security enforced. The priority issue was resolved using constructive notice. The case did not establish an actual cause of action against the bank, in Tadgell JA's opinion.<sup>228</sup>

#### *The New Zealand position regarding Barclays Bank*

- 4.27 A majority of the New Zealand Court of Appeal in *Dollars & Sense Finance Ltd v Nathan* held that *Barclays Bank* did provide a legitimate cause of action in the case of forgery.<sup>229</sup> As noted in chapter 3, Rodney Nathan received a loan from Dollars & Sense (D&S) by putting forward a property owned by his parents as security; he had forged his mother's signature on the documents and attained false attestation.
- 4.28 Glazebrook and Robertson JJ, in the majority, found that Rodney was acting as an agent for D&S, in obtaining a registrable mortgage, and that the mortgage was defeasible on account of fraud. They also stated that, if there were not fraud, they would have set aside the mortgage using the in personam jurisdiction. In their view, *Barclays Bank* is not just about imputed notice but is a case of "courts enforcing standards of conduct on financiers in situations of known risk ... It is therefore an example of policy-motivated restitution, a subset of the law of unjust enrichment".<sup>230</sup> It was explicitly held that such an in personam action was consistent with the objectives of a Torrens system and involved unconscionability in the retention of the mortgage security; and that unjust enrichment derived from *Barclays Bank* was a recognised cause of action.
- 4.29 William Young P, in dissent, accepted for the present purposes that a *Barclays Bank* cause of action was not defeated in New Zealand by the doctrine of indefeasibility of title.<sup>231</sup> His Honour stated that if *Barclays Bank* does establish a relevant cause of action, it is for undue influence and misrepresentation. He also rejected the majority's analysis of a cause of action based on unjust enrichment, pointing out that the mortgagee had lost the money advanced to the borrower. In an argument similar to Tadgell JA's in *Macquarie* he also pointed out the lack of actual personal obligations between the lender and the third party mortgagor.<sup>232</sup>

As well, I think it would be destructive of the scheme of the Torrens system to allow an indefeasible title to be defeated by a personal claim based on imputed notice considerations where there is no other relevant underlying relationship between the parties.

- 4.30 This case was appealed to the Supreme Court, where it was decided in favour of the defrauded guarantor on the grounds of agency fraud, discussed in chapter 3, without the need to address the in personam arguments.<sup>233</sup>

228 *Ibid*, 153–154.

229 *Dollars & Sense Finance Ltd v Nathan*, above n 184.

230 *Ibid*, para 145 Glazebrook and Robertson JJ.

231 *Ibid*, para 25 William Young P.

232 *Ibid*, para 33 William Young P.

233 *Dollars & Sense Finance Ltd v Nathan* [2008] NZSC 20.

## Restitution

- 4.31 The *Barclays Bank* argument addressed in *Dollars & Sense Finance Ltd v Nathan* also questions the applicability of restitutionary claims as in personam claims against registered proprietors.
- 4.32 Unjust enrichment is not yet a cause of action in New Zealand.<sup>234</sup> It is, rather, a principle upon which actions for specific instances of enrichment rest. Although it must be “unjust” for the defendant to retain the benefit gained,<sup>235</sup> it is the fact of enrichment, rather than any dishonest behaviour or state of mind of the defendant, which is the foundation of the remedy of restitution. A cause of action based on unjust enrichment can be seen as potentially conflicting with the high standard of land transfer fraud and the section 182 provision that a person taking title is not affected by knowledge of an unregistered interest. Further, when applied to instances of void transactions, an unjust enrichment remedy can be seen as a means of circumventing immediate indefeasibility and *Frazer v Walker*.
- 4.33 However, Professor Robert Chambers has put forward an argument that restitution should form a legitimate cause of action seemingly in every case where the transaction is based on a void instrument, and that an in personam claim should not rely on any conduct of the registered proprietor.<sup>236</sup> He argues that a case such as *Pyramid Building Society v Scorpion Hotels Ltd* should have been settled by an in personam claim for unjust enrichment.<sup>237</sup>

The application of common law principles to a Torrens system requires some adjustment. The registration of title in the name of the defendant, without the consent of the plaintiff, creates a valid legal title, even though a purported conveyance on that basis would be void at common law. This means that many situations, which could be dealt with at common law through the passive preservation of the plaintiff’s pre-existing property interest, will have to be handled in a Torrens system as restitution or unjust enrichment.

### THE ISSUE: IN PERSONAM CLAIMS AND TORRENS TITLE

- 4.34 In several of the above cases, the developing in personam jurisdiction has been seen as a threat to indefeasibility of a Torrens title. However, there is an argument that the in personam jurisdiction is a parallel jurisdiction to the land transfer in rem (proprietary) jurisdiction, and is not in itself an exception or special threat to Torrens indefeasibility.

### In personam claims as a parallel jurisdiction to land transfer claims

- 4.35 In *Davies v Laughton* the Court of Appeal described the relationship between indefeasibility and claims in personam thus:<sup>238</sup>

Properly perceived the principle [that contracts, or trusts or any personal equity can be enforced against the registered proprietor] sits comfortably with the concept of

<sup>234</sup> However, New Zealand may be moving in that direction: Ross Grantham and Charles Rickett *Enrichment & Restitution in New Zealand* (Hart Publishing, Oxford, 2000) 4, footnote 10.

<sup>235</sup> *The Laws of New Zealand* (Butterworths, Wellington, 1992) Restitution, para 10.

<sup>236</sup> Robert Chambers “Indefeasible Title as a Bar to a Claim for Restitution (*Pyramid Building Society v Scorpion Hotels*)” (1998) 6 RLR 126, 129.

<sup>237</sup> *Ibid*, 128.

<sup>238</sup> *CN & NA Davies v Laughton*, above n 180, 712 Thomas J for the Court.

indefeasibility. ... [T]he principle has as its basis the enforcement of personal claims arising out of the registered proprietor's conduct. It is essentially non-proprietary in nature. The key element is the involvement in or knowledge of the registered proprietor in the unconscionable or illegal act or omission in issue. It is such involvement or knowledge which gives rise to the equity or legal right in the innocent party as against the registered proprietor in person.

- 4.36 In "*Barnes v Addy Claims and the Indefeasibility of Torrens Title*",<sup>239</sup> Harding has argued that the significance of cases in which *Barnes v Addy* claims are made with the effect of divesting a registered proprietor has been overstated. Because in personam liability is personal, the remedy of such a claim need not be to divest a registered proprietor of Torrens title. And on those occasions where the terminal point of an in personam order does require divestment, this presents no unusual or special threat to indefeasibility.
- 4.37 Harding says that to describe an in personam claim as an exception to indefeasibility is misleading. A successful in personam claim is not in itself sufficient to defeat registered title; it may entail orders requiring the performance of certain acts, the performance of which may defeat registered title, but the causal link is too indirect to warrant describing the success of the claim as generating an exception to indefeasibility.<sup>240</sup>

#### Restitutory based claims as undermining Torrens title

- 4.38 Chambers claims that restitution of unjust enrichment does not undermine the objective of the Torrens system, the objective being, primarily, the avoidance of the expense, difficulty and delay of investigating and proving a vendor's title:<sup>241</sup>

There is a great deal of difference between an investigation into the quality of the vendor's title, which the Torrens system is designed to obviate, and an investigation into the validity of the transaction through which title will be obtained. If the defendant knew or ought to have known that the plaintiff was operating under mistake, duress, undue influence, or in ignorance of the transaction itself, the plaintiff's interest in obtaining restitution of the unjust enrichment can prevail over the defendant's interest in the security of his or her receipt, without undermining the objectives of the Torrens system.

- 4.39 This distinguishes between the integrity of the register and the integrity of the transaction, as does the Scottish Law Commission,<sup>242</sup> and could lead to an argument against immediate indefeasibility.
- 4.40 However, there is a counter-argument that the imposition of a constructive trust against a registered proprietor with an apparent indefeasible title, on the basis that registration unjustly enriches the proprietor, could risk undermining the Torrens system, for example, where the proprietor through registration unintentionally defeated another's interest without any fault or unconscionability.<sup>243</sup>

239 Matthew Harding "*Barnes v Addy Claims and the Indefeasibility of Torrens Title*" (2007) 31 MULR 343.

240 *Ibid*, 349.

241 Chambers, "Indefeasible Title as a Bar to a Claim for Restitution", above n 236, 134.

242 See discussion in chapter 2.

243 Contrary to the section 182 provision that notice of unregistered interests does not affect a registered proprietor's title, this would lead to a situation where the fact of an interest could defeat title whether the proprietor had notice or not.

- 4.41 Restitutive causes of action, without more, could also undermine the compensation regime. Defrauded parties may be entitled to compensation, which would pay off a mortgage debt, restoring both the defrauded parties and an innocent mortgagee to the position before the fraud. The imposition of an in personam claim against the mortgagee would mean that the defrauded parties were in the same position, but the lender could no longer recover the money lent. In these situations, in a practical sense, in personam claims have the effect of protecting the state compensation fund rather than the mortgagor. Arguably, denying one party relief on the basis of a cause of action with no fault element may undermine the Act.

## OPTIONS

- 4.42 The in personam jurisdiction in respect of Torrens title is an evolving area as the cases discussed show. It may be best to leave development of this area to the courts, particularly if it is considered that the in personam jurisdiction is conceptually not an exception to indefeasibility, and that the heads of claim would benefit from further judicial consideration. There is an argument that the courts should be able to deal with each case on its circumstances. However, this would continue the present uncertainty.

- 4.43 As noted above, Australian legislation to some extent recognises the in personam jurisdiction. For example, section 185(1) of the Land Title Act 1994 (Qld) provides: “A registered proprietor of a lot does not obtain the benefit of section 184 [indefeasibility] for the following interests in relation to the lot – (a) an equity arising from the act of the registered proprietor”. The Land Title Act 2000 (NT) provides similarly. Section 69 of the South Australian Real Property Act 1886 lists nine “exceptions” to indefeasibility, and section 71 lists six further exceptions to the paramountcy of the registered proprietor’s title, including:

**(d) Contracts**

the rights of a person with whom the registered proprietor shall have made a contract for the sale of land or for any other dealing therewith; and

**(e) Trusts**

the rights of a *cestui que trust* where the registered proprietor is a trustee, whether the trust shall be express, implied, or constructive.

- 4.44 An option, therefore, could be to include the in personam jurisdiction either generally or specifically (by way of the various heads of claim) as an exception to the paramountcy provisions, or limits on indefeasibility, in the new LTA. In addition, boundaries of the in personam jurisdiction could be statutorily specified for more certainty and clarity, such as those as identified by the cases, that:

- (a) the claim must not undermine the objectives of the Torrens system;
- (b) there must be unconscionable conduct by the registered proprietor;
- (c) the in personam claim must be based on an established cause of action.

- 4.45 Another option (suggested in chapter 2 in relation to forged mortgages), which could be considered in respect of limiting the *Barclays Bank v O’Brien* type of claim, is the imposition of statutory duties under the LTA on mortgagees to confirm the identity of the mortgagor, similarly to sections 11A and 11B of the Land Title Act 1994 (Qld). A failure to do so means that the mortgagee does not obtain an indefeasible title (under section 185 of the Land Title Act 1994).

- 4.46 Legislating for deferred or discretionary indefeasibility could also avoid the proliferation of in personam claims in cases of forged (or otherwise void) instruments. The extension of in personam claims regarding Torrens title can be seen as a way of circumventing immediate indefeasibility in cases where there is no fraud but there is unconscionable behaviour by the registered proprietor or mortgagee, raising an equity in favour of the previous registered proprietor or a mortgagor.

Q13 Is an in personam claim an exception to indefeasibility, or a parallel jurisdiction? If the latter is conceptually more accurate, is there nonetheless a risk to Torrens title that should be controlled?

Q14 If so, should the boundaries of the in personam jurisdiction be left to judicial development, or created through legislative reform?

Q15 Would the three requirements for a valid in personam claim set out above have the effect of preventing significant inroads into Torrens principles? If so, should those three requirements be included in the new LTA?

# Chapter 5

## Registrar's powers of correction

### REGISTRAR'S POWERS OF CORRECTION IN THE LTA

- 5.1 Sections 80 to 84 of the Land Transfer Act 1952 (LTA) relate to alterations or corrections to the register by the Registrar. Section 80 of the LTA provides the Registrar with a power to correct errors and supply omissions in certificates of title or the register:
- (1) The Registrar may, upon such evidence as appears to him sufficient, subject to any regulations under this Act, correct errors and supply omissions in certificates of title or in the register, or in any entry therein, and may call in any outstanding instrument of title for that purpose.
  - (2) The Registrar may cancel or correct any computer register and, if appropriate, create a new computer register in order to correct any error or supply any omission in any computer register.
- 5.2 Although this section is used frequently, it is mostly for minor errors. This section is not contentious and has been described as “little more than a ‘slip’ section and not of substantive importance”.<sup>244</sup> Sections 82, 83 and 84 are mechanical provisions that help the Registrar to carry out his or her powers.
- 5.3 Section 81 of the LTA provides the Registrar with a power of correction that is more extensive than that contained in section 80:
- (1) Where it appears to the satisfaction of the Registrar that any certificate of title or other instrument has been issued in error, or contains any misdescription of land or of boundaries, or that any entry or endorsement has been made in error, or that any grant, certificate, instrument, entry, or endorsement has been fraudulently or wrongfully obtained, or is fraudulently or wrongfully retained, he may require the person to whom that grant, certificate, or instrument has been so issued, or by whom it is retained, to deliver up the same for the purpose of being cancelled or corrected, as the case may require.
  - (2) If the Registrar is satisfied as to any matter referred to in this section and there is a computer register involved, the Registrar may cancel or correct any computer register and, if appropriate, create a new computer register.
  - (3) The Registrar must not take action under subsection (2) without first giving notice to any person appearing to be affected and giving a reasonable period for any response.

<sup>244</sup> *Frazer v Walker* [1967] AC 569, 581 (PC) Lord Wilberforce for the Court.



- 5.4 This section gives the Registrar the power to correct the register in three circumstances:
- (a) where the title was issued in error;
  - (b) where there is a misdescription of land or boundaries;<sup>245</sup> and
  - (c) where the title was fraudulently or wrongfully obtained or retained.
- 5.5 Similar provisions exist in the land transfer legislation of other jurisdictions.<sup>246</sup> In New Zealand, most land under the LTA is now on the electronic register. Therefore, subsections (2) and (3) are very important.
- 5.6 Some commentators have suggested that electronic conveyancing may increase the occurrence of mistakes and the need for the Registrar to exercise his or her powers. David Grinlinton suggests that there may be increased need for the Registrar to intervene quickly in light of electronic conveyancing and the risk that errors are not picked up for some time.<sup>247</sup> A commentator has also suggested that the increased role for solicitors in the electronic environment poses risks regarding the Registrar's inability to correct mistakes made by solicitors.<sup>248</sup> Nevertheless, there are electronic checks by the system and the nature of the electronic system means limited scope for a solicitor to make mistakes when entering data electronically (see chapter 13).

Q16 Has the electronic system changed the circumstances in which there is need for the Registrar to exercise his or her powers?

#### INTERPRETATION<sup>5.7</sup> OF SECTION 81

The interpretation of section 81 and its interaction with the principle of immediate indefeasibility has proved difficult. The Privy Council has said that the powers are subject to section 183 of the LTA, that is, they cannot operate once a bona fide purchaser for valuable consideration acquires a title to the land.<sup>249</sup> However, despite the Privy Council's statement in *Frazer v Walker* that the section 81 powers "are significant and extensive" and "are not coincident with the cases excepted in sections 62 and 63",<sup>250</sup> the extent of the powers has been interpreted restrictively in subsequent cases.

245 Misdescription of title correlates with the Land Transfer Act 1952, ss 62(c) and 63(1)(d).

246 See, for example, Real Property Act 1900 (NSW), ss 136, 137; Real Property Act 1886 (SA), s 60–63; Transfer of Land Act 1893 (WA), ss 76 and 77; Land Titles Act 1980 (Tas), ss 163 and 164. In contrast, in England and Wales, under the Land Registration Act 2002, sch 4, cl 5 the Registrar may alter the register for the purpose of: (a) correcting a mistake, (b) bringing the register up to date, (c) giving effect to any estate, right or interest excepted from the effect of registration, or (d) removing a superfluous entry. No alteration that affects the title of the registered proprietor may be made without the proprietor's consent, unless he or she has caused or contributed to the mistake through fraud or lack of proper care, or it would be unjust not to make the alteration (sch 4, cl 6).

247 David Grinlinton "The Registrar's Powers of Correction" in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 217, 241.

248 Ben France-Hudson "Living in Interesting Times: Landonline, Leader in its Field at What Cost" (2006) 12 *Canta LR* 121. See too, Rod Thomas "Fraud, Risk and the Automated Register" in D Grinlinton (ed) *Torrens in the Twenty-first Century*, *ibid*, 349.

249 *Frazer v Walker*, above n 244, 585.

250 *Ibid*, 585. See Struan Scott "Indefeasibility of Title and the Registrar's 'Unwelcome' s 81 Powers" (1999) 7 *Canta LR* 246, 259–261, for an interpretation of *Frazer v Walker* that is more consistent with s 81.

- 5.8 Although there is uncertainty as to the scope of the powers, the general practice in New Zealand has been restraint on the part of the Registrar.<sup>251</sup> However, this does not exclude the possibility of the Registrar’s exercise of his or her powers being contested. Professor McMorland has suggested that this may be done by first, a refusal to comply with the requirement to deliver up the title under section 81; secondly an appeal under section 216; or thirdly the use of the court’s jurisdiction to review.<sup>252</sup>
- 5.9 There are two principal grounds for confusion:
- (a) the meaning of “wrongfully” in section 81(1); and
  - (b) whether the provision allows the Registrar to make substantive findings on legal rights.
- 5.10 Because of the confusion in relation to these powers, this section has been described as “a Pandora’s box waiting to be opened”.<sup>253</sup> There have been calls for reform from the Property Law and Equity Reform Committee in 1977,<sup>254</sup> and judicial expressions of dissatisfaction. For example, in 1988, McGechan J called for the Registrar’s powers to be reviewed.<sup>255</sup>

The present position is thoroughly unsatisfactory. By decision of the Privy Council the Registrar is the holder of revived powers which are anachronistic, which he does not exercise and which he does not want. The recommendation of the Property Law and Equity Reform Committee in 1977, now 10 years old, calls for legislative action, whether in that form or updated. The call will become more urgent, not less.

## ISSUES

### What does “wrongfully” mean?

- 5.11 If section 81 is retained in a similar form in the new Act, it is necessary to consider the meaning of wrongfully and whether it should be clarified or excluded.
- 5.12 Wrongfully is different from fraudulently and goes beyond the exceptions to indefeasibility contained in the Act. The meaning of the word is unclear and has been subject to both restrictive and expansive interpretations. The interpretation of wrongfully is important because of the potential for conflict with the principle of indefeasibility. A title obtained by fraud is not indefeasible under section 63 of the LTA, and, therefore, the Registrar’s power to correct the register in such a situation does not conflict with the principle of indefeasibility. In contrast, where a title is wrongfully obtained or retained, there is no express exception from the indefeasibility provisions, and the Registrar’s powers have the potential to conflict with indefeasibility.

251 See BE Hayes “DLRs and the Power to Cancel Registration” (1988) 4 BCB 255.

252 See DW McMorland “Registrar’s Powers of Correction” (1968) NZLJ 138, 139.

253 Hinde McMorland & Sim *Land Law in New Zealand* (loose leaf, LexisNexis, Wellington, 2005) para 9.027.

254 Property Law and Equity Reform Committee *The Decision in Frazer v Walker* (Report, Wellington, 1977) 18–21.

255 *Housing Corporation of New Zealand v Maori Trustee* [1988] 2 NZLR 662, 700 (HC) McGechan J. See also Hinde McMorland & Sim, above n 253, para 9.027 agreeing that s 81 must be clarified by new legislation.

- 5.13 As stated above, despite the ruling in *Frazer v Walker* that the powers in section 81 “are significant and extensive”,<sup>256</sup> subsequent judgments have often adopted a conservative approach to the question of the Registrar’s powers. Prior to 1987, judges refused to use section 81 to defeat immediate indefeasibility.<sup>257</sup> Wrongfulness was interpreted to require some wrongful intent and involve “something more than that the instrument pursuant to which it was procured was void or that the certificate of correctness was erroneous for that reason”.<sup>258</sup>
- 5.14 This view was shared by Professor Hinde, who stated that:<sup>259</sup>
- [R]egistration is “wrongfully obtained” within the meaning of section 81 if the person applying for registration is guilty of some intentional wrongful act (or perhaps even some negligent act) in the procurement of registration which falls short of fraud in the meaning of the Land Transfer Act...
- 5.15 He went on to say that the better view of section 81, with respect to the meaning of “wrongfully”, is that:<sup>260</sup>
- [A]n innocent registered purchaser or mortgagee for valuable consideration who has acted throughout with complete good faith, and who has diligently carried out all conveyancing procedures normally regarded as appropriate to the particular transaction cannot be said to have obtained registration wrongfully if the instrument by which he became registered, and which he certified to be correct for the purposes of the Land Transfer Act, turns out to be void for any reason.
- 5.16 However, in the *Housing Corporation of New Zealand v Maori Trustee* case, after a thorough survey of the history, case law and academic writing on section 81, McGechan J took a wider approach.<sup>261</sup> Although he sympathised with the rationale for the more conservative approach, he considered himself bound by the Privy Council decision in *Frazer v Walker* regarding the width of the Registrar’s powers. McGechan J stated:<sup>262</sup>
- Whether I like it or not (and I do not) I see no escape from giving the Privy Council decision full force and effect. To my mind it prevents a narrow approach restricting Registrar’s powers to those of ordinary citizens or the Court, ie, to indefeasibility exceptions under sections 62 and 63, and dictates against any narrow construction of the word “wrongful” back to some notion of intentional wrongdoing not very far from fraud, or at least ... some requirement of negligence ... Rather, if anything, a liberal approach is dictated ... I see no escape from the conclusion that section 81 is alive and well, however unwelcome, and applies where the person obtaining registration does so in a manner which is “wrongful” in the sense that *it infringes the legal rights of another*.

256 *Frazer v Walker*, above n 244, 585.

257 See *Chan v Lower Hutt City Corporation* [1976] 2 NZLR 75 (SC) Beattie J; *Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance* [1984] 2 NZLR 704 (HC) Barker J.

258 *Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance*, *ibid*, 714.

259 GW Hinde “Indefeasibility of Title Since *Frazer v Walker*” in GW Hinde (ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971) 33, 68.

260 *Ibid*, 69.

261 *Housing Corporation of New Zealand v Maori Trustee*, above n 255.

262 *Ibid*, 699 (emphasis added).

- 5.17 McGechan J was aware that such an approach could lead to inconsistencies with the application of immediate indefeasibility, because the Registrar may be able to act where the court cannot.<sup>263</sup> However, he acknowledged the general practice in New Zealand that the Registrar does not invalidate registrations under his or her own powers.<sup>264</sup> The restraint on the part of the Registrar was quickly confirmed by the Registrar of the time.<sup>265</sup>
- 5.18 Despite the *Housing Corporation* decision, subsequent cases have returned to a more restrictive interpretation of section 81.<sup>266</sup> In a recent Court of Appeal decision the majority held that section 81:<sup>267</sup>
- [I]s an administrative provision which has to be interpreted in the context of the LTA as a whole... [I]t is unlikely that the Registrar acting administratively would be empowered to defeat indefeasibility in circumstances where a Court cannot.
- 5.19 There is clearly a case for clarifying the meaning of “wrongfully” in section 81. Commentary on section 81 has suggested that it could be confined to situations where an in personam claim exists.<sup>268</sup> In the alternative, “wrongfully obtained or retained” could be excluded from the grounds where the Registrar may exercise his or her powers of correction. This would confine the power to where there has been error, misdescription of title, or fraud as found by a court.

Q17 Should the extent of the Registrar’s powers in relation to the word “wrongfully” be clarified, and if so, how?

Q18 Are there situations where it would be appropriate for the Registrar to correct a title that has been obtained “wrongfully”?

### What level of discretion should the Registrar have?

- 5.20 It is not clear whether section 81 should be interpreted to allow the Registrar to make substantive findings as to legal rights. Grinlinton describes the problem in this way:<sup>269</sup>

[I]t is unclear whether the section simply bestows procedural powers authorising the Registrar to call in instruments to implement alterations pursuant to the “slip” power in section 80, or a Court decision; or whether the section conveys judicial powers to make substantive findings on legal right and implement those findings by altering the register.

263 Ibid, 699.

264 Ibid, 699.

265 Hayes, above n 251, 256.

266 See, for example: *Town & Country Marketing v McCallum* (1998) 3 NZ Conv C 192,698 (HC). The powers of the Registrar have also been interpreted restrictively in Australia: see *State Bank of New South Wales v Berowra Holdings Pty Ltd* (1986) 4 NSWLR 398, 404.

267 *Dollars & Sense Finance Ltd v Nathan* [2007] 2 NZLR 747, para 156 (CA) Glazebrook and Robertson JJ.

268 Grinlinton, above n 247, 239.

269 Ibid, 228.

- 5.21 This suggests that subsection 81(1) could have been interpreted as only giving the Registrar a power to “call in the certificate of title” for the purposes of correction. However, as almost all land is now electronic transactions land, this land is governed by subsections (2) and (3). It is clear that subsection (2) is not merely a procedural, rather it expressly empowers the Registrar to correct the register when the conditions in subsection (1) are met. These subsections have not yet been considered by the courts. Nevertheless, the power contained in subsection 81(2) could be interpreted narrowly to prevent the Registrar from making substantive findings, or it could be given a broad interpretation.<sup>270</sup>
- 5.22 This difficulty of interpretation of the extent of the powers is the greatest in the third ground under section 81: where the title is fraudulently or wrongfully obtained or retained. In the case of error of title, it is relatively simple for the Registrar to identify and rectify the problem. This does not require him or her to perform an adjudicative type function. Likewise, identifying a misdescription of title involves questions of fact. However, in the case of fraud, before the powers to correct may be exercised, the Registrar must ascertain that there has, in fact, been fraud. To what extent should the Registrar be entitled to make such a determination?
- 5.23 Early court decisions have indicated that section 81 was not to be used where there were complicated questions of law and facts.<sup>271</sup> Likewise, Grinlinton recently considered section 81 in light of the principles of statutory interpretation and concluded that a restricted power was to be preferred.<sup>272</sup>
- 5.24 As noted above, the Property Law and Equity Reform Committee examined the Registrar's powers in its 1977 report on *The Decision in Frazer v Walker*.<sup>273</sup> The Committee did not think that provisions in sections 80 and 85 caused any difficulty in application and did not recommend any change. However, the Committee was of the opinion that section 81 was problematic because:<sup>274</sup>
- (1) the Registrar is not equipped to determine issues involving fraud or wrongdoing; and
  - (2) in practice no Registrar would attempt to act in such a situation without the facts having been determined by the Court.
- 5.25 The Committee recommended that section 81 be amended to make it clear that its sole effect was “to give the Registrar appropriate powers to carry an order of the Court into effect”.<sup>275</sup>

270 Ibid, 239–240.

271 See *Re McCarthy and Collins* (1901) 19 NZLR 545 (SC) Edwards J; approved in *Assets Co Ltd v Mere Roihi* [1905] AC 176, 194–195 (PC) Lord Lindley; *Manahi Te Hiakai v District Land Registrar* (1909) 29 NZLR 130, 132 (SC) Chapman J; *Duthie v District Land Registrar at Wellington* (1911) 31 NZLR 245, 250 (SC) Sim J. See also Hinde *McMorland & Sim*, above n 253, para 9.027.

272 The principles he based this on were the purpose and external context of the legislation; the context of the section within the Act; and the meaning of section 81 as guided by the principles *noscitur a sociis* and *eiusdem generis*. Grinlinton, above n 247, 228–235.

273 Property Law and Equity Reform Committee, above n 254, 18–21.

274 Ibid, 20.

275 Ibid, 20.

- 5.26 If the Registrar were given expansive power under section 81, this would allow him or her to make quasi-adjudicative decisions. This can be seen as undesirable because the Registrar performs an administrative role rather than a judicial one. Nevertheless, under the current system there are some safeguards in place:
- the Registrar must be legally trained;<sup>276</sup>
  - the Registrar must not take action under subsection 81(2) without giving notice to any affected person and a reasonable period to respond;<sup>277</sup>
  - a person can apply to have the Registrar reconsider his or her decision and provide written reasons;<sup>278</sup>
  - there can be an appeal to the High Court;<sup>279</sup> and
  - the decision may be judicially reviewed by the courts.
- 5.27 Grinlinton considers that if the Registrar were given a more expansive decision-making power, protections should be put in place as to how that power is exercised.<sup>280</sup>
- 5.28 In Queensland, the Registrar has more expansive powers and may correct the register if he or she is satisfied that:<sup>281</sup>
- (a) the register is incorrect; and
  - (b) the correction will not prejudice the rights of the holder of an interest recorded in the register.
- 5.29 The Registrar may conduct an inquiry for the following purposes:<sup>282</sup>
- (a) to decide whether a register should be corrected; or
  - (b) to consider whether a person has fraudulently or wrongfully –
    - (i) obtained, kept or procured an instrument affecting land in a register; or
    - (ii) procured a particular in a register or an endorsement on an instrument affecting land; or
  - (c) to consider whether a fraud affecting the land registry has otherwise been committed; or
  - (d) to otherwise consider an issue arising from the lodgment or registration of an instrument in the land registry; or
  - (e) in circumstances prescribed by regulation.

In conducting such an inquiry, the Registrar must follow the principles of natural justice.<sup>283</sup>

- 5.30 If the Registrar is not considered to be in the best position to make quasi-adjudicative decisions about rights, then the extent of his or her powers should be clarified in land transfer legislation. Nevertheless, there may be situations where a broader power is appropriate and the Registrar may want to exercise

276 Land Transfer Act 1952, s 4(2).

277 Land Transfer Act 1952, s 81(3). However, there is no such notice required for section 81(1).

278 Land Transfer Act 1952, s 216.

279 Land Transfer Act 1952, s 217.

280 See Grinlinton, above n 247, 242–244.

281 Land Title Act 1994 (Qld), s 15(1).

282 Land Title Act 1994 (Qld), s 19, see also s 15(2)(b).

283 Land Title Act 1994 (Qld), s 20A.

the powers in the present section 81 other than to carry out a court order. For example, where a party concedes that there has been fraud, but there has not been a court order, should the Registrar be able to alter the register? Likewise (subject to the discussion on wrongfulness above), where the registered proprietor refuses to carry out an order for specific performance, is this a situation where it would be appropriate for the Registrar to correct a title that has been “wrongfully” retained?

Q19 Should the Registrar be able to make substantive findings as to legal rights or should his or her power be limited to an administrative power?

Q20 In what situations might it be appropriate for the Registrar to have a broader power to correct the register?

### Options

5.31 There are two main options for reform:

- (a) to retain the current interpretation of section 81, but clarify that the Registrar's powers are limited; or
- (b) to adopt a provision that gives the Registrar a broader discretion to exercise powers of correction as, for example, the Registrar has in Queensland.<sup>284</sup>

Q21 Which of the above options should be adopted?

284 See Land Title Act 1994 (Qld), ss 15 and 19.

# Chapter 6

## Unregistered interests

**INTRODUCTION** 6.1 A commentator has stated that the “mirror principle” is a fundamental principle of the Torrens system. This provides that the register book should reflect all facts material to an owner’s title to land.<sup>285</sup> However, in reality this principle is qualified, as “[n]othing that is incapable of registration and nothing that is not actually registered appears in the picture but the information shown is deemed to be both complete and accurate”.<sup>286</sup> Because of the existence of interests outside the registration system, the register will not always accurately reflect reality.

6.2 This chapter explores both the interests that are unregistered and those that are unregistrable and considers how they are currently protected under the New Zealand Torrens system. The chapter also considers whether the system could be modified to allow a more accurate register, which gives greater protection to unregistered interests, and the impact electronic conveyancing could have on the protection of unregistered interests.

### WHAT ARE UNREGISTERED INTERESTS?

6.3 Section 41(1) of the LTA provides:  
No instrument shall be effectual to pass any estate or interest in any land under the provisions of this Act, ... but, upon the registration of any instrument under this Act or the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, the estate or interest specified in the instrument shall pass.

6.4 This section could be interpreted to mean that unregistered interests are not enforceable under the Act. However, this interpretation is inconsistent with other sections of the Act. Several sections of the LTA support the existence of equitable interests that are not registered under the Act, for example, the provisions relating to lodging caveats to protect unregistered interests,<sup>287</sup> and the provisions relating to trusts.<sup>288</sup>

6.5 Sections 62 and 182 of the LTA are also relevant to the position of unregistered interests. Section 62 provides that, unless there is fraud or specified exceptions apply, the registered proprietor will hold land:

285 TBF Ruoff “An Englishman Looks at the Torrens System: Part 1: The Mirror principle” (1952) 26 ALJ 118, 118.

286 Ibid, 118.

287 See for example, Land Transfer Act 1952, ss 136–148B.

288 Land Transfer Act 1952, ss 128–135.



... subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register constituted by the grant or certificate of title of the land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever.

- 6.6 Section 182 provides that, except in the case of fraud, no purchaser:
- ... shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.
- 6.7 Although these interests are referred to as “unregistered interests” this term may encompass unregistered interests that are capable of being registered, interests contained in an unregistrable instrument and interests that are incapable of being registered. Overriding interests, that is, statutory interests that override the LTA, may also exist outside the register. These are discussed in chapter 9.

### Interests that are not yet registered

- 6.8 First, there are interests that are capable of registration, but that are unregistered, for example, unregistered mortgages, unregistered leases, easements or profits à prendre.
- 6.9 The courts have held that, generally, an interest that has not been registered confers an equitable interest: “[u]nregistered interests, other than tenancies for less than three years, are not legal interests and are dependent upon doctrines of equity”.<sup>289</sup> If the interest is subsequently registered this equitable interest will be transformed into a legal interest: “[w]here an interest enforceable in equity already exists in a transferee the act of registration of a memorandum of transfer substitutes a legal interest for the equitable interest”.<sup>290</sup> The equitable estate is created by “that antecedent agreement, evidenced by the unregistered instrument, not the instrument itself”.<sup>291</sup>
- 6.10 On the face of sections 62 and 182 of the Act, a registered proprietor takes land free of interests that have not been registered, except where there is fraud. As outlined below, these interests can be protected by a caveat.

### Interests contained in unregistrable instruments

- 6.11 Secondly, some interests are registrable in nature but are contained in an unregistrable form. For example, this would cover deeds of lease or mortgage. As with the first class of interests, these interests confer an equitable interest and a registered proprietor will take the land free of these interests except in the case of fraud.

289 *Duncan v McDonald* [1997] 3 NZLR 669, 681 Blanchard J for the Court (CA). This is now out of date in respect of the reference to leases. Under the Property Law Act 2007, a short-term lease is a lease of less than one year (s 207) and a short-term lease is considered a legal interest (s 209).

290 *Ibid*, 681.

291 *Chan v Cresdon Pty Ltd* (1989) 168 CLR 241, 257 (HCA) Mason CJ, Brennan, Deane and McHugh JJ.

- 6.12 However, it is necessary to treat these interests separately because it has been suggested that interests of this nature cannot be protected by a caveat,<sup>292</sup> although it is likely that this is no longer the case under New Zealand law (see chapter 7).<sup>293</sup>

### Interests incapable of registration

- 6.13 Trusts<sup>294</sup> and restrictive and positive covenants<sup>295</sup> are currently incapable of registration under the LTA. Commentators have suggested other interests as falling into this class: periodic and monthly tenancies; licences, which create a proprietary interest; options to purchase; equitable charges; or equitable liens.<sup>296</sup> However, it is unclear to what extent these are truly unregistrable. Insofar as they do exist, they pose a particular problem because their position cannot be protected by registration and, as explained below, it is currently unclear whether some of these are caveatable.

- 6.14 Sections 62 and 182, outlined above, suggest that a purchaser will take land free of unregistered instruments unless there is fraud. However, the position is less clear regarding interests that are incapable of being registered. The authors of *Hinde McMorland & Sim* have noted:<sup>297</sup>

Any interest in land or statutory right affecting land which is not capable of being registered under the provisions of the Land Transfer Act 1952 necessarily exists outside the system of registration of title.

- 6.15 In 1927, in *Carpet Import Co Ltd v Beath and Co Ltd* the Supreme Court held “that [section 182] does not apply to any interest which is not capable of being registered under the provisions of the Act”.<sup>298</sup> The Court declined to decide whether section 62 or section 182 was the predominant section, leaving the effect of the decision unclear.<sup>299</sup> However, it is relevant to note that the decision was based on *Gray v Urquhart*, which found that section 59 of the Land Transfer Act 1908, the equivalent of section 62 of the 1952 Act, did not apply to an unregistrable water-race and the registered proprietor took the land subject to

292 *Miller v Minister of Mines* [1963] NZLR 560, 569 (PC) Lord Guest.

293 *Waitikiri Links Ltd v Windsor Golf Club Incorporated* (1998) 8 NZCPR 527, para 4 (CA) Blanchard J for the Court.

294 See chapter 8. Section 128(1) of the Land Transfer Act 1952 expressly provides that no trust can be entered on the register. Nevertheless, s 128(2) permits the creation of trusts by deed or instrument. Under s 128(2) a trust deed or instrument may be deposited with the registrar, however, this does not appear to have any effect in law or equity. See Struan Scott and others *Adams' Land Transfer* (looseleaf, LexisNexis, Wellington, 2007) S128.4. This is consistent with the position in some other jurisdictions: see, for example, New South Wales, Real Property Act 1900 (NSW), s 82, and Alberta, Land Titles Act RSA 2000 c L-4, s 47.

295 These can be noted on the register under the Property Law Act 2007, s 307.

296 See *Hinde McMorland & Sim Land Law in New Zealand* (loose leaf, LexisNexis, Wellington 2005) paras 10.009, 10.010.

297 *Ibid*, para 9.078.

298 *Carpet Import Co Ltd v Beath and Co Ltd* [1927] NZLR 37, 59 (SC, Full Court) Skerrett CJ for the court. See also *Webb v Hooper* [1953] NZLR 111, 113 (SC), where Stanton J was of the opinion that s 182 may not apply to unregistrable interests, although he decided the case on the basis that the registered proprietor was bound by the unregistrable interest due to the presence of fraud.

299 *Ibid*, 60.

this right.<sup>300</sup> This suggests that both sections 62 and 182 do not apply to unregistrable interests.<sup>301</sup> In contrast, in 1958, Haslam J in the Supreme Court expressed a contrary view in an obiter dictum.<sup>302</sup>

- 6.16 The issue was revisited in 1998 in *Town & Country Marketing Ltd v McCallum*.<sup>303</sup> The High Court referred to the approach in *Carpet Import Co Ltd v Beath and Co Ltd* and said that sections 62 and 182:<sup>304</sup>

[R]efer to legal estates or interests and not to equitable interests which cannot be registered. Thus, an equitable interest if it cannot be registered, may still have priority over a legal interest ...

- 6.17 The *Carpet Import Co Ltd v Beath and Co Ltd* line of authority does not apply to trusts, despite their unregistrable nature under the LTA, because under section 182 of the LTA a purchaser is not affected by notice of a trust in the absence of fraud. This means that trusts can be overridden by a registered title in the absence of fraud, unless a caveat protects them.<sup>305</sup>
- 6.18 Should any of the currently unregistrable interests be able to be registered? Although trusts are generally unregistrable, there are statutory exceptions to this provision.<sup>306</sup> Likewise, covenants are unregistrable; however, fencing covenants are registrable under the Fencing Act 1978.<sup>307</sup> Registration would confer the benefits of state guaranteed title. However, this is unlikely to be practical for all forms of unregistrable interests. Registration of trusts is specifically discussed in chapter 8.

Q22 To what extent are there any truly unregistrable interests under the LTA? If so, what are they?

Q23 How should unregistrable interests be treated in the new LTA?

Q24 Are there any unregistrable interests that should be able to be registered?

300 *Gray v Urquhart* [1910] 30 NZLR 303, 308 (SC) Williams J.

301 See *Town & Country Marketing Ltd v McCallum* (1998) 3 NZ Conv C 192,698, para 29 (HC) Paterson J.

302 *Ruaapekapeka Sawmill Co Ltd v Yeatts* [1958] NZLR 265, 271 (SC) Haslam J.

303 *Town & Country Marketing Ltd v McCallum*, above n 301.

304 *Ibid*, para 29. Justice Paterson also noted that restrictive covenants must be treated differently from other unregistrable interests and the *Carpet Import Co Ltd v Beath and Co Ltd* authority would no longer apply to them because they can now be notified on the register (see para 6.31 below).

305 See for example, *Fels v Knowles* [1907] NZLR 604 (CA).

306 For example see, *Te Ture Whenua Maori Act*, ss 217, 220A, 350; *Friendly Societies and Credit Unions Act 1982*, ss 32, 33; *Charitable Trusts Act 1957*, ss 3–5, 13, 14.

307 *Fencing Act 1978*, s 5.

The “registration gap”

- 6.19 Much discussion about unregistered interests has centred on the issue of the registration gap, that is, the gap between settlement and registration.<sup>308</sup> Concern has been expressed that the unregistered interest in the land is not adequately protected during this time and could be subject to other interests that arise later in time.
- 6.20 Section 182 states that the person “contracting or dealing with or taking or proposing to take a transfer from the registered proprietor” is not guilty of fraud simply because of knowledge of an adverse interest. A literal interpretation suggests that the person who is in the process of contracting, but has not registered, is in the same position regarding notice as a registered proprietor.
- 6.21 However, in practice this interpretation has received no support in the cases and it is well established orthodoxy that one will not be entitled to the benefits of section 182 until registration. Some commentators have agreed with this approach in the scheme of a Torrens system in which registration is the keystone.<sup>309</sup> Others have argued that the result of the non-literal reading is unfair in that a person who innocently contracts and later receives notice cannot complete their registration without the risk of committing fraud.<sup>310</sup>
- 6.22 Section 43A(1) of the Real Property Act 1900 (NSW) is an example of an attempt to protect from notice the purchaser who has completed the contract, but is not registered:

For the purpose only of protection against notice, the estate or interest in land under the provisions of this Act, taken by a person under a dealing registrable, or which when appropriately signed by or on behalf of that person would be registrable under this Act shall, before registration of the dealing, be deemed to be a legal estate.

- 6.23 The meaning of this provision is something of a mystery, and has produced some problems and conflicting case law of its own.<sup>311</sup> However, the settled view is that it gives a Torrens title purchaser, who has completed a contract but is not yet registered, the common law protection of a bona fide purchaser for value without notice.<sup>312</sup> The unregistered purchaser will not be affected by subsequent notice

308 See for example, Pamela O’Connor “Information, Automation and the Conclusive Land Register” in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 249.

309 RP Thomas “Land Transfer Fraud and Unregistered Interests” [1994] NZ Law Rev 218, 218. This interpretation has also prevailed in Australia: see *Templeton v Leviathan Pty Ltd* (1921) 30 CLR 34, 54–55 (HCA) Knox CJ; *Lapin v Abigail* (1930) 44 CLR 166 (HCA); *IAC (Finance) Pty Ltd v Courtenay* (1963) 110 CLR 550, 572 (HCA) Kitto J.

310 Rt Hon Justice Peter Blanchard “Indefeasibility Under the Torrens System in New Zealand” in David Grinlinton *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 29, 44–45; Douglas J Whalan “The Meaning of Fraud Under the Torrens System” (1975) 6 NZULR 207, 211.

311 Peter Butt *Land Law* (5 ed, Lawbook Co, Sydney, 2006) 760–761, 764–765.

312 *IAC (Finance) Pty Ltd v Courtenay*, above n 309, 584 Taylor J. An alternative view of section 43A(1) known as the “Kitto” view equates the words “legal estate” in the section with “registered estate”, giving the purchaser in a completed transaction the same protection (regarding notice) they would have if they were already registered: *IAC (Finance) Pty Ltd v Courtenay*, above n 309, 572–3 Kitto J. Butt notes that “... despite its logic, the “Kitto” view has not prevailed” (Butt, above n 311, 761). Other Australian jurisdictions use a settlement notice system to prevent registration of another instrument affecting the lot in question (Land Title Act 1994 (Qld), s 141, a “stay order” (Transfer of Land Act 1893 (WA), ss 148–149 and Transfer of Land Act 1958 (Vic), s 93) or a priority notice (Land Titles Act 1980 (Tas), s 52) once a dealing concerning that lot is settled.

of other interests. However, the protection does not extend to purchasers who are aware of an interest before registration, or to volunteers.

- 6.24 This issue may be of less importance with the computerisation of the register, as settlement and registration are now virtually simultaneous. However, some contracts are belatedly settled and some settlements are not registered even though a purchaser may have gone into possession. So there may be a gap between settlement and registration. Further, those engaged in pre-settlement dealings are excluded from the protection which section 182 appears to provide them. The discrepancy between the words of the LTA and the orthodox application is a matter of concern.

Q25 Should the section 182 protection to non-registered purchasers be reaffirmed, or should the legislation be changed to reflect the orthodox application of the section?

### Caveats

- 6.25 The caveat system can afford some protection to unregistered interests. A caveat does not create rights but is a means of protecting existing rights. There are several different kinds of caveats under the LTA.<sup>313</sup> For the purposes of this discussion, the relevant type of caveat is a caveat against dealing with the land under the Act.<sup>314</sup>
- 6.26 Chapter 7 discusses whether unregistrable interests (that is, both interests contained in an unregistrable instrument and interests incapable of registration) are caveatable. It is sufficient to note here that the Court of Appeal has provisionally taken a broad view that any interest in land, whether registrable or not, is caveatable.<sup>315</sup> This discussion does not apply to trusts, which, whether express or implied, are expressly caveatable under section 137(1)(b) of the LTA.
- 6.27 Although caveats can give some protection to unregistered interests, their operation can be problematic. Caveats are generally temporary in nature and are not designed to allow the register to more accurately reflect the unregistered interests “carved out” of the registered proprietor’s title:<sup>316</sup>

Such caveats ... are designed to provide temporary protection in anticipation of legal proceedings. They do not provide a means whereby estates and interests in land can be permanently protected.

313 For example, caveats against bringing land under the Act (s 136); caveats authorised by the compulsory registration of title provisions (s 205(1)); caveats entered by the Registrar for the protection of a person “under the disability of infancy or unsoundness of mind or [who] is absent from New Zealand”, to prevent dealing with land where there has been an error by misdescription of that land, or for the prevention of any fraud or improper dealing (s 211(d)); caveats against applications for prescriptive titles for land (Land Transfer Amendment Act 1963, Part 1); and caveats against applications for title to access ways (Land Transfer Act 1952, s 89C).

314 Land Transfer Act 1952, s 137.

315 *Waitikiri Links Ltd v Windsor Golf Club Incorporated*, above n 293, para 4 Blanchard J for the Court.

316 *Les A McCrimmon* “Protection of Equitable Interests under the Torrens System: Polishing the Mirror of Title” (1994) 20 Monash U LR 300, 310.

## Priorities between interests

- 6.28 Where two or more equitable interests exist in the same piece of land, which interest should take priority? The LTA does not contain any provision that determines which competing equitable interest takes priority,<sup>317</sup> and the lodgement of a caveat does not determine the priority of an interest. Rather, the courts have used the rules of equity to determine priority.
- 6.29 Where priority disputes occur, the starting point is generally that, where all other matters are equal, the interest goes to the person who acquired the equitable estate first.<sup>318</sup> However, this rule is not applied in a “mechanical way, but only if the merits are equal”.<sup>319</sup> In making determinations, the courts will consider the surrounding circumstances and will be guided by several principles. The authors of *Brooker’s Land Law* set out 10 guidelines, which can be extracted from case law, to aid the determination of equitable priorities.<sup>320</sup>
- 6.30 Although the order of lodgement of caveats does not determine priority between interests, it may have some effect on the determination of priority. In particular, failure to lodge a caveat may affect a person’s priority against other equitable interests. In 1995, the Court of Appeal held that “[f]ailure to register the caveat promptly can, but not necessarily will, be conduct that may justify a reversal of priorities of equitable charges over land”.<sup>321</sup> Dr McMorland has said that “[t]he lodgement of a caveat can never improve the priority of the holder of an unregistered interest, but, by giving notice of the interest, it can preserve that person’s existing priority”.<sup>322</sup>

## Other ways to protect unregistered interests

### Notification

- 6.31 Restrictive and positive covenants are an example of unregistrable interests. However, section 307 of the Property Law Act 2007 allows the Registrar to enter a notification of such covenants on the register relating to the burdened or benefited land.<sup>323</sup> The section provides that the covenant is treated as an interest within the

317 This is also the position in Torrens legislation in Australia. However, s 52 of the Land Titles Act 1980 (Tas) allows the lodgement of a priority notice, which reserves the priority of the interest.

318 See *Butler v Fairclough* (1917) 23 CLR 78, 91 (HCA) Griffith CJ; *Abigail v Lapin* [1934] AC 491, 504 (PC) Lord Wright; *O’Leary v Sentiero Properties* (18 December 2006) CA 204/05, para 10 (CA) Chambers J. See also Dr DW McMorland “Notice, Knowledge and Fraud” in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 67, especially at 81–83, and Andrew Alston and others *Brooker’s Land Law* (loose leaf, Brookers, Wellington, 1995) paras LT41.08–09.

319 Hinde McMorland & Sim *Land Law in New Zealand* (loose leaf, LexisNexis, Wellington, 2005) para 9.005.

320 *Brooker’s Land Law*, above n 318, para LT41.09. See also *ibid*, 9.005(b).

321 *Australian Guarantee Corporation (NZ) Ltd v CFC Commercial Finance Ltd* [1995] 1 NZLR 129, 138 (CA) Tompkins J for the Court. See also Hinde McMorland & Sim, above n 319, 10.005 for a discussion on the conclusions that can be drawn from the present authorities on this point.

322 Dr DW McMorland “Notice, Knowledge and Fraud”, above n 318, 82.

323 This is a continuation of the process contained in s 126A(1) of the Property Law Act 1952. This initially only applied to restrictive covenant, however, in 1986 it was extended to positive covenants. See Property Law and Equity Reform Committee *Report on Positive Covenants Affecting Land* (Wellington, 1985).

meaning of section 62 of the LTA.<sup>324</sup> Notification does “not in any other way give the covenant any greater operation than it would otherwise have”,<sup>325</sup> and the interest is still only an equitable interest. The effect of section 307 is that:<sup>326</sup>

- where the covenant is notified on the servient tenement, the registered proprietor and successors in title hold the land subject to that interest;
- where the covenant is not notified on the register, the registered proprietor holds the land free of the covenant, except in cases of fraud.

6.32 The covenant must benefit other land.<sup>327</sup> This prevents covenants in gross being noted on the register.<sup>328</sup>

### *Encumbrances*

6.33 Another way to protect unregistered interests is through encumbrances.<sup>329</sup> Under section 62, the registered proprietor is bound by encumbrances listed on the title. This is designed to secure an annuity, rent charge or fixed amount. However, there is evidence that encumbrances are used as a de facto way to note unregistrable instruments, such as covenants in gross, on the register.

### PROBLEMS WITH THE CURRENT SYSTEM?

6.34 The position of unregistered interests raises three principal issues. First, the register does not offer a complete picture of the interests relating to a piece of land. The absence of any evidence of unregistered interests on the register challenges the “mirror principle”, which states that the register should reflect everything that is material to the title. Anyone searching the register will not get a complete picture of the title due to the possible existence of interests that have not yet been registered, or interests that are currently incapable of registration, such as trusts.

6.35 Secondly, unregistered interests are often in a vulnerable position and can be overridden by other interests arising later in time. Trusts and unregistered interests capable of registration will be overridden by subsequent registered interests where there is no fraud, unless there is a viable in personam claim.

6.36 While unregistered interests can be protected by a caveat system, this is only designed to give temporary protection. Further, there is evidence that caveats are infrequently lodged to protect interests during the registration gap, that is, the gap before the interest is registered.<sup>330</sup> Caveats do not give priority to equitable interests, although failure to lodge a caveat may affect an interest’s priority. This means that the rules of equitable priority must be applied. Professor Ronald Sackville has criticised this position:<sup>331</sup>

324 Property Law Act 2007, s 307(4).

325 Property Law Act 2007, s 307(5).

326 Hinde McMorland & Sim, above n 296, para 17.014. See *Town & Country Marketing Ltd v McCallum*, above n 301, paras 30–33.

327 Property Law Act 2007, s 307(1)(c).

328 See Property Law and Equity Reform Committee, above n 323, 41–42; 63–65.

329 See Land Transfer Act 1952, s 101(4).

330 O’Connor, above n 308, 264, footnote 98.

331 Ronald Sackville “The Torrens System – Some Thoughts on Indefeasibility and Priorities” (1973) 47 ALJ 526, 541. See also Mary-Anne Hughson, Marcia Neave and Pamela O’Connor “Reflections on the Mirror of Title: Resolving the Conflict between Purchasers and Prior Interest Holders” [1997] 21 MULR 460, 479.

The failure to develop precise criteria for the resolution of contests between unregistered interests has produced considerable uncertainty and very little encouragement to the holder of an unregistered interest to note his interest on the register by way of a caveat.

- 6.37 Thirdly, there is considerable confusion surrounding the position of unregistered and, in particular, unregistrable interests. Case law suggests that some interests incapable of registration are outside the Torrens system and override indefeasible title.<sup>332</sup> However, this line of authority has not been subject to much discussion or analysis and there is limited recent case law on the matter. Further, it is not finally decided whether unregistrable interests (with the exception of trusts) are caveatable. It is evident that the law relating to these interests is in need of clarification.

Q26 Should the register accurately reflect or “mirror” the interests that relate to a particular piece of land? That is, should unregistered interests that affect land be able to be included on the computer register?

Q27 Should there be greater protection for unregistered interests?

## PROPOSAL FOR REFORM – INTEREST RECORDING

- 6.38 Because there are problems with the position of unregistered interests under the current system, it is necessary to consider options for reform. The question of how unregistered interests could be reflected on the register has been considered in other jurisdictions and some have adopted systems that allow unregistered interests to be noted on the register in a way that confers priority over subsequent interests, whether through the use of the caveat system or through an interest recording system. New Zealand is moving towards electronic conveyancing for all transactions. This would have implications for the recording of unregistered interests.
- 6.39 This chapter considers the following options:
- a notification system (as used for covenants in New Zealand);
  - a caveat system that records priorities;
  - an interest recording system (as suggested by the Canadian Model Land Recording and Registration Act); and
  - the English and Welsh recording system for minor interests.
- 6.40 A useful starting point for this discussion is a brief description of the deeds system. The deeds system provided a record of the instruments affecting title: “it was a system of registration of instruments, not a system of registration of title”.<sup>333</sup> This meant the existence of the rights themselves did not depend on their registration and registration could not validate a void instrument. Registration could, however, grant priority.
- 6.41 A system that records interests and grants priority without conferring ownership has some of the features of a deeds registration system.<sup>334</sup> Pamela O’Connor believes that this is a viable way to protect unregistered interests as this system

332 See *Carpet Import Co Ltd v Beath and Co Ltd*, above n 298, 59.

333 Hinde McMorland & Sim, above n 296, para 7.027.

334 O’Connor, above n 308, 265.



will give more complete information about prior interests, offer a clear rule for determining priority, and is likely to be effective because prior owners are best placed to protect their own interests by registering them.<sup>335</sup>

### Notification of interests

- 6.42 In New Zealand, the rules for notification of covenants on the register under section 307 of the Property Law Act 2007 resemble a deeds registration system.<sup>336</sup> All the notifications are in one place, that is, on the register, so this avoids some of the disadvantages of the deeds system. This notification process could be adapted to protect other unregistered interests. As O'Connor says "[o]ther unregistered interests could be protected by section 62 [LTA], or some similar device, but this possibility has been overlooked".<sup>337</sup>

### Caveats and priority

- 6.43 Other jurisdictions have adapted the caveat system to record priorities. This is the position in several Canadian jurisdictions and in Singapore.<sup>338</sup> The Land Titles Act of Singapore provides:<sup>339</sup>

- (1) Except in the case of fraud, the entry of a caveat protecting an unregistered interest in land under the provisions of this Act shall give that interest priority over any other unregistered interest not so protected at the time when the caveat was entered.
- (2) Knowledge of the existence of an unregistered interest which has not been protected by a caveat shall not of itself be imputed as fraud.

- 6.44 Likewise, the Manitoba Real Property Act provides:<sup>340</sup>

The filing of a caveat by the district registrar or by a caveator gives the same effect, as to priority, to the instrument or subject matter on which the caveat is based, as the registration of an instrument under this Act.

- 6.45 In 1989, the Victorian Law Reform Commission recommended similar changes to their caveat system:<sup>341</sup>

Caveats should determine priority. Lodgment of a caveat before another person lodges a caveat or seeks registration should give priority to the caveator. Failure to lodge a caveat before another person registers or protects their interest should postpone the interest.

335 Ibid, 266.

336 Ibid, 260. See also Douglas J Whalan *The Torrens System in Australia* (Law Book Co, Sydney, 1982) 97.

337 Ibid, 260. See discussion above, paras 6.31-6.32.

338 Land Title Act RSBC 1996 c 250, s 31; Land Titles Act RSA 2000 c L-4, ss 135, 147; Real Property Act CCSM c R30, s 155; Land Titles Act 1993 (Sing), s 49.

339 Land Titles Act 1993 (Sing), s 49.

340 Real Property Act CCSM c R30, s 155.

341 Law Reform Commission of Victoria *Priorities* (LRCV R 22, Melbourne, 1989) 12.

- 6.46 These recommendations have not been adopted in Victoria. However, they offer a useful suggestion of how the caveat system could be modified to more effectively record interests and priorities. It has been claimed that these recommendations “amount to a proposal for the caveat system to be converted into a system of interest recording similar to the deeds registration schemes”.<sup>342</sup>
- 6.47 Such a proposal has been suggested for the New Zealand system.<sup>343</sup> It has received support from Dr McMorland because of the present confusing application of the doctrine of notice and the rules regarding fraud.<sup>344</sup>
- With the advent of electronic registration, it could be possible to use the caveat system to determine the priority of interests using the time of lodgement of a valid caveat. This could apply both to the priority between equitable interests inter se and the priority between equitable interests and later legal interests. Under such a system, priority would be determined by the time of lodgement of the caveat in exactly the same way that priority between registered interests is determined by the time of registration.
- 6.48 Lodging a caveat is a relatively easy process as the Registrar “is not required to be satisfied that the caveator is in fact or at law entitled to the estate or interest claimed in the caveat”.<sup>345</sup>
- 6.49 These changes to the caveat system could only operate fairly if the broad view of which unregistered interests were caveatable was adopted.<sup>346</sup> There also may be the need to create certain exceptions: first, fraud,<sup>347</sup> and, secondly, situations where it is inappropriate to determine priority by order of caveats, for example, where the prior interest holder was unaware of the interest, as is often the case with a constructive trust.<sup>348</sup>
- 6.50 The consequence of caveats recording priority would be that where there are two or more unregistered interests in a piece of land, the interest first protected by a caveat would take priority over all others. The existence of the caveat would prohibit any interest being registered that was incompatible with the initial caveat. Priority would be determined according to who lodges the caveat first and not according to equitable principles. This would be a powerful incentive to record unregistered or unregistrable interests and it would lead to increased certainty in the application of the law.
- 6.51 It is suggested by commentators that this would be consistent with the original goals of a Torrens system: there would be an incentive to caveat and this would lead to a more accurate register, also “it is likely to be cheaper to require an earlier equitable interest holder to caveat, than to require all persons purchasing interests in land to ensure that no prior interest has been created”.<sup>349</sup>

342 Hughson, Neave and O'Connor, above n 331, 488.

343 See Douglas J Whalan “The Position of Purchasers Pending Registration” in GW Hinde (ed) *The New Zealand System Centennial Essays* (Butterworths, Wellington, 1971) 120, 133–4.

344 McMorland, above n 322, 99.

345 Land Transfer Act 1952, s 148A.

346 Hughson, Neave and O'Connor, above n 331, 488.

347 Ibid, 488.

348 Ibid, 488.

349 Ibid, 488.

- 6.52 Permitting caveats to record priority could provide a disincentive to register registrable interests. However, caveats are liable to be challenged and no indefeasible interest would be granted until registration.

### Interest recording system

- 6.53 An alternative to the modification of the caveat system is to expressly combine a title registration system with an interest recording system. Under such a system, certain interests would continue to be registered, while other interests that are currently unregistered would be recorded on the register. Interest recording would confer priority but would not in itself confer ownership.
- 6.54 An interest recording system working in tandem with a title registration system was recommended in 1990 by the Canadian Joint Land Titles Committee.<sup>350</sup> Although the Committee's proposals have never been fully adopted,<sup>351</sup> these particular recommendations correspond to the caveat-priority system that was already in place in most provinces, and the Committee's recommendations were merely designed to rationalise these systems and make their consequences explicit.<sup>352</sup>
- 6.55 The interest recording system proposed by the Committee in its Model Act confirms priority over all other interests but not ownership, while title registration confirms priority and ownership. The Committee recommended combining the two systems as:<sup>353</sup>
- title registration cannot extend to all interests; and
  - interests can be recorded immediately without following the procedures necessary for registration.
- 6.56 Under the Model Act any interest in land can be recorded.<sup>354</sup> In contrast, only certain interests can be registered. These interests are fee simple interests and a "limited number of estates and interests which are sufficiently well understood and recognized by the general law that registration will be efficient and useful".<sup>355</sup>

350 Joint Land Titles Committee (Alberta, British Columbia, Manitoba, The Council of Maritime Premiers, Northwest Territories, Ontario, Saskatchewan, Yukon) *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (Edmonton, 1990).

351 A type of interest recording appears to have been adopted by Saskatchewan's Land Titles Act SS 2000 c L-5.1. Title (that is, surface title, mineral title or condominium title) can be registered and is conclusive proof of ownership, that is it is indefeasible, under section 13(1), except where specified exceptions apply (section 15). However, interests in land, which are less than title, and, according to section 50(1), are either recognised in law (for example, leases, easements and mortgages) or registrable according to any statute, or under the regulations are treated differently. While these interests can be registered under the Act, this "registration" is, in essence, what the Joint Land Titles Committee would call "recording". Under section 54(3) the interest "is only effective according to the terms of the instrument or law on which the interest is based and is not deemed to be valid through registration". In other words, the interest is not indefeasible.

352 *Ibid*, 13–14.

353 *Ibid*, 14.

354 *Ibid*, Model Land Recording and Registration Act, s 4.1. An interest in land includes all interests recognised by the general law (s 1.1(e)).

355 *Ibid*, 21. Section 5.1 of Model Land Recording and Registration Act sets out these interests.

6.57 The result of such a system would be similar to a caveat-based recording system. The interest that was recorded first in time would take priority over interests that subsequently arise. This would prevent the recording or registration of interests that were incompatible with that interest. If unrecorded, interests would be defeated by subsequent recorded interests. Unlike a caveat, a recorded interest would not prevent any dealings with the land, but subsequent purchasers would take land subject to recorded interests. This would improve facility of transfer.<sup>356</sup>

### English and Welsh system

6.58 The system in England and Wales is also effectively a title registration system combined with an interest recording system. This system has three tiers of interests: registrable interests, overriding interests and minor interests. Minor interests are protected either by notices or restrictions.

6.59 A notice is described as “an entry in the register in respect of the burden of an interest affecting a registered estate or charge”.<sup>357</sup> Notices can be entered by agreement or unilaterally.<sup>358</sup> The Land Registration Act 2002 Act (England and Wales) sets out interests, such as trusts, that cannot be protected by a notice.<sup>359</sup> Trusts are excluded because of the nature of notices:<sup>360</sup>

A notice protects an interest in registered land when it is intended to bind any person who acquires the land. It is therefore apposite in relation (for example) to the burden of a restrictive covenant or an easement. It is not the appropriate means of protecting beneficial interests under trusts.

6.60 The existence of a notice “does not necessarily mean that the interest is valid, but does mean that the priority of the interest, if valid, is protected for the purposes of sections 29 and 30”.<sup>361</sup> The general rule regarding priority of interests under the 2002 Act is that priority is determined by their date of creation regardless of when they are registered.<sup>362</sup> However, sections 29 and 30 provide that, where a registrable disposition of an estate or charge is made, unless a minor interest is protected by a notice, the disposition will take priority.

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356 See McCrimmon, above n 316, 313.

357 Land Registration Act 2002 (Eng), s 32(1).

358 In the case of a unilateral notice the registrar must give notice of it to the registered proprietor of the estate to which it relates (Land Registration Act 2002 (Eng), s 35(1)). A unilateral notice must indicate that it is unilateral and identify the beneficiary of the notice (Land Registration Act 2002 (Eng), s 35(2)). A registered proprietor or a person entitled to be a registered proprietor could apply to remove a unilateral notice (Land Registration Act 2002 (Eng), s 36).

359 Under section 33 of the Land Registration Act 2002 (Eng) these are as follows: a trust of land or a settlement under the Settled Land Act 1925; a lease that is for less than three years and is not required to be registered; a restrictive covenant between lessor and lessee; an interest registrable under the Commons Registration Act 1965; an interest in any coal, coal mine or ancillary right.

360 Law Commission and HM Land Registry *Land Registration for the Twenty-first Century: A Conveyancing Revolution: Land Registration Bill and Commentary* (LC 271, the Stationery Office, London, 2001) 95.

361 Land Registration Act 2002 (Eng), s 32(3).

362 See Land Registration Act 2002 (Eng), s 28.

- 6.61 Minor interests can also be protected by restrictions. Restrictions are often used to protect beneficial interests under trusts.<sup>363</sup> A restriction is an entry on the register “regulating the circumstances in which a disposition of a registered estate or charge may be the subject of an entry in the register”.<sup>364</sup> A restriction is designed to prohibit the entry of any disposition or of a specified disposition indefinitely or for a fixed period.<sup>365</sup>
- 6.62 An application to enter a restriction can be made by a person if he or she is the registered proprietor, the registered proprietor consents to the application, or the person has a sufficient interest in the entry.<sup>366</sup>
- 6.63 The Land Registration Act 2002 (England and Wales) was drafted to anticipate the implementation of an electronic system, under which the only way to create or transfer interests is by registration or the entry of a notice of the register.<sup>367</sup> Although the Act provided for priority to be determined by date of creation,<sup>368</sup> once such an electronic system was in operation the date of registration or of the entry of a notice in reality would determine priority:<sup>369</sup>

The necessary corollary of that is that the register will in time become conclusive as to the priority of such interests because the date of the creation of an interest and its registration will be one and the same.

### Conclusion

- 6.64 If it is accepted that it is desirable to change the way in which unregistered interests are treated under the LTA, a method could be developed by which unregistered interests can be noted on the title. This could be done by modifying the caveat system or adopting a new interest recording system.
- 6.65 The result of such a system would be that, once a caveat was lodged or an interest was recorded, that interest would take priority over other interests that have not yet been recorded or registered. However, this would not confer an indefeasible title and would not be proof of the existence of the interest. As is currently the case with caveats, in lodging or recording the interest, the interest holder would not have to prove that he or she was entitled to the interest, unless it was challenged.

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363 See chapter 8.

364 Land Registration Act 2002 (Eng), s 40.

365 Land Registration Act 2002 (Eng), s 40(2).

366 Land Registration Act 2002 (Eng), s 43.

367 Section 93 of the Land Registration Act 2002 (Eng) provides that rules may provide that certain dispositions will only take effect if they are in electronic form and simultaneously communicated to the registrar.

368 See Land Registration Act 2002 (Eng), s 28.

369 Law Commission and HM Land Registry, above n 360, 78.

Q28 How should priority of interests be determined?

Q29 Should New Zealand adopt some form of interest recording system to protect unregistered interests?

Q30 If so, what form should this system take and what interests should it cover?

Q31 Are there any other issues to be considered surrounding unregistered interests?

# Chapter 7

## Caveatability of interests

- INTRODUCTION** 7.1 A caveat can be lodged to prevent dealings with land. This is an important mechanism to protect interests that have not (or possibly cannot) be registered. Caveats are not generally designed to be a permanent record of an interest and can be removed by the caveator withdrawing the caveat;<sup>370</sup> by the registered proprietor of the affected land applying to the High Court for an order that the caveat be removed;<sup>371</sup> or by lapsing.<sup>372</sup>
- 7.2 This chapter will consider what interests should be caveatable. First, it will consider whether interests in an unregistrable form or inherently incapable of registration are caveatable, and, secondly, it will consider whether a registered proprietor should be able to caveat his or her own title.
- 7.3 The preceding chapter examined unregistered interests in general, and considered whether the protections of those interests provided by the caveat system and other mechanisms are adequate. More mechanical issues relating to matters such as the particulars of caveats, the Registrar's role in lodging them, and the lapsing of caveats is discussed in chapter 18.

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### WHAT INTERESTS ARE CAVEATABLE?

- 7.4 Section 137(1) of the LTA provides that a person can lodge a caveat against dealings if the person:
- (a) claims to be entitled to, or to be beneficially interested in, the land or estate or interest by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied, or otherwise; or
  - (b) is transferring the land or estate or interest to any other person to be held in trust.

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<sup>370</sup> Land Transfer Act 1952, s 147.

<sup>371</sup> Land Transfer Act 1952, s 143(1).

<sup>372</sup> Land Transfer Act 1952, ss 145 and 145A.

## Are unregistrable interests caveatable?

### *The narrow view*

- 7.5 It has sometimes been said that interests contained in instruments that are in an unregistrable form cannot be protected by a caveat because the only function of a caveat is to protect an interest before its registration. For example, Lord Guest in *Miller v Minister of Mines* said:<sup>373</sup>

The caveat procedure is an interim procedure designed to freeze the position until an opportunity has been given to a person claiming right under an unregistered instrument to regularise the position by registering the instrument.

- 7.6 This view has been followed in some subsequent cases in New Zealand and Australia.<sup>374</sup>
- 7.7 However, the narrow view has been criticised in both case law and by commentators in New Zealand and Australia. The authors of Hinde McMorland & Sim consider that the narrow view would lead to serious inconvenience. In their opinion: “the protection of a caveat would be denied to equitable interests such as those arising under restrictive covenants, under equitable liens and under contracts of sale where the vendor had not been paid”.<sup>375</sup>
- 7.8 There has also been a suggestion that the narrow view of caveatability is contrary to the practicalities of conveyancing, for example, Justice Chilwill has said:<sup>376</sup>

It has been my experience since first commencing practice that caveats have commonly properly been lodged based on beneficial interests in land created by unregistrable agreements or other instruments such as, for example, long term agreements for sale and purchase of land and informal lease agreements.

373 *Miller v Minister of Mines* [1963] NZLR 560, 569 (PC) Lord Guest.

374 For example, in 1988, Smellie J favoured the restrictive interpretation: *Brown v Healy* (25 July 1988) HC AK A 147/84, 13. For an example of an Australian case see *Classic Heights Pty Ltd v Black Hole Enterprises Pty Ltd* (1994) V ConvR 54-506. This case is discussed in Nimal Wikrama “Do Caveats need Supporting by Registrable Instruments” (1995) LJ 101. See also *George v Biztole Corporation Pty Ltd* (1995) V ConvR 54–519.

375 Hinde McMorland & Sim *Land Law in New Zealand* (loose leaf, LexisNexis, Wellington, 2005) para 10.006. For a list of interests that could not be caveated in Australia see Mary-Anne Hughson, Marcia Neave and Pamela O’Connor “Reflections on the Mirror of Title: Resolving the Conflict between Purchasers and Prior Interest Holders” (1997) 21 MULR 460, 469.

376 *Equiticorp Finance Group Ltd v Smart* (17 February 1989) HC AK M 2025/88, Chilwell J, 16.



*The wider view*

- 7.9 Because of these criticisms a wider view of caveatability has been developed: that any equitable interest in land, even where it is in an unregistrable form can support a caveat.<sup>377</sup> There are several arguments in favour of this view, first, it is consistent with the natural meaning of section 137.<sup>378</sup>
- 7.10 Secondly, this interpretation of section 137 is not necessarily inconsistent with *Miller v Minister of Mines*. As Gallen J said:<sup>379</sup>
- It does not seem to me that the provisions of the Act contemplate only registrable interests or interests capable of being made registrable being protected in this way ... I do not think that the position of the Privy Council [in *Miller v Minister of Mines*] is necessarily to the contrary ... [I]t may be that it is authority for no more than the proposition that if a transaction is capable of being made registrable, then it should be made registrable and the caveat is of significance only until such time as that can be done.
- 7.11 Thirdly, the majority of the authorities in New Zealand and Australia favour the broad approach.<sup>380</sup> In the Australian context Peter Butt has said that “[i]t is clearly inconsistent with long-settled judicial opinion in this country permitting caveats to protect proprietary interests irrespective of the existence of an instrument, present or prospective, registrable or otherwise”.<sup>381</sup> In New Zealand, McMorland has said that “the wider view is not only the better, but the correct one, and that there is sufficient weight of authority now for the point to be regarded as settled in that direction”.<sup>382</sup>
- 7.12 Although the question of whether unregistrable interests are caveatable does not appear to have been definitively decided in a New Zealand court, in *Waitikiri Links v Windsor Golf Club*, the Court of Appeal expressed a provisional view in favour of permitting caveats for interests in an unregistrable form; in this case the interest in question was a deed of lease.<sup>383</sup>

377 For a full discussion of the debate see Hinde McMorland & Sim *Land Law in New Zealand*, above n 375, para 10.006. See also Andrew Alston and others *Brooker's Land Law* (loose leaf, Brookers, Wellington, 1995) para 2.7.06. For a discussion of the debate in Australia see Hughson, Neave and O'Connor “Reflections on the Mirror of Title”, above n 375, 463–476; Adrian Bradbrook and others *Australian Real Property Law* (3 ed, Lawbook Co, Sydney, 2002) 160–162; Peter Butt *Land Law* (5 ed, Lawbook Co, Sydney, 2006) 740.

378 Don McMorland “Can an Unregistered Interest Support a Caveat?” (1996) 7 BCB 185, 186.

379 *Superannuation Investments Ltd v Camelot Licensed Steak House (Manners Street) Ltd*, (10 March 1988) HC WN M 695/87, 4–5, Gallen J. See also Shannon Lindsay *Caveats Against Dealings: In Australia and New Zealand* (Federation Press, Annandale, 1995) 58–59: “The real point made by the Privy Council in *Miller v Minister for Mines* is that the lodgement of a caveat is not intended to be a permanent substitute for registration of an interest and therefore a caveat protecting a registrable interest will not be permitted to remain indefinitely on the title, but only for a limited period in order to allow the caveator an opportunity to secure registration of its interest”.

380 For New Zealand, see *Whiteleigh Holdings (New Zealand) Ltd (in receivership) v Whiteleigh Pacific Resources Limited* (19 February 1987) HC WANG M 6/86, 22–24 McGechan J; *Equiticorp Finance Group Ltd v Smart* (17 February 1989) HC AK M 2025/88, 10 and 16 Chilwell J; *Superannuation Investments Ltd v Camelot Licensed Steak House (Manners Street) Ltd* above n 379, 4–5; *Waitikiri Links Ltd v Windsor Golf Club Incorporated* (1998) 8 NZCPR 527 (CA). For Australia see, for example, *Crampton v French* (1995) V ConvR 54-529; *Composite Buyers Ltd v Soong* (1995) 38 NSWLR 286, 288 (NSWSC) Hodgson J. See also Butt, above n 377, 740, footnote 206 for a list of cases supporting the wider view.

381 Butt, above n 377, 740.

382 McMorland, above n 378, 187.

383 *Waitikiri Links Ltd v Windsor Golf Club Incorporated*, above n 380, para 4 Blanchard J for the Court.

- 7.13 The debate was also considered in a recent High Court case, *Wellesley Club Inc v Wellesley Property Holdings*,<sup>384</sup> where Associate Judge Gendall favoured a broad view as expressed in the New South Wales case *Composite Buyers v Soong*.<sup>385</sup> Associate Judge Gendall stated that “for the purposes of determining whether there is a reasonably arguable case to the caveatable interest claimed, an equitable interest in land which gives relief against the land itself will support the caveat”.<sup>386</sup>
- 7.14 Lastly, there are policy arguments in favour of allowing all equitable interests in land to be protected by a caveat. After a survey of the relevant authorities and analysis of two cases that represent the opposing sides in the debate,<sup>387</sup> Hughson, Neave and O’Connor also indicate a preference for the broader view:<sup>388</sup>

Permitting the holders of unregistrable interests to caveat would provide them with some protection, without undermining the central aim of protecting purchasers transacting on the faith of the register, who themselves become registered... [I]t would be desirable for Torrens legislation to be amended to place the caveatable status of unregistrable interests beyond doubt.

- 7.15 McMorland also submitted that, as a matter of policy, all equitable interests should be able to protected as:<sup>389</sup>

An owner of an equitable interest not ultimately capable of registration under the system, leads a precarious existence, having few avenues available for the protection of the interest either against the creation of subsequent interests which could take priority in equity, possibly for failure to lodge a caveat, or against the creation by registration of later legal interests, which a caveat might have prevented.

### Options for reform

- 7.16 The debate as to what interests are caveatable is longstanding. Regardless of the outcome of the debate, the question of caveatability needs to be expressed more clearly in the legislation. A new LTA should clarify what interests are caveatable.

Q32 What interests should be caveatable?

384 *Wellesley Club Inc v Wellesley Property Holdings* (15 March 2007) HC WN CIV-2006-485-2688, para 37, Associate Judge Gendall.

385 *Composite Buyers Ltd v Soong* (1995) 38 NSWLR 286, 288 (NSWSC) Hodgson J.

386 *Wellesley Club Inc v Wellesley Property Holdings*, above n 384, para 38. For a discussion of this case see *Brooker’s Land Law*, above n 377, para 2.7.06.

387 *Classic Heights Pty Ltd v Black Hole Enterprises Pty Ltd* (1994) V ConvR 54-506 and *Crompton v French* (1995) V ConvR 54-529.

388 Hughson, Neave and O’Connor, above n 375, 476.

389 McMorland, above n 378, 187

REGISTERED  
PROPRIETORS

- 7.17 Another issue is whether this provision entitles registered proprietors to caveat their own title.<sup>390</sup> In *Re Haupiri Courts Ltd (No 2)* Richmond J held:<sup>391</sup>

[A] registered proprietor cannot lodge a caveat against dealings merely because he is the registered proprietor. He must go further and establish some set of circumstances over and above his status as registered proprietor which affirmatively gives rise to a distinct interest in the land. In such circumstances it would seem that the fact that he is the registered proprietor of an estate or interest under the Act may not prevent him lodging a caveat.

- 7.18 Therefore, where a registered proprietor has some interest beyond the interest of a registered proprietor he or she may lodge a caveat. However, where a proprietor suspects impropriety that could lead to the registration of a fraudulent instrument defeating their title, it appears that a caveat cannot be lodged.

- 7.19 The position that a registered proprietor can caveat his or her title where he or she has something beyond the interest of a registered proprietor was confirmed in *Whiteleigh Holdings (New Zealand) Ltd v Whiteleigh Pacific Resources Ltd*.<sup>392</sup> McGechan J held that the interest of an unpaid vendor was “a status distinct from its status as a registered proprietor”<sup>393</sup>

- 7.20 In contrast, some Australian states expressly allow a registered proprietor to lodge a caveat. The New South Wales Real Property Act provides:<sup>394</sup>

Any registered proprietor of an estate or interest who, because of the loss of a relevant certificate of title or some other instrument relating to the estate or interest or for some other reason, fears an improper dealing with the estate or interest by another person may lodge with the Registrar-General a caveat prohibiting the recording of any dealing affecting the estate or interest.

- 7.21 It would be useful to clarify whether registered proprietors should be able to lodge a caveat to protect their interest as registered proprietors and whether it should be expressly permitted in the new LTA.

Q33 Should a registered proprietor be able to caveat his or her own title?

390 See Tom Bennion and others *New Zealand Land Law* (Brookers, Wellington, 2005) 225–226.

391 *Re Haupiri Courts Ltd (No 2)* [1969] NZLR 348, 357 (SC) Richmond J.

392 *Whiteleigh Holdings (New Zealand) Ltd (in receivership) v Whiteleigh Pacific Resources Ltd*, above n 380.

393 *Ibid*, 24.

394 Real Property Act 1900 (NSW), s 74F(2); See also Land Title Act 1994 (Qld), s 122(1)(c).

# Chapter 8

## Trusts on or off the register?

### PRESENT LAW AND ISSUES

#### New Zealand law

- 8.1 Section 128(1) of the LTA provides that except in relation to certain public lands, “... no entry shall be made in the register of any notice of trusts, and no such entry, if made, shall have any effect”. Despite the fact that the first Torrens Act made specific provision for trusts (in the Real Property Act 1858 (SA) sections 56 and 57), “keeping trusts off the register” has come to be regarded as one of the objects of the Torrens system.<sup>395</sup> To reinforce this, the breach by a registered proprietor of any trust is not compensatable (section 178(a)).
- 8.2 However, section 128(2) provides that “Trusts affecting land under this Act may be declared by any deed or instrument; and that deed or instrument, ... may be deposited with the Registrar for safe custody and reference, but shall not be registered”. This subsection is apparently no longer used,<sup>396</sup> and as the authors of *Adams’ Land Transfer* have pointed out, it has no effect in law or equity.<sup>397</sup> In any event, it seems there is no way a prospective purchaser would know to search for a deposited trust deed.
- 8.3 The rights of beneficiaries can be protected, in theory, through entry of a caveat by a beneficiary (section 137). Such protection would not assist a beneficiary without knowledge of a trust in their favour, such as an infant (although the Registrar may caveat on behalf of an infant beneficiary, as well as on behalf of a person of unsound mind or who is absent from New Zealand, or for the prevention of fraud or improper dealings: section 211(d)), or, just possibly, a wife whose husband was sole registered proprietor of a matrimonial home.

395 Douglas J Whalan “Partial Restoration of the Integrity of the Torrens System Register: Notation of Trusts and Land Use Planning and Control” [1970] 4 NZULR 1, 13. Section 56 of the 1858 Act provided that “... the Registrar-General ... shall enter the particulars of such bill of encumbrance or bill of trust in the register-book, and shall endorse upon the grant, certificate of title, lease or other instrument ... the date of the bill of encumbrance or bill of trust, ... and the names and descriptions of the parties for whose benefit the same is created, or for whose use such land is vested in trust, together with the names and descriptions of the trustees, if any ...”

396 Information from Land Information New Zealand (LINZ) on 7 March 2008.

397 Struan Scott and others *Adams’ Land Transfer* (loose leaf, LexisNexis, Wellington, 2007) para S128.4.

- 8.4 Beneficiaries can also to some extent be protected by the transferor applying to enter the words “No survivorship” on the title (section 130).<sup>398</sup> The entry of the words “no survivorship” on the register has been held to indicate that the land is trust property.<sup>399</sup> After such an entry has been made, it is not lawful for any less number of joint proprietors than the number registered to transfer or deal with the land without the sanction of the court.<sup>400</sup> Professor Whalan has said that this provision gives only limited protection because, if there is a full number of joint proprietors, they could deal with the land contrary to the trust deed without the consent of the court, and transfer to a bona fide purchaser putting an end to the trust so far as it affected the land.<sup>401</sup> The beneficiaries of a trust would be left with only in personam rights against the trustees.

### Variable protection of trust beneficiaries in Australian Torrens legislation

- 8.5 In the Land Titles Act 1980 (Tas), section 132 provides that particulars of a trust may not be recorded on the register, but a dealing may state that a person is a trustee where the person is named as a trustee pursuant to an Act. In general, in Australian states, the legislation does not permit a person to be registered as a trustee (with some specific exceptions such as charitable trusts). But (as in New Zealand) trust deeds may be deposited with Registrars for safe keeping and reference. In New South Wales, and in the Australian Capital Territory, if such a deed is deposited, the Registrar-General *must* caveat to forbid registration of an instrument not in accordance with the trust (section 82(3) of the Real Property Act 1900 (NSW)). In Western Australia, where a trust deed has been deposited in the registry, the commissioner *may* protect the persons beneficially interested in that trust “in any manner he thinks fit” (section 55(3) of the Transfer of Land Act 1893 (WA)).
- 8.6 In some cases, as in New Zealand, “no survivorship” may be noted on the register where trustees are registered as joint proprietors (see, for example, section 163 of the Real Property Act 1886 (SA)), which should alert a purchaser to the existence of a trust. These provisions would seem to indicate that it was the intention of the legislature both to protect beneficiaries and also to give notice to purchasers of the existence of a trust.

### Exceptions

- 8.7 In most jurisdictions there are exceptions to the non-registration of trusts, usually for public trusts and charities. There may also be exceptions provided by statutes that specifically permit registration of trusts. An important statute

398 See *Re Bayly* (1985) 2 NZCPR 363, *Atkinson & Borman v Registrar-General of Land* (4 September 2003, High Court Whangarei CIV 2003-488-901, Heath J), *An Application by Loyal Orange Institution of New Zealand (Inc)* (10 April 1996, High Court, Christchurch, M476/94, Panckhurst J), *In re Bunton* (4 July 2008, High Court Auckland CIV 2008-404-003649, Wylie J). In this last case Justice Wylie made orders under sections 123 and 133 of the LTA sanctioning registration of a transmission and transfer of interest in the property.

399 See *In re “the Taranua Club”* (1908) 27 NZLR 928 (SC); and *In re Main (Deceased)* [1931] NZLR 670 (SC); and *Main v District Land Registrar* [1939] NZLR 220 (SC) relied on by Roper J in *In re Robertson* (1943) 44 SR (NSW) 103, cited in Douglas J Whalan *The Torrens System in Australia* (Law Book Co Ltd, Sydney, 1982) 123.

400 *In re Denniston and Hudson* [1940] NZLR 255 (SC).

401 *The Torrens System in Australia*, above n 399, 127. See also, *Re Bayly*, above n 398, 367 per Barker J.

in New Zealand is Te Ture Whenua Maori Act 1993; section 220A provides that trustees of a trust may direct that LTA land be registered in the name of the trust or tipuna (section 220A(2)). Subsection (3) requires the Register-General to implement a direction under subsection (2) on receipt of a copy of that direction from the Registrar of the Māori Land Court and an accompanying certificate from the latter confirming the direction.<sup>402</sup> The provision applies despite anything in the LTA or any other Act or rule of law.

### Queensland and Northern Territory

- 8.8 Sections 109 to 110A of the Land Title Act 1994 (Qld) provide that a person may be registered on the freehold land register as trustee of an interest in a lot, by the registration of a transfer to the person as trustee, or a request to vest the land in that person as a trustee (section 109). A transfer may be lodged to transfer the interest to the trustee or declare the trust (section 110). A request to vest is used to record a transmission by bankruptcy or a vesting that gives effect to an order under the Trusts Act 1973 or another Act (section 110A). A trust dealing must be accompanied by the instrument of trust. However, the details of the trust deed are deposited with the Registrar. The deposited deed, whilst it is imaged and searchable, does not form part of the register.
- 8.9 The consequence of holding the property as trustee is that, by virtue of section 30 of the Land Title Act 1994, all dealings with that interest will be examined in light of the fact that the transaction is governed by the trust deed and trusts legislation, alongside the usual considerations.<sup>403</sup> Sections 109 to 110A are discretionary, hence it is not mandatory for a trustee to be registered as trustee on the title; the trust may remain undisclosed.
- 8.10 It is the current practice of the Queensland Titles Office for a senior examiner to scrutinise trust dealings to ensure that the dealing is not in breach of trust. If there is any appearance of impropriety, the instrument will be requisitioned and the lodging party will be requested to provide authority for that dealing. The instrument will not be registered if the dealing constitutes an unauthorised breach of trust.<sup>404</sup> In Queensland, if a purchaser has knowledge of a trust, it is prudent for him or her to investigate further in case the transfer is in breach of trust and will be unable to be registered. Section 189(1)(a) provides that there is no entitlement to compensation for a breach of trust or fiduciary duty.
- 8.11 Likewise, under the Land Title Act 2000 (NT), a registered proprietor can be registered as a trustee by the instrument of transfer, although such trustee will sell or mortgage the property as an absolute proprietor, free from the trusts, unless there is a caveat.<sup>405</sup>

402 Before that happens the trustees must give to the Registrar of the Māori Land Court: (a) a direction addressed to the Registrar-General of Land, (b) a certificate identifying the beneficiaries and (c) evidence of the resolution of the beneficiaries approving the direction (section 220A(4)). But the Registrar-General does not receive a certificate identifying the beneficiaries – information from LINZ, 1 March 2008.

403 Email from Max Locke, Queensland Registrar General, 17 March 2008.

404 Ibid.

405 Land Title Act 2000 (NT), ss 125–131.

## British Columbia

- 8.12 In British Columbia, a person may be registered as a trustee with reference to the trust instrument, although the particulars of the trust cannot be entered on the register. Lawyers have said that this is a major improvement.<sup>406</sup> Section 180 of the Land Title Act 1996 provides in its first four subsections:<sup>407</sup>

### Recognition of trust estates

- (1) If land vests in a personal representative or a trustee, that person's title may be registered, but particulars of a trust created or declared in respect of that land must not be entered in the register.
- (2) In effecting registration in the name of a personal representative, the registrar must add, following the name and address of the personal representative, an endorsement containing any additional information that the registrar considers necessary to identify the estate of the testate or intestate and a reference by number to the trust instrument.
- (3) In effecting registration in the name of a trustee, the registrar must add, following the name and address of the trustee, an endorsement containing the words "in trust" and a reference by number to the trust instrument.
- (4) The trust instrument must be filed with the registrar with the application for registration of title.

### REGISTRATION OF TRUSTS AND NOTING OF TRUSTS

- 8.13 A distinction needs to be made between registration of trusts and noting of trusts on the register. The "no survivorship" provisions in effect permit a basic noting; a caveat is a more specific noting. In England, while trusts remain "off the register" (that is, they are not registered as such) there is a provision for "restrictions" to be noted on the register. As explained in chapter 6, a restriction is an entry on the register "regulating the circumstances in which a disposition of a registered estate or charge may be the subject of an entry in the register".<sup>408</sup> Restrictions enable the register to reflect the limited capacity of registered proprietors to deal with the land where appropriate, in other words they endorse the "mirror" principle. They are mainly (and commonly) used for trusts where there is no power of sale.<sup>409</sup> No disposition can be registered unless in compliance with the terms of the restriction,<sup>410</sup> which, in the case of trusts, clearly states the effect of a trust in relation to a disposition of the land. The restriction remains noted on the register although there can be an application to cancel or modify it.

### ARGUMENTS IN FAVOUR OF PUTTING TRUSTS "ON THE REGISTER"

- 8.14 The arguments below conflate registration of trusts and noting of trusts on the register. But the arguments are essentially underpinned by the "mirror" principle so would apply to either system.

406 HL Robinson "The Assurance Fund in British Columbia" (1952) 30 Can Bar Rev 445, 446; cited in Robert Stein "Torrens Title – A Case for the Registration of Trusts in New South Wales" (1982) 9 Sydney LR 605, 626.

407 Land Title Act RSBC 1996 c 250.

408 Land Registration Act 2002 (Eng), s 40.

409 Discussion with HM Land Registry staff in London on 28 July 2008. In England this is known as a power to overreach (that is, a power to provide a capital receipt to the beneficiaries).

410 Land Registration Act 2002 (Eng), s 41.

- 8.15 In 1970, Professor Whalan proposed “notation” of trusts on the register.<sup>411</sup> His arguments were that this would favour security of interests in land for the owner for the time being and for beneficiaries, and that present ways of protecting beneficiaries are inadequate from the point of view of the beneficiaries and do not assist a purchaser in finding out the true position either. A purchaser should be entitled to have full knowledge of any beneficial interests on first searching the title, rather than perhaps finding out after settlement but before registration, when proceeding with such knowledge might amount to fraud.
- 8.16 Robert Stein has put the case for registration of trusts in New South Wales.<sup>412</sup> In New South Wales, as in New Zealand, although notice of trusts may not be recorded on the title, a trust instrument may be lodged with the Registrar-General for safekeeping and reference (section 82 of the Real Property Act 1900). In New South Wales, the Registrar-General is then under a duty to record his or her caveat preventing the registration of any instrument not in accordance with the trust provisions (as was previously the case in New Zealand). These provisions are apparently rarely used.<sup>413</sup>
- 8.17 Stein’s main argument is that failure to register a trust detracts from the theory of registration that the title should be ascertainable, together with encumbrances, from an examination of the register:<sup>414</sup>
- ... if the system of registration is to keep up with modern developments in the growth and complexity of society it must reveal interests and privileges which relate to property upon the Register.
- 8.18 Further, if the protective provisions are not used (and no caveat recorded) the beneficiaries’ interests are precarious. It is also the case that non-trust settlements may be able to be registered and there seems no reason to treat these differently from trust settlements. In Queensland, section 55 of the Land Title Act 1994 allows the Registrar to record, in the freehold register, an interest in a lot for life and an interest in remainder.
- 8.19 A Registrar’s caveat can protect a person’s interests in land under section 12(1) (f) of the New South Wales Act and such a caveat will not lapse, but if the Registrar merely suspects a dealing to be in breach of trust, he or she is not entitled to prevent registration.<sup>415</sup> If the trust is lodged under section 82, however, the Registrar-General has the opportunity of seeing whether a dealing lodged for registration conforms with the trust document and so whether registration of that dealing can be refused. This means that it is initially the Registrar who interprets the validity of a transaction where there is a trust involved. Stein suggests it may be simpler and fairer if the beneficiaries were protected by registration of the trust, allowing the purchaser to know whether he or she was about to buy a law suit.

411 Whalan, above n 395, 15.

412 Stein, above n 406.

413 Ibid, 610.

414 Ibid, 614.

415 See *Templeton v Leviathan Pty Ltd* (1921) 30 CLR 34, 63 per Higgins J; 72 per Starke J (HCA).



- 8.20 Stein points out that from the early years of the setting up of Torrens systems of land transfer, it was recognised that the protection of equitable interests was an important issue that was not incompatible with the system. Registration of trusts was advocated, and, even where it was rejected, some means of protecting beneficiaries was provided.<sup>416</sup>
- 8.21 Prior to the introduction of the Land Title Act 1994, a 1989 *Working Paper of the Queensland Law Reform Commission* included Professor Whalan’s argument that the previous system whereby the trustee was not recorded on the title, in that capacity, was unsatisfactory both for beneficiaries and for persons dealing with the land who may have to decide rights claimed on inadequate information.<sup>417</sup> Although the Commission did not propose changing the system (of prohibiting the registration of trusts), it recommended that the (then) current practice, whereby the mechanics of establishing a trust leads to the existence of the trust being known to the Registrar and persons searching the register, should remain as a very cost efficient method of policing trusts.<sup>418</sup>
- 8.22 In summary, some clear system of noting the fact and restrictions of a trust would be in keeping with the original Torrens idea that the register should reflect all interests, including equitable interests, in order that a person dealing with the registered proprietor may know the true state of the title. This would enable a prospective purchaser to be more adequately and accurately informed about interests in, and encumbrances on, a specific parcel of land. It could also be more effective protection for beneficiaries.

#### ARGUMENTS AGAINST TRUSTS ON THE REGISTER

- 8.23 There appear to be two main arguments against registration of trusts. First, registration of the fact of a trust, without a requirement to deposit the trust instrument with the Registrar, would leave open the question whether a purchaser would be under an obligation to investigate compliance with the trust instrument. If registration of the fact of a trust were accompanied by a requirement to deposit the trust instrument, there might still be a question regarding a purchaser’s obligation. Examination of the trust instrument might lead to the need for further inquiry as to whether its terms had been complied with. If a process similar to that applying in Queensland were adopted, examination by a Land Information New Zealand officer might be sufficient to relieve a purchaser of further inquiry. It would be preferable for the Act to state the extent of the purchaser’s obligation in that regard.
- 8.24 Secondly, if trusts were to be registered, even optionally as in Queensland and British Columbia, the land registration system could become unnecessarily complex and burdensome for those involved in and reliant upon it. For example, if the system in place in Queensland were to be adopted, the equivalent of senior examiners at the Queensland Titles Office would be scrutinising all dealings where a trust deed had been deposited with the Registrar, to ensure that there was no breach of the relevant trust. If purchasers were obliged to ensure that

416 See authorities cited by Stein, above n n 406, 623–625, for example, the South Australian Commission of 1873 said: “the consideration of the most complete way of protecting beneficiaries has engaged our earnest and protracted attention”.

417 Queensland Law Reform Commission *Working Paper of the Queensland Law Reform Commission on a Bill in Respect of an Act to Reform and Consolidate the Real Property Acts of Queensland* (QLRC WP32, Brisbane, 1989) 157–158.

418 *Ibid*, 160.

there was no breach of trust, that might set up a train of inquiry in which the transaction costs could be significant. Imposing additional burdens on purchasers that increase the expense and complexity of property conveyances would result in consequences that the Torrens system was designed to avoid.

**SUMMARY: THE  
ISSUE AND  
OPTIONS**

- 8.25 Similar arguments apply to a much lesser extent to noting trusts on the register and there is already provision for this in the LTA. At present, however, the provisions show a degree of ambivalence; because, although trusts may not be “entered on the register” (section 128(1)), the deed or instrument “may be deposited” but “shall not be registered” (section 128(2)). Not surprisingly, the latter provision is not now used. The entering of the words “no survivorship” on the register is some sort of notification that land is trust property, and beneficiaries may caveat to protect their interests. So, in some cases, there will be notice of a trust and a prudent conveyancer would no doubt make further inquiries, or at least obtain sworn assurances that the conveyance would not be in breach of the trust.
- 8.26 The issue is first, whether it should be possible (but not obligatory) to register trusts under a system like that in Queensland, where proprietors may be registered as trustees in relevant cases, and, if so, whether they should be obliged to deposit the trust deed with the Registrar so that it may be searched (as in British Columbia). If registration as a trustee is optional, a private trust deed need not be open for public inspection. In that case, too, beneficiaries would not necessarily be protected – unless they have caveated their interest. But provisions for compulsory registration as a trustee do not appear to be a requirement in any legislation considered.
- 8.27 Or, secondly, should it be possible to note restrictions on the register in order to inform a prospective purchaser of the status of title to the land and prevent a breach of trust (particularly where trustees have no power of sale), following the English system? This would replace the current caveat and no survivorship notings.
- 8.28 The current situation, whereby trusts are not “on the register”, but are still ascertainable sometimes, may cause no real issues or problems, and the Law Commission would be reluctant to recommend changing established conveyancing practice if this is the case. A third option, therefore, would be to clarify the legislation to reflect best current practice and principle.

Q34 Is there a problem with the present provisions for trusts?

Q35 If so, should the new LTA provide that trustees can be described as such on the register?

Q36 If so, should they be obliged to deposit the trust deed with the Registrar (with a reference on the register) so that it may be searched?

Q37 Or, should the new LTA provide for a system of noting restrictions on the register, similar to that in the English legislation?

Q38 What would be the practical consequences of a system similar to that in Queensland: (a) for the registry and (b) for the purchaser?

Q39 What would be the benefits of registering trusts for beneficiaries? For purchasers? For conveyancers?

Q40 What might be the disadvantages of registration for purchasers?

Q41 Would the benefits of registration outweigh the disadvantages?

Q42 What would be the practical consequences of a system similar to that in England: (a) for the registry and (b) for the purchaser?

Q43 What would be the disadvantages and benefits of a system of noting restrictions?

# Chapter 9

## Overriding statutes

### OVERRIDING STATUTORY INTERESTS

- 9.1 Certain statutory provisions outside the LTA create legal rights, powers or charges that affect land held under that Act. In some cases where there have been conflicts between the provisions, these other provisions have been held to override the LTA. Concerns have been raised about the implications of this for the principle of indefeasibility of title underpinning our land transfer system.
- 9.2 Statutory rights affecting the title to land under the LTA, which are not noted on the register, can prevail against the title of a registered proprietor. However, to have priority over the interests of registered proprietors, these rights must be set out in statutory provisions in which there is an express direction, or clear implication, that the LTA provisions are not to apply.
- 9.3 This principle was clearly set out in *Miller v Minister of Mines*,<sup>419</sup> which examined the effect of statutory rights on land transfer titles. In that case, mining privileges were held to be valid and effective against the title of a registered proprietor under the LTA, which contained no reference to them. The Court considered several cases where such rights were held to exist even though they were not noted on the register. Cleary J set out guiding principles for courts to apply generally when any statute is inconsistent with the LTA:<sup>420</sup>
- [T]he fundamental reason why statutory interests have been accorded priority over the registered title is neither because they were in the nature of easements nor because they aided some public purpose, but because the provisions of the particular statute required that they have priority ... The determination of the question must depend upon the purpose and interpretation of the statute under which the interest arises.
- 9.4 This decision was affirmed by the Privy Council. Lord Guest said:<sup>421</sup>
- It is not necessary in their Lordships' opinion that there should be a direct provision overriding the provisions of the Land Transfer Act. It is sufficient if this is a proper implication from the terms of the relative statute.

419 *Miller v Minister of Mines* [1961] NZLR 820 (CA).

420 *Ibid*, 839 Cleary J.

421 *Miller v Minister of Mines* [1963] NZLR 560, 569 (PC) Lord Guest.

- 9.5 Commentators divide statutory rights affecting titles, on the basis of whether they are registrable, into three types:<sup>422</sup>
- Rights that do not need to be entered on the register, which override registered interests by operation of the statute creating them.<sup>423</sup>
  - Rights for which there is provision for registration, but which arise and affect a title independently of registration.<sup>424</sup>
  - Rights that need to be registered to be effective against a registered proprietor's successors, which are clearly consistent with the principle of indefeasibility.<sup>425</sup>
- 9.6 An Australian commentator considers that registrability is only one consideration in determining whether the legislature intended a statutory interest to override the LTA, and many proprietary interests can bind land whether registered or not.<sup>426</sup> Whether interests are registered or not:<sup>427</sup>
- [I]s only part of a wider problem presented by a myriad of statutes authorising decisions to be made affecting land by creating rights over it, such as easements or rights of access or entry, or by imposing charges or obligations upon owners of land. Purchasers of the land may be affected by administrative decisions the existence of which is in many instances difficult to discover before purchase ... Where a registered interest arises in circumstances accompanied by a contravention, the other statute may conflict with the indefeasibility provisions which ordinarily validate titles despite underlying defects.
- 9.7 In practice, many of the rights for which there is provision for registration, are registered. One view is that only those provisions creating rights that do not need to be entered on the register are problematic. Mining privileges are the historical example of these rights, but the conflict between them and the land transfer system was largely resolved by the Mining Tenures Registration Act 1962, Mining Act 1971 and Crown Minerals Act 1991. There are many statutes that merely affect or create limitations on the use of land but most interests are entered or noted on the register. One view is that there are good policy reasons for these statutes.

422 Hinde McMorland & Sim *Land Law in New Zealand* (loose leaf, LexisNexis, Wellington, 2005) paras 9.057–9.077.

423 For example, rights given under the Local Government Act 2002, s 181, to place water pipes on or under private land and to enter that land to service the pipes. See too, powers under the River Boards Act 1908, s 76, regarding carrying out protective or other works in relation to rivers. Compare the Environmental Planning and Assessment Act 1979 (NSW), ss 122 and 123, discussed in *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2002) 55 NSWLR 446, providing for remedies for a breach of the Act including a failure to comply with a condition subject to which a consent was granted. The condition in question was creation of an easement when a subdivision into two lots had been approved; the easement was never created and was not noted on the titles. The Court of Appeal held that, pursuant to the 1979 Act, the easement was nonetheless a burden on the title.

424 For example, Local Government Act 1974, s 461; Crown Minerals Act 1991, ss 84–85; Forestry Rights Registration Act 1983; Te Ture Whenua Māori Act 1993, s 299.

425 For example, Housing Act 1955, ss 26(4), 27(3), 28(3); Forestry Encouragement Act 1962, s 6; Resource Management Act 1991, s 237B(5); Historic Places Act 1993, s 8.

426 Pamela O'Connor "Public Rights and Overriding Statutes as Exceptions to Indefeasibility of Title" (1994) 19 MULR 649, 652.

427 *Ibid*, 652.

- 9.8 The authors of Hinde, McMorland & Sim have noted that the following statutes contain provisions that appear to provide exceptions to the principle of indefeasibility of title:<sup>428</sup>
- Property Law Act 2007;
  - Public Works Act 1981;
  - Property (Relationships) Act 1976;
  - Insolvency Act 2006;
  - Companies Act 1993;
  - Housing Act 1955;
  - Resource Management Act 1991;
  - Unit Titles Act 1972;
  - Overseas Investment Act 2005;
  - Crown Minerals Act 1991;
  - Proceeds of Crimes Act 1991 and Terrorism Suppression Act 2002;
  - Te Ture Whenua Māori Act 1993.

### Property Law Act 2007

- 9.9 Commentators suggest that certain provisions in the Property Law Act 1952 create exceptions to the principle of indefeasibility. This Act was replaced by the Property Law Act 2007, which largely brought forward these provisions. The new Act in its general application provision, section 8, is expressed to be subject to the LTA unless the Act otherwise provides. Under section 264 of the Act, the court can cancel an estate or interest granted to a third person, where a landlord has refused to renew a lease despite a tenant having fulfilled agreed conditions, and leased or sold the land to the third person. The court may also award damages or compensation under this section to the third person who was prejudicially affected. The tenant must, under section 262, apply for relief within three months of the landlord's refusal to renew the lease.
- 9.10 The court has a general discretion under section 323, where it is just and equitable, to grant relief in cases of wrongly placed structures. The court may, under section 324, look at the conduct of the parties and whether there has been unjust enrichment of one party at the expense of another. The court has the power under section 325 to vest the land occupied by the wrongly placed structure in the owner of the land affected or the intended land, and to declare the land to be free of any mortgage or encumbrance or to vary such interests. The court can also, under this section, order reasonable compensation to be paid.
- 9.11 The court may, under section 328, make orders for reasonable access to landlocked land that can include vesting land in the owner of the landlocked land or granting an easement over land. The court may look at matters set out in section 329 that include how the land became landlocked, the conduct of the parties over access, and any resulting hardship. The court is able to ensure that people have access to their land.

<sup>428</sup> Hinde McMorland & Sim, above n 422, paras 9.062–9.077.

- 9.12 Under section 348, the court may make an order setting aside certain dispositions of property made by a debtor to put property beyond the reach of general creditors. The court may, under section 350, restore the property for the benefit of the creditors by vesting the property in the Official Assignee, the debtor or a trustee for the debtor's creditors. This provision expressly overrides the LTA.
- 9.13 It is arguable that these remedial provisions are not incompatible with the LTA provisions, provided their application is confined to the narrow purpose intended by the legislature. The provision empowering the court to grant relief against refusals to renew leases is intended to protect a lease interest, which comprises both an interest in land and a contract. But a lessee must act quickly to ensure certainty in property dealings. The approach of the court has been that the legislature has empowered it to do what it thinks just in the circumstances.
- 9.14 The court's powers relating to encroachments and landlocked land can divest a registered proprietor of part of their land. Again, however, the provisions containing these discretionary powers are remedial. Before granting relief, the court will balance competing property interests to ensure its intervention is no more than is necessary to provide proper relief. The court has emphasised that as the encroachment relief provisions are departures from the indefeasibility principle, they ought to be applied with circumspection to achieve the purpose of the provisions, and no more.<sup>429</sup> Most of the decisions relating to landlocked land have reinstated existing access or corrected an historical accident during the subdivision of land, and without relief people would be trespassers. These powers generally only affect the margins of people's property interests, as they are exercised to adjust the rights of affected parties.
- 9.15 One commentator, however, asks whether a particular decision about landlocked land, where a property developer successfully applied for relief, reaches beyond the parameters of relief.<sup>430</sup> Another commentator, though, notes that enabling the greater use of land may be a positive development.<sup>431</sup> This commentator observes that indefeasibility of title gives people the right to enjoy possession of their land, and it is a matter of balancing interests between competing indefeasible titles, rather than a derogation of the principle of indefeasibility of title itself.
- 9.16 Although the court can, under section 348, set aside a registered interest under the LTA where there has been a prejudicial disposition, the interest of a person who acquired property for valuable consideration and in good faith, without knowledge that it was made with the intent to prejudice creditors, is expressly protected under section 348. The court has discretion under section 348 to require compensation to be paid rather than set aside a prejudicial disposition. The court may also, under section 349, decline to make an order restoring the property if it would be unjust in the circumstances.

429 DW McMorland "Conveyancer's Notebook: Encroachment – Property Law Act 1952 ss 129 and 129A: *Blackburn v Gemell*" (1982) NZ Recent Law 196.

430 Elizabeth Toomey "Landlocked Land: A Real Threat to Indefeasibility in the Twenty-first Century" in D Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 177–198.

431 Ferne Bradley "Turning the Key-Unlocking Land", NZLS Property Law Conference, symposium paper, 2004.

## Other statutes

- 9.17 There are other examples where special provisions in later Acts, for policy reasons override the LTA. The compulsory acquisition of land by the Crown and local authorities for public works,<sup>432</sup> for example, overrides the indefeasibility provisions of the LTA. It is arguable that the public purpose outweighs the importance of individual title security.
- 9.18 Under the Property (Relationships) Act 1976 the rights of spouses or partners in relation to land that are determined under the Act can override the registered title. There are several provisions that appear to have this effect.<sup>433</sup> The land register is often only about financial interests. However, the policy behind the Property (Relationships) Act is to recognise the domestic relationship as a partnership of equals and that there should generally be an equal division of property at the end of a relationship where non-financial contributions are equally valued. Otherwise people's interests in property are overridden by financial contributions. In property relationship matters, generally only the registered proprietor is affected.
- 9.19 Certain provisions in the Insolvency Act 2006 and Companies Act 1993 may override a registered title.<sup>434</sup> For example, a bankrupt's property vests upon adjudication in the Official Assignee. A person's registered title or the registered title of a mortgagee may not be indefeasible against the liquidator of a company. But these statutes contain provisions that protect the interests of bona fide purchasers for value in certain circumstances and, generally, only the bankrupt or insolvent person's interest is affected.
- 9.20 The Resource Management Act 1991 requires certain resource consents relating to water or drainage rights for registered water or drainage easements to be effective. People may need to look behind the register to ensure these consents have been obtained, because registration of these easements is necessary for the exercise of these rights. However, these provisions reflect the importance of the management of water resources. They provide a limitation on the use of land rather than an encroachment into an indefeasible title.
- 9.21 Under the Unit Titles Act 1972, the registration of a transfer of a principal unit without its accessory unit, or an accessory unit without its principal unit, is void and the indefeasible title of the transferee is overridden.<sup>435</sup> The overriding concern in a unit title development is its preservation for so long as the body corporate of owners wishes to maintain its identity.
- 9.22 The Overseas Investment Act 2005 empowers the court to order the disposal of property including land where an overseas person has failed to comply with the Act.<sup>436</sup> The purpose of this Act is to acknowledge that it is a privilege for overseas persons to own sensitive assets and they must comply with certain obligations attaching to that privilege.

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432 Local Government Act 2002, s 181; Public Works Act 1981, Part 2.

433 Property (Relationships) Act 1976, ss 41–44, 46.

434 Insolvency Act 2006, s 101; Companies Act 1993, s 295.

435 Unit Titles Act 1972, s 10.

436 Overseas Investment Act 2005, s 47.



- 9.23 The Proceeds of Crimes Act 1991 and Terrorism Suppression Act 2002<sup>437</sup> provide that interests in land may be forfeited to the Crown. The Proceeds of Crimes Act 1991 provides for the confiscation of the proceeds of serious criminal offending, which is a significant disincentive to people to act illegally. There is provision for the court to grant relief to innocent third parties. The Terrorism Suppression Act 2002, which has property forfeiture provisions, also has provision for the relief of third parties.
- 9.24 Under the Credit Contracts and Consumer Finance Act 2003 the court can re-open a buy-back transaction when appropriate, to set aside a security interest.<sup>438</sup> In *Burmeister v O'Brien* it was argued that this impliedly overrides the indefeasibility provisions. However, Associate Judge Abbott has said:<sup>439</sup>
- Whilst I accept the Court's powers under section 127 may extend, in appropriate cases, to orders divesting a registered interest, I do not accept that that is intended to override the interest of a bona fide purchaser for value. That is such a long-standing principle that, in my view, it could only be overridden by express words.
- 9.25 Section 7(5) of the Contractual Mistakes Act 1977 empowers the court to make vesting orders regarding property in order to provide relief for mistake, which appears to provide a statutory exception to indefeasibility of title. The court's discretion appears to be confined to setting aside dispositions to people with knowledge of the mistake in the original transaction. The Act provides that dispositions to bona fide third parties without notice should not be invalidated.

#### IMPLICATIONS FOR THE REGISTER

##### Indefeasibility of title

- 9.26 As discussed in chapter 2, under section 62 of the LTA, the estate of a registered proprietor is paramount subject to the interests against the land noted on the register and the exceptions stated in the Act. The register is intended to provide a complete and conclusive record of the interests affecting a land title so that people are saved from the expense and trouble of looking behind the register to investigate a title and check its validity.

##### Effect of overriding the register

- 9.27 Concerns have been raised about the existence of other statutes, unconnected to the LTA, which can affect a registered proprietor's otherwise indefeasible title.
- 9.28 One view is that these statutory interests undermine the conclusive register and the security of a proprietor's title. If a registered title may potentially be affected adversely by interests that do not appear on the register, it does not provide a complete and reliable record. People may need to look behind the register to verify the accuracy of title information or there may be serious practical implications. The effect is that people may lose confidence in the reliability and efficiency of the system and in the security of their indefeasible title.

437 Proceeds of Crimes Act 1991, s 15, and Terrorism Suppression Act 2002, s 55.

438 Credit Contracts and Consumer Finance Act 2003, s 127.

439 *Burmeister v O'Brien* (2006) 11 TCLR 737, para 52 (HC) Abbott AJ.

9.29 However, another view is that the existence of statutory provisions that override the register is inevitable and justifiable on policy grounds, and the implications for indefeasibility may not be as serious as suggested. Bona fide purchasers for value without fraud are protected in many cases and, generally, interests are noted or entered on the register. Few statutory interests that are created off the register pose a significant threat to indefeasibility without good reason.<sup>440</sup>

9.30 The task of resolving statutory conflicts falls to the court. There is a presumption that the legislature does not intend to contradict itself, but intends that inconsistent provisions should be reasonably and properly reconciled, by reading one as subject to the other. In determining which provisions should prevail, the court has been guided by ordinary statutory interpretation principles.

### Indefeasibility overridden by speciality

9.31 One guiding statutory interpretation principle is that statutes containing special rules prevail against rules of general application, such as those in the LTA, which provides a registration system. Statutes, such as Te Ture Whenua Maori Act 1993, for example, contain special rules that apply to land under the LTA.<sup>441</sup>

9.32 In *Miller v Minister of Mines* the Court of Appeal was persuaded by the special provisions in the Mining Act 1926, governing mining rights that operated to the exclusion of the registration regime under the LTA. The Court noted that a grant of a mining licence under the Mining Act was held to confer an immediate legal interest that did not need registration under the LTA to make it fully effectual. In comparison, the Court noted that an instrument affecting land transfer land merely confers an equitable title until registration.<sup>442</sup>

### Indefeasibility overridden by later legislation

9.33 Another principle of statutory interpretation is that later legislation overrides earlier legislation to the extent of any inconsistency. This principle was followed in *South-Eastern Drainage Board (S.A.) v Savings Bank of South Australia*<sup>443</sup> where charges imposed under later legislation took priority over mortgages registered under a Torrens statute, the Real Property Act 1886 (SA).

9.34 In *Travinto Nominees Pty. Limited v Vlattas* a later statute was held to qualify the Real Property Act 1900 (NSW), rendering a lease void and illegal regardless of registration.<sup>444</sup> Gibbs J said:<sup>445</sup>

Although the Real Property Act is of the greatest importance in relation to land titles it is not a fundamental or organic law to which other statutes are subordinate. The question is simply whether the provisions of the later enactment, section 88B of the Industrial Arbitration Act, override the inconsistent provisions of the Real Property Act.

440 Non-statutory unregistered interests are discussed in chapter 6.

441 See chapter 10 for a discussion of the relationship between Te Ture Whenua Maori Act and the land transfer system.

442 *Miller v Minister of Mines*, above n 419.

443 *South-Eastern Drainage Board (S.A.) v Savings Bank of South Australia* (1939) 62 CLR 603 (HCA).

444 *Travinto Nominees Pty. Limited v Vlattas* (1973) 129 CLR 1 (HCA).

445 *Ibid.*, 35 Gibbs J.

The High Court noted that the later statutory provisions clearly applied to all leases of land, including land under the Real Property Act, and, properly construed, were effective so as to avoid a lease that did not comply, despite indefeasibility of title.

- 9.35 In *Duncan v McDonald*<sup>446</sup> the question was whether an illegal mortgage was protected by the indefeasibility provisions of the LTA. The Court noted that, while under the Illegal Contracts Act 1970, every illegal contract is declared to be of no effect, this provision is expressly stated to be subject to any other enactment. Accordingly, the Court held the Illegal Contracts Act to be subject to the operation of the LTA and the illegal mortgage was, in the absence of fraud on the part of the mortgagee, to be valid and enforceable.

### Other considerations

- 9.36 There are other factors that have assisted the court in ascertaining the intention of the legislature where statutes are inconsistent. In *Housing Corporation of New Zealand v Maori Trustee* the High Court considered the relationship between the Maori Affairs Act 1953 and the indefeasibility provisions of the LTA.<sup>447</sup> The Court, after examining the history of the provisions and their intended purpose, decided that the interest being protected by the special provision was not of such a compelling character as to warrant overriding the indefeasibility provisions.
- 9.37 Likewise, in *Registrar-General of Land v Marshall*, the Court considered that a failure to observe notification requirements in the Maori Affairs Act 1953 should not affect indefeasibility of title because the benefit in ensuring that public registry information is consistent should not diminish the primacy of indefeasibility of title.<sup>448</sup>

### RESPONSE TO THE PROBLEM

- 9.38 Arguably, it is an unrealistic and impractical ideal for there to be no statutory interests overriding the LTA. The legislature cannot bind its successors to ensure that future legislation is not inconsistent with the LTA. The High Court of Australia noted in *South-Eastern Drainage Board (S.A.) v Savings Bank of South Australia* that the South Australian legislature could not be commanded by a prior legislature to express its intention in a particular way.<sup>449</sup> The principle of indefeasibility is important but not of such a critical nature that it should not be overridden, for example, to give effect to an important policy objective in another statute. Some other provisions may be of such public importance or of such a compelling nature as to warrant their modifying the principle.

<sup>446</sup> *Duncan v McDonald* [1997] 3 NZLR 669. Note that the in personam jurisdiction enabled the same relief to be given to the mortgagor as under the Illegal Contracts Act, s 7.

<sup>447</sup> *Housing Corporation of New Zealand v Maori Trustee* [1988] 2 NZLR 662 (HC). See chapter 10 for a full discussion of this case.

<sup>448</sup> *Registrar-General of Land v Marshall* [1995] 2 NZLR 189, 198 (HC) Hammond J. See chapter 10 for a full discussion of this case.

<sup>449</sup> *South-Eastern Drainage Board (S.A.) v Savings Bank of South Australia*, above n 443, 633 Evatt J.

- 9.39 There may be a point, however, when there are too many interests outside the register and the indefeasibility principle is threatened. However, this is largely a potential problem at this stage. A policy focus on managing the proliferation of these overriding interests may alleviate the alarm expressed by some commentators about the risks for the land transfer system.

## Historic response

### *Land charges*

- 9.40 The legislature has in the past responded to the problem by enacting legislation to decrease the special interests in land that could exist without registration. The Statutory Land Charges Registration Act 1928 enables statutory land charges created under other Acts to be registered where those other Acts do not provide for registration. The purpose of this Act is to ensure there is a complete picture of a land title, which strengthens the principle of indefeasibility of title underpinning the land transfer system.<sup>450</sup>

### *Mining*

- 9.41 The Mining Act 1926 contained its own registration system and, as discussed previously, mining privileges under that Act prevailed against a registered land title. The Mining Tenures Registration Act 1962 was enacted to bring the mining tenure licences within the LTA registration regime by requiring all new licences or renewals to be registered under the LTA. People were able to obtain freehold titles in exchange for existing licences. This conversion process has largely been completed now.
- 9.42 The Mining Act 1971 assisted in resolving the conflict between mining rights and the land transfer system by requiring mining privileges to be recorded on the register. But registration of these rights only provided notice of their existence and they operated independently of registration. Although there are still some licences in existence that were granted under the Mining Act 1971, this Act was replaced by the Crown Minerals Act 1991. Similarly, there was provision under the Petroleum Act 1937 for certain access easements in respect of oil pipelines to be registered but, again, registration was evidentiary rather than constitutive of such rights.
- 9.43 The Crown Minerals Act 1991 replaced the Mining Act, Petroleum Act and the coal mining legislation. Most minerals today are Crown owned and now when someone obtains a minerals permit from the Crown under this Act in respect of Crown-owned minerals they need to negotiate an access arrangement with the owner of the land, as well as obtain any necessary resource consents under the Resource Management Act 1991. There is provision for a compulsory arbitration process with land owners who refuse to allow access to permit holders, if it is in the national interest. The Crown Minerals Act requires the noting on the land transfer register of all access arrangements of more than six months' duration which bind future owners of the land.

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<sup>450</sup> The Statutory Land Charges Registration Act 1928 is further discussed in chapter 23.

## Amending the LTA

- 9.44 One option may be to amend the LTA to signal more clearly to people that other special statutory exceptions may exist that affect their title. However, people may then feel compelled to search beyond the register for information about the title, which defeats a main purpose of the register.

## Future legislation

- 9.45 Agencies may not always be aware of the priority implications of creating interests off the register. They should be aware of the practical disadvantage in not registering interests. For those interests that are capable of being registered, an incentive to register promptly may be useful. Registration may be encouraged if the status of interests depends on their registration. For example, the status of those that are not registered could be reduced; their legal effect could depend on registration. Agencies should be aware of the benefit, when drafting provisions, of including clear guidance to the court that the provisions are intended, or not intended, to override the LTA. It may be useful for provisions to include a statement that bona fide purchasers for value without fraud take priority.
- 9.46 Under the existing Cabinet consultation requirements for new legislation, agencies should consult Land Information New Zealand (LINZ) or the Ministry of Justice, as the responsible agencies, on Bills that contain provisions that may affect the title to land. But this may not always happen and agencies may not always be aware that overriding statutory provisions should be created only where it is necessary and proper for policy reasons to override the LTA.
- 9.47 Agencies need to be aware of the issues in order to properly advise ministers. So these matters need to be clearly brought to the attention of agencies and appropriate consultation encouraged during the policy development stage of the legislative process. One option is for LINZ and the Ministry of Justice to develop guidelines which may assist. A cross reference on the Cabinet website to these guidelines may be useful or a Cabinet Office directive to chief executives to re-enforce the importance of the issues and purpose behind the consultation.
- 9.48 A further option may be to refer all Bills affecting land to the Legislation Advisory Committee, which provides advice on new legislation and ensures compliance with their Legislation Advisory Committee Guidelines. The current guidelines state that new legislation should be consistent with existing legislation as far as practicable.<sup>451</sup> These guidelines could be amended to alert agencies to the implications for new provisions affecting land, and recommend that special rights should be noted or entered on the register to be effective.

451 Legislation Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation* (2001 and amendments, Wellington) para 7.2.1.

Q44 What sort of interests created under other statutes should be effective against a registered proprietor under the LTA? Should registration affect their validity and be required in order to perfect these interests or should they be able to exist in an unregistered form with a lesser status?

Q45 Are you aware of other examples of statutory provisions that are inconsistent with the LTA?

Q46 Should the LTA be amended to more clearly signal to people that other statutory interests may override their registered interest?

Q47 Would an administrative response involving a Cabinet Office process or the Legislation Advisory Committee assist?

Q48 Should the matter of ascertaining legislative intention for the purpose of reconciling statutory conflicts be left to the court? Would a clearer guide in the statutory provisions of the particular overriding statute to legislative intention be helpful?

# Chapter 10

## Registration of Māori land

- INTRODUCTION 10.1 Te Ture Whenua Maori/ Maori Land Act 1993 (TTWMA) divides land into six types:<sup>452</sup>
- (a) Māori customary land;
  - (b) Māori freehold land;
  - (c) general land owned by Māori;
  - (d) general land;
  - (e) Crown land;
  - (f) Crown land reserved for Māori.
- 10.2 A significant amount of land in New Zealand is Māori freehold land.<sup>453</sup> In 2006, the Māori Land Court administered 1,607,819 hectares of Māori land.<sup>454</sup> Although this is only around 5 percent of New Zealand, only 120,212 hectares of Māori land are in the South Island. This means that the proportion of Māori land is significant in the North Island: around 12 percent.
- 10.3 Māori land is subject to the jurisdiction of the Māori Land Court. Most dealings with Māori land must be done by an order of that Court. Some Māori land is recorded under both the LTA and TTWMA. However, some Māori land has no LTA title.
- 10.4 The interrelationship of the TTWMA and the LTA has been described thus:<sup>455</sup>
- In reality there are two systems of title recording in New Zealand, one official (the Land Transfer system) and one quasi-official (the Maori land system). The Land Transfer Act system is regarded, justifiably on the whole, as a model of streamlined efficiency.

452 Te Ture Whenua Maori Act 1993, s 129.

453 While the Māori Land Court also has jurisdiction over Māori customary land there is virtually no such land in existence. See Boast and others *Māori Land Law* (2 ed, LexisNexis, Wellington, 2004) 65 [*Māori Land Law*].

454 *New Zealand Official Yearbook 2006* (105 ed, Statistics New Zealand, Auckland, 2006) 320.

455 Richard P Boast “The Implications of Indefeasibility for Maori Land” in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 101, 102 [“The Implications of Indefeasibility for Maori Land”].

The Maori Land system is unofficial, difficult to use, cumbersome, and overwhelmed by the practical difficulties of monitoring and recording the continuous proliferation of multiple interests.

- 10.5 There are two main issues regarding the position of Māori land in the land transfer system. The first is conceptual: what is the relationship between the two Acts and does one override the other? The second is practical: how can the Māori Land Court and Land Information New Zealand (LINZ) reconcile the two title recording systems? The resolution of the first question has implications for the resolution of any practical problems. Although the Law Commission asks questions on these issues, it is outside the terms of reference to offer solutions to these complex matters.

## MĀORI LAND AND INDEFEASIBILITY **Te Ture Whenua Maori Act 1993**

- 10.6 The TTWMA was enacted in 1993. It is convenient to summarise some of the relevant sections below with a view to understanding how such an Act interacts with the LTA.

### *Principles of Act*

- 10.7 The English version of the preamble to TTWMA reads:

Whereas the Treaty of Waitangi established the special relationship between the Maori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu: And whereas it is desirable to maintain a Court and to establish mechanisms to assist the Maori people to achieve the implementation of these principles.

- 10.8 Section 2 provides:

- (1) It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble to this Act.
- (2) Without limiting the generality of subsection (1) of this section, it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Maori land as taonga tuku iho by Maori owners, their whanau, their hapu, and their descendants, and that protects wahi tapu.

- 10.9 Section 17 sets out the objectives of the court. Under subsection (1) the primary objective of the court is to promote and assist in:



- (a) The retention of Maori land and General land owned by Maori in the hands of the owners; and
  - (b) The effective use, management, and development, by or on behalf of the owners, of Maori land and General land owned by Maori.
- 10.10 These sections show the Act's focus on the retention of land by Māori people. This was a departure from the focus of the previous Acts regulating Māori land.

### *Record of title*

- 10.11 The Māori Land Court is a court of record. It must keep records of the orders it makes. Most dealings with Māori land must be done by a court order. Under sections 122 and 123 of TTWMA every order affecting title made by the Māori Land Court must be registered under the LTA and, in order to facilitate this, no fee is payable.
- 10.12 Section 123(5) provides that:
- Until registration has been effected, an order of the Court in respect of land subject to the Land Transfer Act 1952 shall affect only the equitable title to the land.
- 10.13 All sales and gifts of Māori freehold land, by trusts, incorporations or other owners require confirmation by the Māori Land Court.<sup>456</sup> Other specified alienations by owners that are not trusts or incorporations require confirmation by the Registrar of the Court.<sup>457</sup> Section 126 of TTWMA Act states that:
- The District Land Registrar shall not register any instrument affecting Maori land (other than an instrument not required to be confirmed or an order of the Court or of the Registrar) unless the instrument has been confirmed by the Court, or the Registrar of the Court has issued a certificate of confirmation in respect of the instrument, in accordance with the relevant provisions of Part 8 of this Act.
- 10.14 Under section 127, the Registrar of the Court is required to maintain a record of the legal and beneficial ownership of all Māori freehold land and any trusts affecting that land. In all proceedings this list is prima facie evidence of the legal and beneficial ownership of the land.<sup>458</sup>

### *Ability of court to alter title*

- 10.15 Because dealings with Māori land generally must be done by court order, the land transfer title can be altered by the order of a court. For example, the Māori Land Court has jurisdiction under section 18(1)(a):
- To hear and determine any claim, whether at law or in equity, to the ownership or possession of Maori freehold land, or to any right, title, estate, or interest in any such land or in the proceeds of the alienation of any such right, title, estate, or interest.

456 Te Ture Whenua Maori Act 1993, ss 150A(3)(a), 150B(3)(a), 150C(3)(a).

457 Te Ture Whenua Maori Act 1993, s 150C(3)(b). The specified alienations are leases, licences, forestry rights, profits, mortgages, charges or encumbrances. Note that under sections 150A(3)(b) and 150B(3)(b) the Registrar of the Māori Land Court must note an alienation by a trust or incorporation by way of a lease, licence, or forestry right, for more than 21 years, or a mortgage.

458 Te Ture Whenua Maori Act 1993, s 127(4).

- 10.16 Also, under section 128, where any instrument of title (whether registered under the LTA or not) does not fully disclose the names of several persons entitled to the estate the court may make an order declaring that those people are entitled to the interest.
- 10.17 Under section 44, the Chief Judge of the Māori Land Court may alter or cancel orders of the court where he or she is satisfied that it “was erroneous in fact or in law because of any mistake or omission on the part of the Court or the Registrar or in the presentation of the facts of the case to the Court or the Registrar”.<sup>459</sup>
- 10.18 Orders under section 44 can affect the title on the LTA register and represent in this sense a “challenge to the general principle of indefeasibility.”<sup>460</sup> However, there are some limits and these orders cannot “take away or affect any right or interest acquired for value and in good faith under any instrument of alienation registered before the making of any such order”.<sup>461</sup>

### The High Court cases

- 10.19 There have been two High Court cases that considered in depth the interaction of the LTA and the Maori Affairs Act 1953 (the predecessor of TTWMA).

#### *Housing Corporation of New Zealand v Maori Trustee*<sup>462</sup>

- 10.20 The *Housing Corporation* case involved a mortgage that had not been endorsed by the Registrar of the Māori Land Court under section 233 of the Maori Affairs Act 1953,<sup>463</sup> but had, nevertheless, been registered by the District Land Registrar. McGechan J had to consider whether the registration conferred an indefeasible title and whether, in any case, the Registrar could exercise powers of correction under section 81 of the LTA.
- 10.21 In deciding that registration had conferred an indefeasible title, McGechan J noted that upon registration title is immediately indefeasible.<sup>464</sup> However, in this case it was necessary to consider whether immediate indefeasibility is “destroyed or rendered vulnerable through non-compliance with section 233 of the Maori Affairs Act 1953.”<sup>465</sup>

459 Te Ture Whenua Maori Act 1993, s 44.

460 Jacinta Ruru “Maori Land Law for Conveyancers” in Struan Scott and others *Adams’ Land Transfer* (loose leaf, LexisNexis, Wellington, 2007) Appendix B, para B.2.3.6.

461 Te Ture Whenua Maori Act 1993, s 48(1).

462 *Housing Corporation of New Zealand v Maori Trustee* [1988] 2 NZLR 662 (HC) McGechan J.

463 Section 233(1) of the Maori Affairs Act 1953 provides:

No alienation of Maori freehold land which is not by this Part of this Act required to be confirmed by the Court shall have any force or effect unless and until the instrument by which the alienation is effected has endorsed thereon a memorial that it has been produced to the Registrar and has been noted in the records of the Court.

464 *Housing Corporation of New Zealand v Maori Trustee*, above n 462, 671.

465 *Ibid*, 672.

- 10.22 McGechan J considered that the Maori Affairs Act 1953 and the 1967 amendment to it would have been enacted by a legislature that was aware of the LTA and the position regarding indefeasibility. In 1967, it “would have been clear that if such registrations did occur then subject only to the District Land Registrar’s corrective powers (then an area of some uncertainty) such registrations would create indefeasible interests”.<sup>466</sup>
- 10.23 Further, his Honour commented that the duty of the Registrar under section 233 is a recording function and the object of the section “was to ensure that the Maori Land Court had an immediate and complete record available to it”.<sup>467</sup> In his opinion, section 233 reflected a “promotion of administrative convenience rather than deep legal or social importance”.<sup>468</sup>
- 10.24 McGechan J considered Australian case law on the resolution of conflict between the Torrens system and other legislation. *Breskvar v Wall* offered an example of the High Court of Australia holding that statutory provisions rendering instruments void do not prevail against indefeasibility.<sup>469</sup>
- 10.25 Lastly, he considered other principles of statutory interpretation: that general legislation is overridden by special legislation and that earlier statutes are overridden by later statutes. Although these principles favoured section 233 overriding the LTA, he indicated that they should be only taken as a guide.<sup>470</sup> He concluded that the Maori Affairs Act 1953 was subject to the immediate indefeasibility provisions in the LTA.
- 10.26 As outlined in chapter 5, McGechan J decided that the Registrar did have power to correct the register as it had been “wrongfully obtained”.<sup>471</sup> However, this ruling is in conflict with the generally conservative approach to these powers exhibited by registrars.

#### *Registrar-General of Land v Marshall*<sup>472</sup>

- 10.27 This issue was again considered in the High Court in *Registrar-General of Land v Marshall*. Although this case was decided after the enactment of TTWMA, the decision was based on the Maori Affairs Act 1953.
- 10.28 In this case, the LTA title and the Māori Land Court register recorded different people as owners of the land. The transfer had not complied with section 83 of the Maori Affairs Amendment Act 1967 or section 233 of the Maori Affairs Act 1953. The central issue in the case was whether Marshall, the registered proprietor on the land transfer title, could claim compensation for having to prove the strength of his own title.

466 Ibid, 673.

467 Ibid, 673.

468 Ibid, 674

469 *Breskvar v Wall* (1971) 126 CLR 376.

470 *Housing Corporation of New Zealand v Maori Trustee*, above n 462, 678.

471 Ibid, 702.

472 *Registrar-General of Land v Marshall* [1995] 2 NZLR 189 (HC) Hammond J.

10.29 Hammond J noted that:<sup>473</sup>

Where there are two systems of registration of interests in land running side by side within one jurisdiction, the noting of interests as between those two systems will necessarily give rise to difficulties.

10.30 Regarding the interface between the LTA and the Maori Affairs Act 1953, Hammond J stated that:<sup>474</sup>

In short, on this sort of question of primacy, the Land Transfer Act trumps the Maori Affairs legislation. At the end of the day, as a matter of high principle, that must be so: if there is any area of the law in which the absolute security is required – without any equivocation – it must be in the area of security of title to real property. I completely agree with the premise that, with respect, lies behind much of McGechan J’s reasoning that any watering down of the primacy of indefeasibility of title through failure to carry out collateral notifications to other Registries ought to be resisted strenuously.

The Maori Land Court is an important institution in New Zealand. It is an institution to which many Maori in fact look before turning their attention to the Land Transfer Office. Maori rightly regard the Court as an important guardian of their interests. But, at the end of the day, as I have said, there can be no equivocation on a matter of such importance as where paramountcy of title lies. To say that non-compliance with other reporting requirements can or might somehow affect indefeasibility of title is simply untenable.

## LTA and TTWMA

10.31 The effect of TTWMA is to create a dual registration system that operates in parallel with the LTA. Sometimes these registers will coincide, however, at other times interests on the Māori Land Court record will not be included on the LTA title and vice versa.<sup>475</sup>

10.32 As noted in chapter 9, when considering whether a statute overrides the LTA, one should be guided by the principles expressed in *Miller v Minister of Mines*.<sup>476</sup> The Court of Appeal in this case stated that determining whether an interest overrides the LTA depends “upon the purpose and interpretation of the statute under which the interest arises”.<sup>477</sup> The Privy Council advised that it was not necessary.<sup>478</sup>

...that there should be a direct provision overriding the provisions of the Land Transfer Act. It is sufficient if this is the proper implication from the terms of the relative statute.

473 Ibid, 192.

474 Ibid, 198–199.

475 See *Māori Land Law*, above n 453, 257.

476 *Miller v Minister of Mines* [1961] NZLR 820 (CA); *Miller v Minister of Mines* [1963] NZLR 560 (PC).

477 *Miller v Minister of Mines*, above n 476, 839 (CA) Cleary J.

478 *Miller v Minister of Mines*, above n 476, 569 (PC) Lord Guest.

- 10.33 As stated above, the High Court cases on the interface between the LTA and the Maori Affairs Act 1953 found that the LTA trumped the Maori Affairs Act. However, TTWMA has significantly changed the focus of Māori land law,<sup>479</sup> and may call for a reconsideration of this stance.<sup>480</sup>
- 10.34 It is also relevant to note that the *Housing Corporation* decision was concerned with a failure of the Registrar to endorse the dealing as opposed to confirmation by the court. In a recent Māori Land Court decision, Judge Ambler said:<sup>481</sup>
- While Justice McGechan’s comments that noting was not of “deep legal or social importance” may be valid in relation to the noting function of the Registrar, it is doubtful that the same can be said for the confirmation of alienations, particularly under the 1993 Act.
- 10.35 In *Re Pakiri R Block and Rahui Te Kuri Incorporation*, judges of the Māori Land Court indicated that the relationship between the two Acts should be reconsidered in light of TTWMA.<sup>482</sup> Various sections of TTWMA generally and section 126 of the Act in particular “seem to be aimed at improving the relationship between the Maori Land Court and Land Transfer Title system and at protecting the Maori Land Court record”.<sup>483</sup> The Judges went on to say:<sup>484</sup>
- If the title is clearly identified as Maori land and someone deals with it in disregard of the law pertaining to it, and registration takes place, wrongfully, then there may be circumstances where it would be appropriate for a District Land Registrar to use his powers of correction under section 81.
- 10.36 Writing in 1995, Professor McMorland indicated that a “much fuller analysis of the relationship between the two Acts, and in particular the detailed terms of Te Ture Whenua Maori Act 1993” is needed to resolve which statute takes priority.<sup>485</sup>
- 10.37 It has been submitted that section 123(5) of the TTWMA, which states that before registration under the LTA, orders of the court only affect the equitable title, makes it clear that the LTA overrides the new Act.<sup>486</sup> However, others have argued that section 127(4), which states that in all proceedings the Māori record is prima facie evidence of legal and beneficial ownership, leaves the question open.<sup>487</sup>

479 See principles of TTWMA detailed in paras 10.6–10.10 above.

480 See, for example, Hinde McMorland & Sim *Land Law in New Zealand* (loose leaf, LexisNexis, Wellington, 2005) para 9.077. See also *Proprietors of Hiruharama Ponui Block Inc v Attorney General (No2)* [2004] 1 NZLR 394, paras 19–20 (HC) where Rodney Hansen J acknowledged the calls for the limited application of section 81 of the LTA to be reviewed in light of TTWMA (As section 126 TTWMA did not apply to the facts of the case he did not attempt to make any conclusions on this point).

481 *Re Orongotea B No 1* (2008) 125 Whangarei Minute Book 36, para 19 Judge Ambler.

482 *Re Pakiri R Block and Rahui Te Kuri Incorporation* (23 March 1994) Māori Appellate Court, Taitokerau District, paras 58–60 Deputy Chief Judge McHugh, Judges Smith and Carter.

483 *Ibid*, para 60.

484 *Ibid*, para 60.

485 Don McMorland “The Land Transfer Office and the Maori Land Court” (1996) 7 BCB 135.

486 *Māori Land Law*, above n 453, 262–263, footnote 38.

487 Ruru, above n 460, para B.2.4.2.

10.38 An examination of the provisions of the two Acts shows that the relationship between the LTA and TTWMA is unclear. While it is likely that the general courts would favour an interpretation that the LTA overrides the TTWMA record, it is arguable that the latter could prevail. Therefore, it is appropriate to clarify the relationship of the two statutes.

### Should the LTA override TTWMA?

10.39 Regardless of whether the natural construction of the two Acts suggests that the LTA prevails over TTWMA it is necessary to consider whether this should be the case. Certainly Māori owners deprived of land through the operation of the LTA can claim compensation under the LTA. Also, if someone deliberately tries to deprive Māori owners of their land, he or she will be guilty of fraud under the LTA.

10.40 However, simply compensating Māori for lost land may offer an example of a situation where the doctrine of immediate indefeasibility operates unfairly (see chapter 2). As Judge Carter has commented:<sup>488</sup>

While compensation should be available, to many Māori the loss of family or ancestral land is something that is felt very deeply and cannot simply be replaced by compensation.

10.41 The operation of indefeasibility to deprive Māori owners of their land appears to run contrary to the fundamental principles of TTWMA, which reinforce the importance of Māori land being regarded as a taonga and remaining with Māori.<sup>489</sup>

10.42 Indeed, Richard Boast has criticised the LTA for playing a role “in validating illegal or fraudulent dealings in Māori land”.<sup>490</sup> For example, Boast refers to the decision in *Beale v Tihema Te Hau*, where a whole Māori village, which had never ceased occupation of the land in question, was deprived of their land through the operation of the LTA and indefeasibility.<sup>491</sup>

### An alternative approach?

10.43 There may be an alternative way to view to the complex interrelationship of TTWMA and the LTA. The unique nature of Māori land and, in particular, the continuing role of the Māori Land Court in making orders affecting Māori land means that it cannot fit within the LTA system in the same way as general land. It seems unhelpful and, perhaps, overly simplistic to view this issue as merely a question of which Act overrides the other.

488 *Re Marshall – Part Allotment 65B2B Parish of Whangape* (1990) 69 Waikato Minute Book 136, para 50 Judge Carter.

489 Te Ture Whenua Maori Act 1993, preamble, ss 2 and 17. See also *Valuer-General v Mangatu Inc* [1997] 3 NZLR 641, 650 (CA) Richardson P for the Court.

490 “The Implications of Indefeasibility for Maori Land”, above n 455, 101.

491 *Beale v Tihema te Hau and Others and the Attorney-General* (1905) 24 NZLR 883.

- 10.44 The two Acts should not be regarded as being in opposition to one another and they should be able to function effectively together. However, mistakes do occur within the system and when an instrument is registered contrary to TTWMA, it is necessary to develop a principled way of dealing with this.

Q49 Should it be made clear how these Acts relate to one another? How might this be done?

## PRACTICAL PROBLEMS

- 10.45 The interface between the Māori Land Court records and the LTA register causes problems on a practical level. First, the land is often unregistered. Secondly, where the land is registered the two records may differ.

### Unregistered land

- 10.46 Māori land is often not registered under the LTA. Historically, this has been due to various factors, for example: the cost of registration, the large number of owners, and the fact that land is often unsurveyed. If the land is unregistered, an order of the court only affects the equitable title to the land,<sup>492</sup> and it does not receive the protection of the Torrens system; it is not state guaranteed title.
- 10.47 Recently, there have been steps taken to ensure that all Māori land is registered. First, under TTWMA, where there has been an order of the Māori Land Court, it is compulsory to register that order and no fee is payable.<sup>493</sup>
- 10.48 Secondly, the Māori freehold land registration project, which is being undertaken by LINZ and the Māori Land Court, aims to bring unregistered Māori freehold land onto the LTA register. Where the information relating to the land is incomplete, it will be provisionally registered, that is, incorporated into a relevant computer interest register.<sup>494</sup>
- 10.49 This project may, in fact, bring to light discrepancies between the Māori Land Court records and the LTA title. A recent Māori Land Court decision is an example of this: the Māori Land Court made an order as to a block of land that was provisionally registered, only to find that the block had been fully registered (without cancelling the provisional title) and two subsequent transfers had been made and registered that did not comply with TTWMA.<sup>495</sup>

### Dual title system

- 10.50 Once all Māori land has been brought onto the land transfer system, there is still the problem of keeping both records of title up to date. If the two titles are different, this raises the question of which should prevail. As suggested above, it seems likely that the general courts will favour the indefeasibility of the LTA

492 Te Ture Whenua Maori Act 1993, s 123(5), although it is prima facie evidence of the legal title: Te Ture Whenua Maori Act 1993, s 127(4).

493 See Te Ture Whenua Maori Act 1993, ss 122 and 123.

494 See Te Ture Whenua Maori Act 1993, s 124. See chapter 13 of the issues paper for a discussion on the effect of provisional registration.

495 *Re Orongotea B No 1*, above n 481.

title. However, this may lead to unfair results as the TTWMA record may often be the more up-to-date title. To avoid conflict between the two titles there seem to be two possible courses:

- consideration of whether a dual recording system is necessary; or
- development of notification practices that ensure that changes to one title are reflected in the other

*Is there a need for dual registration?*

10.51 On the one hand, it has been suggested that the Māori Land Court records were never intended to be an alternative title register. Regarding the recording function of the Māori Land Court, the Hon Eddie Durie has said:<sup>496</sup>

The Court is popularly conceived of as a titles Court. It has also been described as a travelling Land Transfer Office. Neither description is totally accurate. All that the Court does, it does by way of orders. It keeps records of its orders, and it is bound to keep them in an efficient and proper manner so that owners might know what they own ...It has been convenient to summarise those orders in what are called 'Title Binders' but they are administrative things only with no legal significance in themselves, and they are not meant as substitutes for Land Transfer Titles.

10.52 In 1980, the Royal Commission on the Māori Land Courts recommended that all Māori land be brought under the LTA.<sup>497</sup>

It is widely recognised that the present system is unsatisfactory and that the creation of one record of titles in the Land Registry Office [now LINZ] is necessary to end the confusion. There is needless expense in maintaining a dual system of land registration which gives no absolute certainty of title.

10.53 The Commission thought that this would give the benefits of a system of state guaranteed title to Māori as:<sup>498</sup>

- (a) they could deal with land under a much simpler system;
- (b) they would have certainty of title and this would remove the difficulties in borrowing money for developing land;
- (c) an up-to-date record of title would make it easier to amalgamate uneconomic blocks and to use aggregation for the benefit of Māori owners.

10.54 On the other hand, because many dealings with Māori land are done by court order, the Māori Land Court must retain some records of interests in a block of land. In addition, while the LTA title is concerned with legal interest, the Māori Land Court records equitable interests.<sup>499</sup> This means, for example, where there is a trust the Māori Land Court record will provide a list of all the beneficial owners.

496 Eddie Durie *Submission to the Royal Commission on the Maori Land Courts* 66–67.

497 Rt Hon Sir Thaddeus Pearcey McCarthy (chair) *The Royal Commission on the Maori Land Courts* [1980] IV AJHR H 3 41.

498 *Ibid.*, 42.

499 See *Te Ture Whenua Maori Act 1993*, s 127(1).



10.55 Richard Boast believes that the legislature intended the Māori Land Court record to:<sup>500</sup>

[R]ecord a *fuller* record of title than does the land transfer system, in that it records, in addition to the legal interests supposedly recorded under the LTA, equitable and beneficial interests that the latter system does not record. It follows from this that in any dealing with Māori land *both* records must be searched.

10.56 To summarise, the LTA title and the record held by the Māori Land Court perform distinct functions. To allow each record of title to be used effectively, the two records need to be aligned and discrepancies between the two eliminated.

#### *Notification of changes*

10.57 A possible solution to avoid discrepancies between the Māori Land Court records and LTA title would be to require, by legislation, that both the Registrar-General of Land and Registrars of the Māori Land Court formally notify each other when changes are made to either title. This would allow the other title to be updated also, keeping the two systems aligned.

10.58 Such a solution was suggested in 1995, by Professor McMorland:<sup>501</sup>

The problems posed by having two recording systems in place simultaneously for the same parcel of land clearly needs resolution, preferably not by the crude hammer of indefeasibility, but, at least in the first instance, by putting in place bureaucratic procedures between the Maori Land Court Registries and the Land Transfer offices to ensure that the records match.

#### **Landonline and Māori Land**

10.59 Before the introduction of e-dealing, it was the responsibility of the District Land Registrar to check that transfers relating to Māori land complied with the requirements of TTWMA.

10.60 Dealings with Māori land can now be lodged electronically. Where the land is Māori land the solicitor is required to certify that “any statutory provisions specified by the Registrar relating to Māori freehold land have been complied with or do not apply”. Provided the solicitor certifies this, registration will take place. The Registrar, therefore, no longer performs the same sort of examination as prior to the development of e-dealing.

10.61 In the Māori Land Court, Judge Ambler has recently criticised the current process as ineffective in preventing the wrongful registration of Māori land.<sup>502</sup> It is debatable whether this process is sufficient to discharge the Registrar’s obligation under section 126 of TTWMA, that is, the obligation not to “register any instrument affecting Māori land ... unless it has been confirmed by the Court, or the Registrar of the Court has issued a certificate of confirmation”.

500 *Māori Land Law*, above n 453, 258.

501 McMorland, above n 485, 135.

502 *Re Orongotea B No 1*, above n 481, paras 32–38.

10.62 However, the examination of transfers by the “paper” registration system did not prevent problems in the past as the cases discussed in this chapter show. LINZ and the Māori Land Court are aware of the potential problems. The aim is to keep the two systems aligned and to address the challenges created by the confirmation requirements.

Q50 How could the practical problems of interface between the LTA and TTWMA be resolved?

# Chapter 11

## The compensation provisions

### COMPENSATION AND TORRENS TITLE

- 11.1 A central aim of the Torrens system is that the register accurately and completely mirrors the state of the title, so that purchasers of land should not have to look behind the register. The other major aspect of Torrens title – compensation for loss – is based on the insurance principle: “if the mirror of title gives an incorrect reflection and as a result a person incurs a loss, that loss should be met by a State assurance fund”.<sup>503</sup> As Elizabeth Toomey notes, “[t]he principles of ‘indefeasibility’ and ‘guarantee’ are complementary: the former gives security against deprivation; the latter assumes the possibility of such deprivation and grants financial assistance if it occurs”.<sup>504</sup>
- 11.2 In a system of Torrens title, the state is responsible for the administration of the register. State compensation provides a method for recovery of loss caused by errors in the public registry office. Indefeasibility of title also has the potential to be unfair in blocking access to actions for recovery of land. Sim suggests that it is appropriate to compensate for loss caused by this change:<sup>505</sup>

In the case of transactions in relation to which the *Non dat* principle has been altered, the policy of the law has generally been to let the loss lie where it falls. Commercial convenience, no doubt, is sufficient justification for the occasional hardship. In the case of land, other considerations apply. The fact that land is usually an asset of substantial value in relation to other assets of the parties affected, and the complexity and variety of interests which may subsist in it, would no doubt be sufficient reasons for compensating under the Torrens system legislation the losses caused by that system ... [T]he reasons mentioned above must have seemed to the first framers of the legislation, as they seem now, the logical and inevitable complement to the fundamental aims of the legislation.

503 Tom Bennion and others *New Zealand Land Law* (Brookers, Wellington, 2005) 39.

504 Elizabeth Toomey “State Guarantee of Title – An Unguided Path?” (1995) 6 *Canta LR* 149, 149.

505 PBA Sim “The Compensation Provisions of the Act” in GW Hinde (ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971) 138, 139.

## Overview

- 11.3 The main provisions relating to compensation are contained in Part 11 of the LTA. Sections 172 and 172A establish in which circumstances compensation will be available. Sections 173 to 177 are procedural provisions. Section 178 provides five exceptions to the right to compensation from the Crown. As will be seen below, there are numerous other exceptions scattered throughout the Act and the common law. Section 179 deals with the measure of damages. Section 180 provides a limitation of actions. Section 181 states that plaintiffs are not entitled to compensation for loss caused through bringing land under the Act, if they had notice that the land was being brought under the Act and “wilfully, negligently, or collusively either omitted to lodge a caveat or allowed a caveat to lapse”.

## Availability of compensation

- 11.4 There are three statutory bases for a claim to compensation: section 172(a), section 172(b) and section 172A. Section 172(a) relates to loss caused by an omission, mistake or misfeasance of the Registrar, the Registrar’s delegate, or a LINZ employee, while performing their duties under the Act. Section 172(b) relates to a loss of land through the operation of the Act. Section 172 reads:

### **Compensation for mistake or misfeasance of Registrar**

Any person—

- (a) who sustains loss or damage through any omission, mistake, or misfeasance in the performance of any duty, function, or power imposed or conferred under this Act on the Registrar or an employee of the chief executive of the Department or person to whom a delegation has been made under section 5; or
- (b) who is deprived of any land, or of any estate or interest in land, through the bringing of the land under the Land Transfer Acts, or by the registration of any other person as proprietor of that land, or by any error, omission, or misdescription in any certificate of title, or in any entry or memorial in the register, or has sustained any loss or damage by the wrongful inclusion of land in any certificate as aforesaid, and who by this Act is barred from bringing an action for possession or other action for the recovery of that land, estate, or interest—

may bring an action against the Crown for recovery of damages.

- 11.5 Section 172A was added in 1984, and provides compensation for loss caused by the delay between the final search of the register and the time of lodgement (now also the registration date).

*Section 172(a)*

- 11.6 The High Court in *Registrar-General of Land v Marshall* broke section 172(a) down into six requirements:<sup>506</sup>
- (a) that a person;
  - (b) has sustained loss or damage;
  - (c) through;
  - (d) any omission, mistake or misfeasance;
  - (e) of specified officers;
  - (f) in the execution of their duties.

A claim under section 172(a) is statutory, and relies on the words of the section, not the law of torts.<sup>507</sup>

- 11.7 That case also confirmed that the “loss or damage” is not restricted to a loss of land, which is specifically covered by section 172(b). The High Court found that such a restriction was not justified by previous authority or by ordinary principles of statutory interpretation, and would impede the operational scope of the compensation regime.<sup>508</sup> Some examples of loss or damage claimed for under section 172(a) include:

- the costs of a Māori Land Court hearing to clarify the status of the land after the Registrar registered Māori freehold land without the necessary Māori Land Court endorsement;<sup>509</sup>
- reliance on the area detailed on a then certificate of title in accepting the title as matrimonial settlement, after the Registrar had failed to note the title was limited as to parcels;<sup>510</sup> and
- loss caused by the unjustified lodgement of a caveat.<sup>511</sup>

- 11.8 The third aspect of the section, “through”, “comprehends that there must be a causal nexus between the loss or damage sustained and the actions complained of”.<sup>512</sup> Regarding points (e) and (f), section 172(a) does:<sup>513</sup>

... not extend to the work of any person other than the Registrar, an employee of the chief executive of the Department, or a person to whom a delegation has been made under section 5 of the Land Transfer Act 1952.

This excludes loss caused by faulty surveys.<sup>514</sup>

- 11.9 With the automation of registration, there may be less scope for error in the Land Registry Office, because lodgement is, in general, completed electronically by solicitors, although a significant proportion will still be processed by LINZ staff.

506 *Registrar-General of Land v Marshall* [1995] 2 NZLR 189, 197 (HC) Hammond J.

507 *Ibid*, 196.

508 *Ibid*, 195–196.

509 *Ibid*.

510 *McNicholl v Attorney-General* (1996) 3 NZ Conv C 192,451 (HC).

511 *Attorney-General v Langdon* [1999] 3 NZLR 457 (HC).

512 *Registrar-General of Land v Marshall*, above n 506, 197.

513 *Hinde McMorland & Sim Land Law in New Zealand* (loose leaf, LexisNexis, Wellington, 2005) para 9.086.

514 *Alliance Developments Ltd v Flannery* [1997] DCR 404.

Ben France-Hudson argued in 2006 that because a conveyancing solicitor is not a specified officer under section 172(a), there will now be no compensation for loss caused by registration contrary to regulatory provisions, or registration of void instruments.<sup>515</sup> He argued that now the Crown can avoid these costs, the burden will be felt by professional indemnity insurance.

- 11.10 However, complying with regulatory provisions and ensuring that instruments of registration are valid has always been a responsibility of the solicitor. It should also be noted that checks are built into the electronic system, reducing the scope for mistakes. The checks built in to Landonline comprise data matching that aligns instrument details to ensure the right estate or interest is being transacted; identification of stop documents such as caveats, which may prevent registration; flags warning conveyancers of the status of land or an entry on the register such as a mortgage, which may require compliance with statutory requirements; and ensuring that all section 164A certifications have been given. LINZ also audits transactions and monitors “risky” transactions. These checks are discussed in further detail in chapter 13. It is unclear whether Hudson’s fears have materialised.

Q51 Has the risk of mistakes and errors in the registration process increased or decreased with the automation of the register?

Q52 Is it satisfactory that section 172(a) of the LTA claims are limited to claims for Registrar’s errors?

### Section 172(b)

- 11.11 Section 172(b) provides a right for recovery of damages against the Crown where the claimant has been deprived of land, or an estate or interest in land, and is barred by the LTA from bringing an action for recovery of that land or interest.<sup>516</sup> There must be an actual deprivation.<sup>517</sup>
- 11.12 There are three categories of deprivation: loss of an equitable interest, partial deprivation, and total deprivation.<sup>518</sup> The availability of compensation in cases of deprivation of equitable interests was established by *Williams v Papworth*,<sup>519</sup> and is now supported by a wealth of authority.<sup>520</sup> However, as will become evident below, the exceptions to the right to compensation preclude the majority of equitable claims.

515 Ben France-Hudson “Living in Interesting Times: Landonline, Leader in its Field at What Cost?” (2006) 12 *Canta LR* 121, 141.

516 Section 63 of the Land Transfer Act 1952 bars an action for recovery of land, with certain exceptions.

517 In *Blackwell v Davy* (1890) 8 NZLR 129 (SC) Richmond J, it was found that there is no actual loss in the removal of a bare legal estate.

518 Bennion and others, above n 503, 143.

519 *Williams v Papworth* [1900] AC 563 (PC).

520 See *Heid v Connell Investments Pty Ltd and the Registrar-General* (1987) 9 NSWLR 628, 636 (NSWSC) Young J.

- 11.13 An example of a partial deprivation is the wrongful registration of a mortgage against the title. In such a case, the registered proprietor is entitled to compensation to discharge the mortgage. The deprivation can be conceptualised as the subtraction of the lesser estate (the mortgage) from the fee simple estate of the registered proprietor.<sup>521</sup>
- 11.14 Total deprivation occurs where the former registered proprietor has wholly lost ownership and interest in the land, and cannot regain status as the registered proprietor. This occurs when a new registered proprietor gains an indefeasible title, in accordance with the immediate indefeasibility rule of *Frazer v Walker*<sup>522</sup> or the protection of bona fide purchasers for value in section 182 of the LTA.
- 11.15 It has been argued that the introduction of electronic conveyancing to replace the paper system will result in an increased number of frauds, because of the abolition of the duplicate certificate of title, and the increased reliance on the integrity of the legal profession.<sup>523</sup> LINZ considers that the new system and the security measures surrounding it will not lead to an increase in fraud, and the apparent increase in claims is due to frauds using buy-back schemes, which are possible in paper and electronic environments. As a rule, LINZ only pays compensation for fraud in the case of forgery, and will not pay out where the claimant has been negligent, for example, has signed a blank document. A fraudulent solicitor with access to the automated register may have a greater scope to commit fraud, although such fraud would be readily traceable.
- 11.16 Elizabeth Toomey has criticised the wording of section 172 as “ungainly” and argues that a requirement for strict adherence to the words of either paragraph (a) or (b) negatively limits what should be a wide scope for compensation, by restricting the available method for measuring damages.<sup>524</sup> This raises the question whether the two subsections are mutually exclusive. The word “or” at the end of paragraph (a) suggests that this is the case. The heading of section 172 – “Compensation for mistake or misfeasance of Registrar” – is also problematic. It suggests that the Registrar must be responsible for the loss, which is inconsistent with the wording and rationale of paragraph (b).

Q53 Does section 172 of the LTA provide adequate grounds for a claim of compensation?

Q54 Do the grounds for compensation need to be more clearly stated?

521 Hinde McMorland & Sim, above n 513, para 9.091.

522 *Frazer v Walker* [1967] AC 569 (PC).

523 Rod Thomas “Fraud, Risk and the Automated Register” in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 349.

524 Toomey, above n 504, 157. The measures of damage for each paragraph are different, see below.

## Section 172A

- 11.17 In 1984, section 172A was added as a third ground for compensation.<sup>525</sup> It provides that if a party receives a search copy of the title within 14 days before settlement,<sup>526</sup> and any loss occurs through the registration of another instrument that does not appear on that search copy, the party can bring an action for recovery of damages against the Crown.<sup>527</sup> The registration or lodging of the instrument must have occurred within two months of settlement.<sup>528</sup> The court may extend the two-month limit where there is a delay which is not attributable to the purchaser.<sup>529</sup> Section 175(1A) states that if the loss is caused by a negligent solicitor, the Crown may recover the compensation from that solicitor, and section 175(1B) states that, except in special circumstances, it is not negligent to rely on the search copy without searching the journal or records of the Registrar.<sup>530</sup>
- 11.18 The result of this amendment is that, although purchasers who suffer loss due to a delay between lodgement and registration do not receive an indefeasible title, they are compensated for any loss. Settlement, lodgement and registration are now virtually simultaneous for instruments that are registered electronically. As the New Zealand system becomes increasingly automated, it may be that section 172A is no longer needed.

Q55 Does section 172A of the LTA provide adequate protection for those suffering loss caused by the gap between lodgement and registration?

Q56 With automation of the register, could section 172A of the LTA be repealed in the future?

- 525 This section was added in response to the case of *Bradley v Attorney General* [1978] 1 NZLR 36 (SC), where the conveyancer had searched the register prior to settlement of the contract and, having found the title clear, had proceeded to settlement and lodged the client's interest for registration. However, a mortgage had already been lodged against the title, and by the time the client's transfer was registered it was encumbered with a registered mortgage. At the time of the search, the mortgage had not appeared in the register, as the District Land Registry Office was about 5000 entries behind in registration of lodged instruments. The existence of the mortgage would have become apparent if the Registrar's journal had been searched. The Supreme Court held that this was not an "omission, mistake or misfeasance" on the part of the Land Registry Office, and that the conveyancer had been negligent in failing to search the journal (*Bradley v Attorney General*, 48 and 51 O'Regan J).
- 526 "Settlement" is defined in section 172A(2). A section 172A "search copy" is not an ordinary search copy but is specifically defined in section 172A as being for the purposes of the section; it is often called a "guaranteed search".
- 527 Land Transfer Act 1952, s 172A(3).
- 528 Land Transfer Act 1952, s 172A(3)(b).
- 529 Land Transfer Act 1952, s 172A(4).
- 530 An example of a "special circumstance" could be where there is a risk of a notice of claim under section 42 of the Property (Relationships) Act 1976 being lodged (Hinde McMorland & Sim, above n 513, para 9.101).



## Procedure for claim

### Section 173

- 11.19 Section 173 is designed to avoid formal proceedings (and the associated costs). Under section 173(1) a claimant must give notice to the Attorney-General and Registrar-General one month before commencing a claim for compensation.<sup>531</sup> If the Attorney-General and Registrar-General agree that the claim should be allowed, the claimant can be paid and the court action avoided.<sup>532</sup>
- 11.20 When a notice of claim under section 173 is received,<sup>533</sup> LINZ staff solicitors investigate the compensation claim and report their findings.<sup>534</sup> If the Registrar considers that a claim has merit, a report will be sent to the Crown Law Office setting out the facts and recommending payment. If Crown Counsel agree with the Registrar's report, they will confirm by letter that the claim can be paid. When a claim patently lacks merit, the Registrar may reject it without referral to Crown Law. In less straightforward cases, where the Registrar considers that a claim should be rejected, it will be referred to Crown Law with that recommendation.<sup>535</sup>

### Small claims

- 11.21 "Small claims" are potentially inexpensive claims that are uncomplicated, seek low amounts of compensation and the validity of which is relatively easy to assess. In practice, some small claims have been for as little as \$25;<sup>536</sup> and many claims are restricted to solicitor's costs falling within the \$200 to \$500 range. No matter how small and straightforward the claim, every case must still be referred to both the Attorney-General and the Registrar under section 173.
- 11.22 Where a small claim has obvious merits, the Registrar's report and the Crown Law Office's confirmation serve only as an audit trail to demonstrate that the procedure has been followed. This incurs Crown Law costs and a delay before payment can be made. This means that a small claim may cost several times more than its value in processing time.
- 11.23 The current procedure works well in practice, but is expensive in some cases. The expense could be reduced if the Registrar could determine small claims without reference to Crown Law. This would require amendment to the LTA,

531 Failure to comply with section 173 will defeat a claim under section 172: *Goodwin v Roach* (1977) 1 NZCPR 630, 632 (SC).

532 Under section 174 the claimant will also be liable for the full costs of defending an action if judgment is given in favour of the Crown or if the claimant discontinues the action or becomes non-suited.

533 Letters to the Registrar-General that do not strictly comply with the requirements of section 173 are usually treated by the Registrar-General as if they were formal claims. Where proceedings are issued without regard to the formal requirements of section 173, proceedings are usually rejected and the letter returned with advice as to the requirements of the section.

534 The Registrar-General's powers under sections 172 and 173 of the Land Transfer Act 1952 are not delegable: Land Transfer Act 1952, s 5(1)(a).

535 This procedure is consistent with Cabinet Directions requiring government departments facing imminent High Court litigation involving Crown interests to obtain advice and representation from Crown Law: "Cabinet Directions for the Conduct of Crown Legal Business 1993" 63/1166 (6 May 1993) *New Zealand Gazette* Wellington.

536 The cost of requesting LINZ to correct a simple and incontrovertible error, such as an incorrectly spelt name; Land Transfer Act 1952, s 172(a).

but would not appear to contravene the Cabinet Directions. If the procedure for small claims were to be changed, “small claims” would need to be defined. This could be done by imposing a ceiling on the amount of compensation;<sup>537</sup> by restricting claims to professional costs, with all damage and deprivation cases still going to the Crown, and limits fixed by Order in Council; or by the use of a formula accounting for the amount of compensation claimed and the complexity of the case.

Q57 Is the procedure in section 173 of the LTA efficient and fair for the parties involved?

Q58 Does cost effectiveness justify giving the Registrar-General the power to decide the merits of small claims and pay them without reference to Crown Law? Is this a necessary safeguard on the Registrar’s discretion?

Q59 If small claims are to be treated differently to large claims, what should be the ceiling for “small claims”? Should this be stated in regulations?

## Exceptions to the Right to Compensation in the LTA

### Section 178

11.24 Section 178 provides some specific exceptions to the right of compensation and states that the Crown is not liable for loss caused:

- (a) by the breach by a registered proprietor of any trust; or
- (b) by the same land having been included in 2 or more grants from the Crown; or
- (c) by the improper use of the seal of any corporation or company; or
- (d) by the registration of any instrument executed by any person under any legal disability, unless the fact of that disability was disclosed on the instrument by virtue of which that person was registered as proprietor; or
- (e) by the improper exercise of any power of sale or re-entry.<sup>538</sup>

11.25 According to *Adams’ Land Transfer*, these five exceptions to the right to compensation are justified, because they involve circumstances where “the Crown has no control to prevent the loss or where the problem would be difficult to detect”.<sup>539</sup>

537 An appropriate ceiling may be somewhere between \$500 and \$2000.

538 For example, failing to comply with the requirements of the Property Law Act 2007 when exercising mortgagee power of sale.

539 Struan Scott and others *Adams’ Land Transfer* (loose leaf, LexisNexis, Wellington, 2007) para S178.3.

- 11.26 Adams and Sim have argued that the breach of trust exception is consistent with the fact that notice of trusts cannot appear on the register.<sup>540</sup> This is a significant exception to the right to compensation for equitable interests under section 172(b). The Australian Torrens statutes share this exception.<sup>541</sup>
- 11.27 Section 178(b) precludes compensation for loss caused by the existence of two or more Crown grants. The registered proprietor(s) in such a case are not immune from ejection according to section 63(1)(e). This dispute is resolved outside of the indefeasibility/compensation structure.
- 11.28 An example where section 178(c) would preclude a compensation claim is if a seal or proper attestations to it were forged. If the forgery did not involve the seal it would on its face be compensable; this is arguably an arbitrary distinction. The New South Wales Law Reform Commission has argued that the introduction of a similar provision in New South Wales would be arbitrary and unjust.<sup>542</sup> The Commission also stated that “there appears to be no valid reason for discriminating between persons suffering loss on the basis of their legal identity”.<sup>543</sup>
- 11.29 Under section 178(d) compensation is not available for loss caused by execution of instruments of registration by a person with a legal disability, unless that disability was disclosed on the instrument leading to that person’s registration. “In practice, the Registrar may enter a caveat if he has knowledge or notice of a legal disability.”<sup>544</sup>

#### *Other exceptions in the LTA*

- 11.30 The LTA sets out a number of other exceptions. These are:
- Section 180 – Limitation of actions: an action for compensation under section 172 must be brought within six years from the date when the right to bring the action accrued;<sup>545</sup> but any person under the disability of infancy or unsoundness of mind may bring an action within three years from the date that the disability ceased.<sup>546</sup> This exception will be explored in further detail below.
  - Section 181 – laches: a person who suffers loss by the bringing of land under the LTA will not be entitled to compensation for that loss if they or their predecessor in title had notice that the land was being brought under the Act,

540 Ibid, para S178; Sim, above n 505, 145.

541 For example: Real Property Act 1900 (NSW), s 129(2)(f); Real Property Act 1886 (SA), s 211; Transfer of Land Act 1958 (Vic), s 109(2)(a); Land Title Act 1994 (Qld), s 189(1)(a).

542 New South Wales Law Reform Commission *Torrens Title: Compensation for Loss* (NSWLRC R 76, Sydney, 1996) para 4.43.

543 Ibid, para 4.44.

544 *Adams’ Land Transfer*, above n 539, para S178.4. See also Land Transfer Act 1952, s 211(d) (power of Registrar to caveat).

545 Under section 180(2) of the LTA the “date when the right to bring an action accrued” is calculated as “the date on which the plaintiff becomes aware, or but for his own default might have become aware, of the existence of his right to make a claim.

546 This exclusion does not apply if the Registrar has been personally served with notice of the claim, or if the Registrar had actual personal knowledge of the claim and failed to recognise it (Land Transfer Act 1952, s 180(1)).

and wilfully, negligently or collusively failed to lodge a caveat or allowed a caveat to lapse.<sup>547</sup>

- Section 60 – failure to register: a person deprived of an interest in land when that land is brought under the LTA is not entitled to compensation if he or she held that interest through a registrable deed or instrument that he or she failed to register under the Deeds Registration Act 1908.<sup>548</sup>
- Section 89E – title to access strips: where an access strip is created, any fee simple estate previously held by a person who is not a registered owner of the access strip will cease (as discussed in chapter 22). That person is not entitled to compensation unless the person was deprived through fraud or by the error, omission or misfeasance of the Registrar, and he or she is barred by the LTA from bringing an action for possession or recovery of the land.<sup>549</sup>
- Part 12 – title limited as to title and to parcels: there are restrictions on claiming compensation for land which is limited as to title,<sup>550</sup> or to parcels.<sup>551</sup> The continuing need for these exceptions must be considered in light of the continued existence of title limited as to title and to parcels (as discussed in chapter 20).
- Section 19 Land Transfer Amendment Act 1963 – prescriptive title: a registered proprietor deprived of any estate or interest in land by reason of a claim to adverse possession can only claim compensation if he or she was deprived of the interest by fraud on the part of any applicant or by the error, omission or misfeasance of the Registrar; and is barred by the indefeasibility provisions of the LTA from bringing a proceeding for possession or other proceeding for recovery.<sup>552</sup>

Q60 Is it appropriate to retain the above exceptions to the right to compensation, or can/should some of these exceptions be repealed?

## Non-LTA exceptions to the right to compensation

- 11.31 There are also several exceptions to the right to compensation that exist outside the LTA. First, section 172(a) does not apply where the Registrar is acting in a ministerial capacity (for example, issuing a then certificate of title in lieu of a Crown grant),<sup>553</sup> or where the Registrar is exercising a discretionary power.<sup>554</sup> However, section 216 allows decisions of the Registrar to be reviewed.

547 Now that virtually all freehold land in New Zealand has been registered (and given the six-year limitation on actions for compensation), this section may no longer be relevant. The same principle is also covered by contributory negligence, which is discussed below.

548 Land Transfer Act 1952, s 60.

549 Land Transfer Act 1952, s 89E(i)(i)(ii).

550 Land Transfer Act 1952, ss 201 and 204.

551 Land Transfer Act 1952, s 209.

552 This limitation is probably justified considering the ability of the registered proprietor to easily defeat a claim for adverse possession by lodging a caveat.

553 *The King v Registrar-General of Land* (1905) 24 NZLR 946 (CA); followed by *Alliance Developments Ltd v Flannery*, above n 514. Discussed in *Hinde McMorland & Sim*, above n 513, para 9.087. *Sim*, above n 505, 142.

554 *Sim*, *ibid*, 142; *Hinde McMorland & Sim*, *ibid*, para 9.087.

- 11.32 Secondly, there is an issue as to the availability of compensation where the Registrar has exercised the section 81 powers of correction (as discussed in chapter 5). It may be that an innocent person who obtains or retains registration “wrongfully” is not entitled to compensation if their title is cancelled or reduced by the Registrar acting under section 81.<sup>555</sup> The effect on the compensation regime of any amendment of section 81 will need to be considered.
- 11.33 Erroneous measurements are also an exception to the compensation provisions. Case law has established that the true measurements of a parcel of land are to be established by reference to the original survey pegs, as opposed to what is noted on the computer register, where the two are inconsistent.<sup>556</sup> There can be no claim under section 172(b) for loss of land through erroneous measurements, because the claimant is not barred from pursuing an action for ejection under section 63(1)(d). Another rationale for this exception is that what the purchaser bargains for is that parcel which was owned by the vendor, and that is what they will have received regardless of whether the measurements are correct.<sup>557</sup> Errors in measurement will usually be attributable to surveyors’ errors, which do not fall under section 172(a).<sup>558</sup> Adams has said:<sup>559</sup>
- No claim has ever been paid yet because the area or the measurements on a certificate of title have been wrongly shown. The theory is that in an ordinary guaranteed title the land which is guaranteed is the land as originally pegged, and if the claimant is in possession of that land he has got everything which the state has guaranteed.
- 11.34 Likewise, erroneous abutments are not covered. As is the case with erroneous measurements, the guarantee of title only extends to the parcel described. As such, there can be no claim to compensation where the land is erroneously described as abutting on a public highway.<sup>560</sup>
- 11.35 There are provisions in several statutes that may bar a claim for compensation under the LTA, for example:<sup>561</sup>
- Forestry Rights Registration Act 1983, section 5(1) (proviso) (boundaries of a forestry right not defined in accordance with the Land Transfer Act 1952, section 167);
  - Property Law Act 2007, section 146(2) (loss damage, or deprivation occasioned by the improper exercise by a mortgagee of any powers conferred by sections 142–145);
  - Resource Management Act 1991, section 417(3) (certificate specifying the rights of the holder of a deemed permit not indicating the true course of any race, the site of any dam, or boundary of any part of the land);

555 Bennion and others, above n 503, 144–145.

556 *Dempster v Richardson* (1931) 44 CLR 576, 590 (HCA) Starke J; *Russell v Mueller* (1906) 25 NZLR 256, 257 (SC) Stout CJ; *Moore v Dentice* (1902) 20 NZLR 128, 133–134 (SC); *Alliance Developments Ltd v Flannery*, above n 514, 408–409 Judge GR Joyce QC.

557 *Voudouris v Registrar General* (1993) 30 NSWLR 195, 198–199 (SC) Hodgson J; *Dempster v Richardson*, *ibid*, 590.

558 *Alliance Developments Ltd v Flannery*, above n 514, 411.

559 EC Adams *The Land Transfer Act 1952* (2 ed, Butterworths, Wellington, 1971) para 481, example 6.

560 *Ibid*, para 9.100.

561 For a full list see Hinde McMorland & Sim, above n 513, para 9.097, footnote 1. This list is also endorsed by Bennion and others, above n 503, 148.

- Statutory Land Charges Registration Act 1928, section 11 (no claim in respect of the registration or release of a charge, or by reason of any omission, mistake, or misfeasance of any person other than the Registrar or his or her staff in relation to the registration or release of a charge under the Act).

11.36 Contributory negligence may also alter the application of the compensation provisions. This is discussed in further detail below.

Q61 Is it appropriate to retain the above exceptions to the right to compensation, or should some of these exceptions be repealed?

Q62 Should the land transfer legislation codify the exceptions to the right to compensation with an exclusive list?

## THE COST OF THE COMPENSATION PROVISIONS

- 11.37 In considering whether the availability of compensation should be adjusted, and whether any of the exceptions to the right to compensation should be abolished, it is important to consider the cost that any changes to the compensation regime may create. Commentators have suggested that compensation claims are small and relatively infrequent.<sup>562</sup> The cost of maintaining a particular compensation system should also be considered against the benefits of an effective Torrens system.
- 11.38 LINZ is the government department that is responsible for paying compensation claims. LINZ does not categorise compensation claims according to the three sections of the Act (172(a), 172(b), 172A)). Rather, claims are split into five categories: court actions; errors; fraud; guaranteed search notes; and lost documents. “Guaranteed search note” claims are claims under section 172A. Cases categorised under “court actions” do not necessarily relate to a completed claim. Often when a case listed under “court action” is resolved, it will be noted in another category reflecting the basis of the claim. Errors, frauds, and lost documents will most likely fall into either subsection of section 172.
- 11.39 From 1 July 2002 to April 2007, a total of \$1,380,205.85 was paid out under the Act; \$198,890.05 was successfully claimed under section 172A.<sup>563</sup> This was made up of 19 claims paid in full and three claims paid in part. In this period, 17 claims under section 172A were denied. As mentioned above, with the automation of the register, claims under section 172A should become virtually non-existent in the future.
- 11.40 In the same period, \$1,181,315.80 was paid in compensation claims under section 172. As noted above, these claims have, for the most part, been categorised into cases of lost documents, error or fraud.
- 11.41 There were 30 lost document cases in the five-year period from 1999 to 2004. This includes five cases where landonline was temporarily not operating. Presumably, increased automation lessens the scope for documents to be lost.

<sup>562</sup> Sim, above n 505, 157–158.

<sup>563</sup> It should be noted that this figure is affected by a single claim for \$113,000.

- 11.42 'Errors' is by far the largest category of compensation claims, with 121 claims for the 1999–2004 period, and 28 claims in the financial year 2004–2005. Of those 28, 15 were accepted, five were partially accepted and six were declined.<sup>564</sup> A total of \$70,120.87 was paid out.
- 11.43 By comparison, claims based on fraud are rare, but more expensive, with only 20 claims for the 1999–2004 period. Of \$548,255.40 paid out under section 172 in the 2006–2007 financial year, \$500,000 was for two instances of fraud.<sup>565</sup> Of \$269,593.30 paid out under section 172 in the 2004–2005 financial year, \$193,500 was compensation for loss caused by fraud. As stated above, many cases of fraud could occur in either the paper or electronic environments.

## ISSUES

## Measure of damages

*Section 172(a)*

- 11.44 *McNicholl v Attorney General*<sup>566</sup> held that section 179 of the LTA, which deals with the measure of damages, only applies to claims under section 172(b), and that claims under section 172(a) are to be determined in accordance with "ordinary common law principles". The Court quoted *Registrar of Titles v Spencer* in which damages were quantified as:<sup>567</sup>

... commensurate with the loss [the plaintiff] has sustained, that is to say, he is to be put in the same position, so far as money can do it, as if the wrongful act complained of had not been done.

- 11.45 It was held that the relevant point in time for determining the loss was the date of deprivation. Mrs McNicholl had accepted the title to a block of land as settlement in a matrimonial property dispute on the basis that it was worth \$120,000. However, the Registrar had mistakenly left the limitation as to parcels off the title. In fact, the land was only worth \$12,000, because a paper road ran through the title. The Court found that at the date of deprivation – the date she settled the matrimonial property dispute – she had lost about \$100,000 (the difference between the values). She was thus entitled to compensation, despite the fact that at the time of the court case she did have a title worth \$120,000, as the council had since transferred the paper road to her.
- 11.46 Elizabeth Toomey disagrees with the Court's application of "ordinary common law principles" stating:<sup>568</sup>

The principle is to put the plaintiff in the same position as if the wrongful act complained of had not been done. Mrs McNicholl's claim raises an unusual question. At the time of the hearing, and through a seemingly unrelated event, Mrs McNicholl was in the position she originally anticipated. Her subsequent agreement with the North Shore City Council vested in Mrs McNicholl additional land taking the total value of her land to a sum equivalent to the basis of the matrimonial settlement. Should not Mrs McNicholl's claim have been measured in that light?

564 One was marked N/A and another referred to the Crown property manager.

565 One of which was the two instances of forgery in the *Waller v Davies* [2007] NZSC 43 buy-back scheme.

566 *McNicholl v Attorney General*, above n 510.

567 *Registrar of Titles v Spencer* (1909) 9 CLR 641, 645.

568 Elizabeth Toomey "Indefeasibility: Compensation – Error or Omission by Registrar" 7 BCB 119, 120.

11.47 It has been suggested that a more discretionary approach, as adopted by Mahoney JA in *Registrar-General v Behn*, should apply:<sup>569</sup>

I ... do not think that what was said in *Spencer's* case ... should be seen as limiting damages in all cases to the value of the land at the date when the plaintiff was deprived of it. I do not mean by this that, in every case, damages under the statutory count are to be assessed by reference to the value of the land of which the plaintiff was deprived at the time of the judgment. Each case must be considered according to its own facts ...

### Section 172(b)

11.48 Claims under section 172(b) are determined by section 179 of the Act:

#### Measure of damages

No person shall, as against the Crown, be entitled to recover any greater amount for compensation in respect of the loss or deprivation of any land, or of any estate or interest therein, than the value of that land, estate, or interest at the time of that deprivation, together with the value of the messuages and tenements erected thereon and improvements made thereto (if any) prior to the time of that deprivation, with interest at the rate of 5 percent per annum to the date of judgment recovered.

11.49 Stout CJ in *Russell v Registrar-General of Land* characterised the relevant value as follows:<sup>570</sup>

In my opinion that is the limit of the damages – ... the value of the interest in the land (and the buildings on it) of which they have been deprived – the value relative to the other part of the land leased to them. If, for example, the part lost contained a valuable water-right, and if the balance of the land were valueless without that water-right, then the value of the part lost would have to be ascertained relatively to the other land and to what damages they sustained by the loss of that valuable water-right. I am of opinion that they are not entitled to loss of profits, for they may buy another piece of land suitable to their business.

11.50 Setting the date for calculation of loss as the date of deprivation has been criticised as “a likely source of hardship in times of increasing property values”.<sup>571</sup> *Finucane v Registrar of Titles*<sup>572</sup> and *Spencer v Registrar of Titles*<sup>573</sup> note that the date of deprivation is the date on which the right of recovery of land became barred by the Torrens legislation.

11.51 On this point, the Canadian Joint Land Titles Committee found that basing compensation on the date of deprivation is likely to be unfair given the likelihood of increase in property values and the possibility of a long period of time between

569 *Registrar-General v Behn* [1980] 1 NSWLR 589, 597; cited in *ibid*, 120.

570 *Russell v Registrar-General of Land* (1907) 26 NZLR 1223, 1229 (CA) Stout CJ.

571 Hinde McMorland & Sim, above n 513, para 9.094.

572 *Finucane v Registrar of Titles* [1902] QSR 75.

573 *Spencer v Registrar of Titles* [1906] AC 503 (PC).



deprivation and discovery.<sup>574</sup> The Committee considered using the date of discovery but ultimately recommended the time at which the claimant brought the claim to the attention of the Registrar or sued on it because the “more current date is likely to be fairer, and proof of value at that date is likely to be easier and more accurate”.<sup>575</sup>

Q63 What is the most appropriate method of measuring damages for a compensation claim under the LTA?

Q64 Should the measure of damages applicable under section 172(a) of the LTA be left to the common law, or should guidance be given in the statute?

Q65 Does section 179 provide an appropriate method of calculating damages for section 172(b) of the LTA? In particular, should damages be measured as at the date when the claimant was deprived of land?

### Limitation periods

11.52 As discussed above, under section 180, claims must be brought within six years from the date the right to bring an action accrued. Similar limitation periods have been considered problematic in other jurisdictions because there may often be a significant amount of time between when the right to bring an action accrued and when that right is discovered.<sup>576</sup>

11.53 The Joint Canadian Land Titles Committee considered that a limitation period that commences at the time the claimant is deprived of his or her interest:<sup>577</sup>

is unfair, because in many cases there is nothing to bring to the claimant’s attention that the deprivation has taken place, so that the right to compensation is lost before the claimant knows of it.

11.54 For this reason, the Committee recommended a limitation period of two years running from the time when the claimant “knows or ought to know of the loss”.<sup>578</sup>

574 Joint Land Titles Committee (Alberta, British Columbia, Manitoba, The Council of Maritime Premiers, Northwest Territories, Ontario, Saskatchewan, Yukon) *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (Edmonton, 1990) 31. For a discussion of this issue in the Australian context see Les McCrimmon “Compensation Provisions in Torrens Statutes: The Existing Structure and Proposals for Change” (1993) 67 ALJ 904, 913 and 919–920.

575 *Ibid*, 31 and Model Land Recording and Registration Act, s 7.2.

576 For a survey of the law reform proposals in relation to this provision in other jurisdictions see Les McCrimmon “Compensation Provisions in Torrens Statutes: The Existing Structure and Proposals for Change” (1993) 67 ALJ 904, 918–919.

577 Joint Land Titles Committee, above n 574, 33. See also the Land Titles Act SNB 1981, c l-11, s 78.

578 *Ibid*, 34 and Model Land Recording and Registration Act, s 7.3.

- 11.55 This issue has also been considered in Australia. In 1996, the New South Wales Law Reform Commission recommended that the limitation period run for one year from the date of discovery.<sup>579</sup> In response to the same problem, the Queensland Law Reform Commission considered that it was inappropriate to have any limitation period.<sup>580</sup> However, a limitation period has been included in the Queensland Land Title Act 1994: 12 years from when a person becomes aware or reasonably ought to have become aware of the entitlement to compensation or a longer period if the court considers it just.<sup>581</sup>
- 11.56 The Limitation Act 1950 is currently being reviewed in New Zealand and a draft Limitation Defences Bill was published for discussion in December 2007.<sup>582</sup> The Law Commission considers that it is preferable to address the question of a limitation period for LTA compensation claims in light of future developments with this Bill. The general law relating to limitation periods, as contained in a new Limitation Defence Act, may address the issues identified here and it may no longer be necessary to include a specific provision in the LTA.

Q66 Should the limitation period in section 180 of the LTA be reconsidered?

### Contributory Negligence

- 11.57 It was held in *Miller v Davy*<sup>583</sup> and *Russell v Registrar-General of Land*<sup>584</sup> that the doctrine of contributory negligence applies to compensation claims under the LTA. When the cases were decided, contributory negligence operated as a complete defence to a claim for compensation. Now, section 3 of the Contributory Negligence Act 1947 allows for apportionment between multiple negligent actors. *Melville-Smith v Attorney-General* held that the Contributory Negligence Act 1947 applies to compensation claims under section 172(a) of the LTA.<sup>585</sup> The authors of Hinde, McMorland & Sim argue that “there would seem to be no reason why the same principle should not be applied to claims under section 172(b)”.<sup>586</sup> The application of contributory negligence to the compensation provisions is also supported by other commentators.<sup>587</sup>

579 New South Wales Law Reform Commission, above n 542, recommendation 14 and para 5.18. This recommendation has not been adopted, see the Real Property Act 1900 (NSW), s 131(2).

580 Queensland Law Reform Commission *Consolidation of Real Property Acts* (QLRC R 40, Brisbane, 1991) 51.

581 Land Title Act 1994 (Qld), s 188C.

582 Draft Limitation Defences Bill, [www.lawcom.govt.nz/ProjectCorporateReports.aspx?ProjectID=69](http://www.lawcom.govt.nz/ProjectCorporateReports.aspx?ProjectID=69) (accessed 4 September 2008).

583 *Miller v Davy* (1889) 7 NZLR 515, 521 (CA) Richmond J; followed in *In Re Jackson's Claim* (1892) 10 NZLR 148 (SC) Prendergast CJ.

584 *Russell v Registrar-General of Land*, above n 570, 1227–1228 Stout J.

585 *Melville-Smith v Attorney-General* [1996] 1 NZLR 596, 603 (HC) Hammond J.

586 Hinde McMorland & Sim, above n 513, para 9.098.

587 Sim, above n 505, 155–156; Toomey, above n 504, 153.

- 11.58 The applicability of contributory negligence to the compensation regime has not been directly challenged, but is sometimes ignored. An example is the case of *McNicholl v Attorney General* where the claimant was awarded compensation despite her own apparent negligence. This decision was criticised by Elizabeth Toomey as follows:<sup>588</sup>

On the present facts it can be argued that Mrs McNicholl was contributorily negligent in a number of ways. First, she had been living close to the land for a number of years and must be taken to have known that the road ran through the land as shown on the title. Further, the government valuation of the land was based on an area of 4550m<sup>2</sup> and the rates on the land would have been assessed accordingly. A prudent person proposing to take title to the land could have been expected to notice the discrepancy between these figures and the title, especially so given a history of familiarity with the land.

- 11.59 Immediate indefeasibility may be seen as protecting the purchaser or mortgagee against their own lack of care. It may seem like a contradictory policy that the mortgagee who negligently accepts a void mortgage (perhaps through fraud of a third party) is protected, but the mortgagor who negligently but innocently enables the fraud to occur is unprotected. However, contributory negligence has been incorporated into the guaranteed search scheme. A claim under section 172A is recoverable by the Crown against the claimant's conveyancer to the extent that the loss was caused by the conveyancer's negligence.<sup>589</sup>
- 11.60 LINZ applies contributory negligence considerations in cases that do not reach the court: for example, officers will not pay a claimant who has signed a blank transfer or mortgage document.
- 11.61 The Victoria Court of Appeal in *Registrar of Titles v Fairless*<sup>590</sup> took a different approach to arguably "negligent" victims of fraud. The case involved an elderly man who was defrauded over several years by a friend, culminating in a transfer of both of his properties. Although the documents of transfer had been signed, neither the trial judge nor the Court of Appeal found that this impeded a claim to compensation. The Court quoted the trial judge:<sup>591</sup>

Whether Mr Fairless failed to take reasonable care must be judged in the context of the facts as I have found them to be. The failure to read the documents, or take them away, or obtain advice, may in themselves be regarded as indicating a lack of care, or as a cause of the loss. But the wider context explains why such things occurred ... Mr Fairless' knowledge was that which had been represented or induced by Mr Doran. He was led by fraud into a false sense of understanding and accordingly signed the relevant documents without exercising that degree of scrutiny and care which may otherwise have been the case. The false sense of understanding was brought about by a complex of factors including what was said, his sense of trust and the manner of presentation of the documents to him.

588 Toomey "Indefeasibility: Compensation – Error or Omission by Registrar", above n 568, 120.

589 Land Transfer Act 1952, s 175(1A).

590 *Registrar of Titles v Fairless* [1997] 1 VR 404 (CA).

591 *Ibid*, 419 Phillips JA.

Q67 Should the Contributory Negligence Act 1947 apply to compensation claims under the LTA? If so, should it be listed in the land transfer legislation as qualification on the right to compensation? Should it apply to section 172(a) and section 172(b)?

Q68 If contributory negligence should apply to the compensation regime, should there be any limits to its application?

Q69 Is the policy of immediate indefeasibility consistent with a policy of contributory negligence, particularly in cases of third party fraud?

### Private title insurance

- 11.62 At least two title insurance companies are now in operation in New Zealand. According to Pamela O’Conner: “it is likely that its overseas competitors will be quick to follow the international market leader’s expansion into the Australian and New Zealand markets”.<sup>592</sup>
- 11.63 The need for private title insurance in a Torrens system with a state guarantee of title is questionable. However, it could be said that title insurance removes the cost, hassle and uncertainty of pursuing a suit against the loss-causer where state compensation is not available. Even where state compensation is available (in cases of fraud, for example), it may be easier to rely on title insurance.
- 11.64 In a transnational survey of private title insurance, Benito Arrunada concludes that insurance may not be able to establish itself outside the United States. He identifies one possible role for American insurance companies outside the United States as assisting international investment: American investors may be looking for the insurance securities they are familiar with when entering an unfamiliar property transaction.<sup>593</sup>
- 11.65 It may be that state compensation and private title insurance are complementary, with insurance covering the gaps left by compensation. Jonathan Flaws argues that the procedural requirements of the LTA “make state compensation a payment of last resort” while “the title insurer’s duty to defend ... [means] a claim under a title insurance policy is the first resort”.<sup>594</sup> Likewise, “[m]ost owners want the property they purchased, not the money. The title insurer’s duty to defend the insured’s title is probably of greater value to the insured than

592 Pamela O’Conner “Double Indemnity – Title Insurance and the Torrens System” (2003) 3 QUTLJ 141, 142.

593 Benito Arrunada “A Transaction Cost View of Title Insurance and its Role in Different Legal Systems” (2002) 27 The Geneva Papers on Risk and Insurance 582, 590 and 597.

594 Jonathan Flaws (Director of First Title Australia) “Compensation for Loss under the Torrens System – Extending State Compensation with Private Insurance” in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 397, 405, 408.

the entitlement to indemnity for actual loss”.<sup>595</sup> If these statements are true, it is arguable whether these gaps left by the compensation regime are best filled by private title insurance, or by more effective legislation.

- 11.66 After analysing the Canadian private title experience, Bruce Ziff is cautionary, stating that “[t]he clashes over market share, the reaction of the legal profession, issues around professional ethics and the unlawful practice of law (by title insurance companies), even anti-trust problems, seem likely to recur wherever title insurance seeks to make inroads”.<sup>596</sup> Pamela O’Conner argues that established Torrens systems are not at risk of experiencing the negative impact of private title insurance as felt in the United States. In New Zealand and Australia, the risk is that private insurance will erode our models of social insurance.<sup>597</sup>

Q70 Does the existence of private title insurance indicate problems with the state compensation system?

### The scope of the compensation scheme

- 11.67 It is uncontroversial that the benefits of Torrens title outweigh the costs, including the costs of state guarantee of title. The current issue is what benefits, if any, would result from an increase or decrease in the availability of compensation.
- 11.68 In 1989, the New South Wales Law Reform Commission suggested radical changes to the compensation regime that would remove the financial burden from the state.<sup>598</sup> However, these suggestions were not well received.<sup>599</sup> Following these submissions, the New South Wales Law Reform Commission recommended retaining state guarantee of title with an improved statutory scheme.<sup>600</sup>

595 Pamela O’Conner “Title Insurance – Is There A Catch?” (2003) 10 APLJ 24, 51.

596 Bruce Ziff “Title Insurance: The Big Print Giveth, But Does the Small Print Taketh Away” in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 371, 378. See too, Manitoba Law Reform Commission *Private Title Insurance* (a joint project with the Law Reform Commission of Saskatchewan) (MLRC R114, Winnipeg, 2006) recommending continuation (and, in part, extension) of the statutory compensation schemes with private title insurance as an optional extra.

597 O’Conner, above n 592, 165.

598 The changes suggested included abolishing compensation altogether (making registered proprietors responsible for insuring themselves against loss), and contracting out the state’s compensation obligations to a private insurance company (New South Wales Law Reform Commission *Torrens Title: Compensation for Loss* (NSWLRC IP 6, Sydney, 1989) para 6.3).

599 In response to the suggested abolition of compensation, it was submitted that state guarantee of title is a cheap and effective form of consumer protection, and that tort remedies, with their associated costs and delays, were an inadequate alternative. It was submitted that real property is significantly different to personal property. The Commission’s argument that compensation could be abolished since registration systems in foreign jurisdictions operate satisfactorily without compensation was rejected on the grounds of legal, social and economic differences between jurisdictions, and a lack of information about these other jurisdictions (New South Wales Law Reform Commission, above n 542, paras 4.2–4.10). The suggested introduction of private insurance to provide the state guarantee was rejected on the grounds that it could cause a loss of faith in the Register and the ability of the Land Titles Office to perform its statutory obligations. It was thought that given the Land Title Office’s familiarity with claims, such a change would be more costly. Submissions were concerned that a private insurer would not be adequately accountable to Parliament. The optional or compulsory purchase of private title insurance by registered proprietors themselves was also rejected as too costly (New South Wales Law Reform Commission, above n 542, paras 4.12 and 4.14).

600 *Ibid*, para 5.1.

- 11.69 The Law Commission does not suggest abolition of state guarantee of title, or its replacement with private insurance. Rather, with the introduction of private title insurance in New Zealand (as discussed above), it is necessary to ask whether a broadening of the availability of compensation is required to protect a scheme of *state* guarantee of title.
- 11.70 If increased availability of compensation is desirable and affordable, there are arguments for broadening the scope of the regime in the following ways:
- The relevant date for determining the measure of damages (at least for section 172(b)) could be changed from the “date of deprivation” to the date of the decision to pay the compensation (see discussion above).
  - It may be that some of the exceptions to the right to compensation are no longer considered fair. For example, the exclusion of loss caused by misuse of a company’s seal is arguably an arbitrary exclusion that can leave defrauded shareholders unable to recover losses.
  - Where both parties to a transaction are guilty of a degree of negligence short of fraud and not giving rise to an *in personam* claim, the principle of immediate indefeasibility protects completely the new interest holder. The application of contributory negligence may prevent the former interest holder from recovering the full amount of loss. Restricting the compensation available to the former interest holder may be unfair.
- 11.71 The compensation regime was originally supported by an assurance fund that was built up by a small levy paid on bringing land under the Act. Because the fund became quite large, and was rarely called upon, it was abolished and the proceeds paid into the Crown Bank Account from which claims are now paid.<sup>601</sup> If the cost of maintaining or adjusting the compensation regime is a concern, one option could be the re-establishment of a levy.

Q71 Should the scope of the compensation scheme be altered in any way?

601 Hinde McMorland & Sim, above n 513, para 9.084.

# Chapter 12

## Revising the Land Transfer Act

### CURRENT STRUCTURE OF THE ACT AND THE PROBLEMS

- 12.1 The present Land Transfer Act (LTA) is largely based on the Act of 1885. It is in 13 parts and originally comprised 245 sections. A number of these have been repealed, new parts and new sections have been added, and many sections have been amended. There are also two separate stand-alone amendment Acts: the Land Transfer Amendment Act 1963, which sets out a procedure to claim land based on adverse possession and the Land Transfer (Computer and Electronic Lodgement) Amendment Act 2002 (the 2002 Act), which provides for the computerisation of the register and for electronic dealing.
- 12.2 The Act is structured in a similar way to many other Torrens Acts. Part 1 of the LTA is headed “Administration” and includes general powers of the Registrar-General of Land. Part 2 is headed “Land subject to this Act” and covers voluntary applications to bring land under the Act. Part 3, “Registration”, concerns the paper system of registration. It includes the effect of registration for the registered proprietor: a paramount title subject to exceptions (sections 62, 63 and 64).
- 12.3 Part 4 is entitled “Certificate of Title”; this part covers certificates of title, noting of encumbrances on the register and their removal and the Registrar’s powers of correction of the register. Part 4A is headed “Title to access strips” and provides a mechanism to enable adjoining owners to obtain title to access strips. Part 5 is headed “Transfers” and includes creation of easements by various methods, and of covenants and life estates. Covenants can be noted but not registered as such. Part 6 relates to “Mortgages”, their variation and discharge; some provisions have recently been repealed by the Property Law Act 2007. Part 7 is entitled “Leases” and includes registration, variation and surrender of leases. Part 7A, entitled “Flat and office owning companies”, deals with registration of licences to occupy flats and offices.
- 12.4 Part 8 is headed “Transmissions, trusts (which generally may not be entered on the register pursuant to section 128), caveats, and powers of attorney”. Part 9 is headed “General provisions as to instruments” and contains provisions as to implied covenants and the execution of instruments. Part 10 is entitled “Plans and surveys” and includes provisions relating to the deposit of plans on subdivision and in other specified situations.

- 12.5 Part 11 is headed “Guarantee of title” and concerns compensation for loss or damage, including for register mistakes and for fraud, and for losses occurring after settlement but before registration. This part also contains sections 182 and 183, specifically protecting purchasers from actions for damages or possession.
- 12.6 Part 12 is entitled “Compulsory registration of titles”, and provides that all private general land is to be brought under the LTA. It substantially re-enacts the Transfer (Compulsory Registration of Titles) Act 1924. Part 13 is “General provisions” and covers additional powers of the Registrar, rights of review and appeal, offences and miscellaneous provisions, including power to make regulations.

## The LTA 1952: problems in drafting and structure

### *Questions of drafting*

- 12.7 The LTA and amendment Acts are in need of consolidation, modernisation, reorganisation, clarification in part and removal of obsolete sections. Some of the parts, outlined above, would benefit from re-positioning; much of the language needs updating. There are problems with the operation of a considerable number of the sections as will be described in Part 2 of this issues paper.
- 12.8 At the least, the legislation needs comprehensive revision so that it conforms with principles of clear drafting and is relatively simple, coherent and accessible for all users. Substantive matters would not be changed in the process of producing an up-to-date statute, except where necessary to give effect to recommendations resulting from this review. It is not the purpose of the review to alter the fundamental elements of the Torrens system.

### *Location of key provisions*

- 12.9 The LTA currently begins with administrative and procedural provisions. The key principles (a conclusive and inclusive register, certainty and security (or “indefeasibility”) of title and state compensation for loss of title due to the system) are distributed throughout the Act, mainly in sections 61 to 64 and sections 172 to 183. They should be near the start of the Act with the limitations on an indefeasible title clarified in one section. All Registrars’ powers (sections 81 to 85 in Part 4) and delegations thereof (see section 5) should be in one part of the Act. Part 11 (“Guarantee of title”), is key to Torrens registration systems and should be positioned nearer to the beginning of the Act, and sections 172 to 181 possibly entitled “State compensation”.

### *Obsolete or less important material*

- 12.10 As noted, the current form of the LTA is based on the 1885 Act. Part 1 relates to land registration districts and the office of the Registrar-General, essentially administrative provisions, which, in a modern statute, would appear towards the end of an Act. Sections 19 to 32 in Part 2, relating to bringing land under the Torrens



registration system, once required prominence but are now little used.<sup>602</sup> They could also more appropriately be repositioned at the end of the Act or in a schedule, together with the provisional registration and deeds provisions in Part 3.

#### *Revision of wording*

- 12.11 The language of many sections refers to the pre-electronic era of registration (for example, “duplicate certificate of title”). Much of the language of the Act is archaic. Many provisions are in long complex sentences, often difficult to understand and apply.<sup>603</sup>

#### *Incorporation of amendment Acts*

- 12.12 The new statute should reflect the fact that the system is now predominantly electronic. The 2002 Act and the Land Transfer Amendment Act 1963 (concerning adverse possession) should be merged with the LTA, rather than being separate from it. The electronic system was based on the Ontario electronic system<sup>604</sup> so the Ontario legislation could be a useful model for merging the 2002 Act with the new LTA.
- 12.13 However, provision still needs to be made for paper registration of some dealings. A neutral word is needed to enable much of the Act to be written in a way that applies both to the electronic and the paper register, and corresponding dealings. The Property Law Act 2007 definition of instruments may provide a useful model; “instrument” is defined as “any use of words, figures or symbols (for example, an agreement, contract, deed, grant, memorandum, ... or a judgment, order, or process of a court) that– (i) creates, evidences, modifies or extinguishes legal or equitable rights, interests or liabilities ... and (ii) is in a visible and tangible form and medium ... or is in an electronic form in accordance with the Electronic Transactions Act 2002 or the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 ...”.

#### *Procedural material – balance between the Act and the Regulations*

- 12.14 Some of the procedural and detailed material in the Act might be more appropriately placed in regulations, for example, the technical requirements relating to instruments and execution of documents in Part 9.

## RESTRUCTURING THE LTA Principles to guide reform of the Act

### *Principles of a modern Torrens land transfer system*

- 12.15 In 1971, Professor Hinde described the principles of the Torrens system as:<sup>605</sup>

First to provide a complete and reliable register of titles, which will disclose all the facts relevant to each registered proprietor’s title; secondly, to afford protection against the

602 The provisions still apply to deeds lands and Māori freehold land.

603 For examples see Part 2 of this issues paper.

604 See B France-Hudson “Living in Interesting Times: Landonline, Leader in its Field at What Cost?” [2006] 12 *Canta L R*, 121, 129.

605 GW Hinde “Preface” in GW Hinde (ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971) vii, vii. See GW Hinde “The Future of the Torrens System in New Zealand” in J F Northey (ed) *The AG Davis Essays in Law* (Butterworths, London, 1965) 77–78 where these are set out in further detail.

losses which, under common law systems of conveyancing, can result from defects in a vendor's or a mortgagor's title; and thirdly, to give a State guarantee of each registered proprietor's title.

12.16 In 1990, (as noted in the Introduction of this issues paper) the Canadian Joint Land Titles Committee expressed the purposes of its draft Act similarly, as:<sup>606</sup>

- (a) to provide certainty for ownership of interests in land and to simplify proof of ownership,
- (b) to facilitate the economic and efficient execution of transactions with respect to interests in land, and
- (c) to provide compensation for persons who sustain loss through entries in registers which are not authorized by this Act.

12.17 One of the main issues with these principles or purposes is that there is a tension between certainty of ownership and facility of transfer (sometimes referred to as “static security” and “dynamic security”).<sup>607</sup> While the latter promotes the interests of the immediate purchaser, once that purchaser has become a registered proprietor, their ownership of the land is subject to divestment by a fraudster or an instrument that would be void at common law. Another main issue is that, although legal interests can only be created by the state through registration, equitable interests are still recognised. A third is that there are interests that override the register by virtue of other legislation.<sup>608</sup> These issues are addressed in Torrens' registration Acts, but not always sufficiently. They need to be taken into account in a new Land Transfer Act.

#### *Elements of “Torrens” land registration*

12.18 Most land registration Acts that were modelled on the South Australian Act of 1861 – and indeed many land registration Acts modelled on the so-called English approach – have several strong similarities. The main elements appear to be:

- the conclusive register – and registration as the source of legal title;
- paramountcy of title for the registered proprietor, subject to exceptions or limits (for example, adverse possession, short-term leases);
- protection of the bona fide purchaser (for value) who is not affected by notice;
- protection of registered interests less than fee simple (mortgages, easements, leases);
- protection for unregistered interests (by caveats, cautions, recording);
- Registrar's powers of correction of the register;
- state compensation for losses as a result of the system – or fraud.

606 Joint Land Titles Committee (Alberta, British Columbia, Manitoba, The Council of Maritime Premiers, Northwest Territories, Ontario, Saskatchewan, Yukon) *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (Edmonton, 1990), Model Land Recording and Registration Act, s 1.5.

607 P O'Connor “Registration of Title in England and Australia: A Theoretical and Comparative Analysis” in E Cooke ed *Modern Studies in Property Law* (vol 2, Hart Publishing, Oxford, 2003) 81, 85.

608 See TW Mapp *Torrens Elusive Title* (vol 1, Alberta Law Review Book Series, University of Alberta, Edmonton, 1978) ch 4, for a similar analysis.

- 12.19 The above elements have developed from the original Torrens registration principles, and in the Law Commission's preliminary view should be retained in any reformed Land Transfer Act.
- 12.20 The key principles of a modern Torrens land transfer system might be stated as follows:
- reliable registration of title to land; a register that is as conclusive and inclusive as possible with regard to each registered proprietor's title;
  - certainty and security of legal title to interests in land as far as is possible;
  - protection of equitable title (where it is recorded in the system) as far as practicable;
  - relative simplicity and efficiency of transfer of title;
  - state compensation for loss of title due to the system.

#### *Legislative drafting principles*

- 12.21 Legislation should be effective, clear and accessible. That depends on good design. Good design is important in ensuring that the policy objectives of legislation are achieved. To this end, the legislation should be structured in a logical way that makes it easy for readers to follow and understand.
- 12.22 The Parliamentary Counsel Office guidelines suggest that material should be arranged in the following ways:
- substantive matters should come before procedural matters;
  - the general should come before the particular;
  - provisions that have universal or wide application should come before provisions that have limited application;
  - administrative and procedural provisions should be located after substantive provisions so as to give prominence to what is important to readers. Readers should not have to read through provisions that set up bodies and define their functions and powers before they reach what really matters.

#### A POSSIBLE STRUCTURE FOR A NEW LAND TRANSFER ACT

- 12.23 There is a variety of different structural models for a new LTA. Three models for reform are described in outline in this chapter. Model 1 is essentially the current LTA reorganised differently and incorporating the 1963 and 2002 stand-alone amendments. Model 2 is a structure based on modern Torrens legislation, the example set out being the Queensland Land Title Act 1994. Model 3 is a structure based on the proposed Canadian Model Land Recording and Registration Act. Models 1 and 2 are different in overall structure, but do not significantly differ as to what is included in the Act. The Canadian model, if adopted, would involve significant change because many provisions currently found in statute would be in regulations.

#### MODEL 1: BASED ON THE CURRENT LTA

- 12.24 It would be possible to revise the LTA part by part and section by section, guided by the Torrens principles and the principles of legislative drafting outlined above, without considering any overseas models in detail. The aim would be to modernise the language, clarify meanings and settle doubts, remove obsolete provisions, re-position key provisions so they are all in the same part and re-arrange the parts so that less important or little-used ones come at the end of the Act or in schedules. The existing 1963 and 2002 Amendment Acts

should be incorporated. At the same time, changes of substance can be made where reform is considered necessary as a consequence of research and responses to this issues paper. A possible structure is outlined below.

### Land Transfer Act – a possible new structure

<b>Part 1</b>	<b>Preliminary provisions</b>	Commencement, purpose, interpretation, overview.
<b>Part 2</b>	<b>Application</b>	Land to which Act applies – list of interests capable of registration.
<b>Part 3</b>	<b>Register</b>	Form and content. Responsibility for maintaining register. Access and searching.
<b>Part 4</b>	<b>Registration and its effect</b>	Principle of indefeasibility. Exceptions.
<b>Part 5</b>	<b>Evidence of title</b>	
<b>Part 6</b>	<b>Compensation</b>	
<b>Part 7</b>	<b>Powers of Registrar-General</b>	
<b>Part 8</b>	<b>Dealings with land and interests in land</b>	Transfers. Transmissions. Leases. Mortgages. Trusts. Easements. Covenants. Profits à prendre.
<b>Part 9</b>	<b>Caveats</b>	
<b>Part 10</b>	<b>Adverse possession applications</b>	1963 Amendment.
<b>Part 11</b>	<b>Access strips</b>	
<b>Part 12</b>	<b>Bringing land under Act</b>	Voluntary applications. Saving for Part 12.
<b>Part 13</b>	<b>Requirements for information</b>	Plans and surveys.
<b>Part 14</b>	<b>Flat and office owning companies</b>	
<b>Part 15</b>	<b>General provisions</b>	Administration. Appeals. Offences. Regulations. Savings and transitional. Repeals and consequential amendments.

MODEL 2:  
BASED ON  
A MODERN  
AUSTRALIAN  
TORRENS ACT

- 12.25 Comparative study of land title registration systems in other jurisdictions can be a helpful influence on revision of the New Zealand legislation. It has only been possible, within the time limits of this reference, to focus on some of the Australian Torrens Acts, and some of the Canadian legislation, these being the most relevant because of their many similarities with the New Zealand Act. Perusal of these Acts has also alerted the Law Commission to some instances of clear differences of substance from the New Zealand legislation, which has led to consideration of other possible changes to the New Zealand system. These have already been noted in previous chapters.
- 12.26 Consistency with the Australian legislation is a useful objective where that legislation is uniform across states and territories. Tasmania and Queensland (and the Northern Territory) have relatively modern land transfer legislation that could be relevant to restructuring the New Zealand LTA. The structure of those Acts is not very different from the current New Zealand LTA. However (particularly in the Queensland statute), the language is considerably updated, meanings are clearer and the arrangement of the sections more logical.
- 12.27 The Queensland Law Reform Commission reviewed the previous Queensland legislation and produced the *Consolidation of Real Property Act* report.<sup>609</sup> The focus of the review was on consolidation, modernisation and provision of a statute that was in a simple and accessible form for students, practitioners and employees of the titles office. The Land Title Act 1994<sup>610</sup> did, however, reform the substance of the legislation as well as consolidate it and, since 1994, there have been further substantive amendments reforming the Act.<sup>611</sup>
- 12.28 One of the purposes of the 1994 Act was to enable significant development projects so the Act interacts with the Land Act 1994, the Integrated Planning Act 1994 and, later, the Body Corporate and Community Development Act 1997 to enable “three-dimensional titling” for large complexes (including housing, shopping centres, freeways, casinos and so on, known as “mixed-use community development”). Another purpose was to more clearly define what is an indefeasible title to a lot, and a third was to increase the powers of the Registrar.<sup>612</sup> Not all these purposes may be relevant to New Zealand, but this need not detract from the utility of the Queensland Act as a model to influence reform.

*Structure of the Queensland Land Title Act 1994*

- 12.29 The Act had 210 sections originally, and 12 parts. Part 1 includes the object of the Act and definitions. Part 2 covers administration and contains general requirements for instruments of registration, and the powers of the Registrar (including the holding of inquiries). Section 8 provides that “a register kept by the registrar may be kept in the form (whether or not in a documentary form) the registrar considers appropriate.” Part 3 is about the freehold land register. Sections 37 to 41 of this part concern the creation and meaning of “indefeasible”

609 Queensland Law Reform Commission *Consolidation of Real Property Acts* (QLRC R 40, Brisbane, 1991).

610 [www.legislation.qld.gov.au/LEGISLTN/CURRENT/L/LandTitleA94.pdf](http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/L/LandTitleA94.pdf) (accessed 4 September 2008).

611 M Weir “An Australian View: The Queensland Land Title Act 1994” in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 295.

612 Discussion with S Dorsett, Victoria University of Wellington, on 23 April 2008 at the Law Commission.

title. Part 4 is headed “Registration of land” and includes formats for plans of survey and subdivision and building management statements. Section 48A establishes a relationship between this Act and subdivision under the strata title legislation. Part 5 is about joint holders, who can now sever a joint tenancy by unilaterally transferring their interest.

- 12.30 Part 6 is headed “Dealings directly affecting lots”. It covers transfers, leases (including variation of a lease) and mortgages (priorities can be varied), easements, covenants and profits à prendre. The latter can now be registered but a covenant (positive or negative) can only be registered where the state or local government is the covenantee. Part 6 also covers adverse possession applications, and registration of trusts. Part 6A concerns community titles schemes.
- 12.31 Part 7 is about other dealings such as caveats (sections 121 to 131) and powers of attorney. Part 7A covers settlement notices to protect some interests after their creation (sections 138 to 152) and Part 8 is about “Instruments”, including their correction, execution and standard terms.
- 12.32 Part 9 concerns registration and its effect. Sections 180 to 183 cover the benefits and consequences of registration, including for a volunteer. Sections 184 to 187 cover indefeasibility and the exceptions to indefeasibility (including “an equity arising from the act of the registered proprietor”); and sections 188 to 190 concern compensation for deprivation of land or for loss or damage. These key Torrens provisions are located together but not near the start of the Act.
- 12.33 Part 10, section 191 says that a vendor does not have an equitable lien. Part 10A covers tidal boundaries of plans of subdivisions. Part 11 is miscellaneous matters and includes the regulation-making power and Part 12 covers savings and transitional provisions.
- 12.34 It can be seen that the structure is not radically different to structures of present Torrens Acts but it would be different to the ordering of parts proposed by model 1, above.

### MODEL 3: THE CANADIAN MODEL LAND RECORDING AND REGISTRATION ACT

- 12.35 Another possible model is the Canadian Joint Land Titles Committee’s proposed Model Land Recording and Registration Act for the Canadian provinces and territories.<sup>613</sup> This proposed Act is based on Torrens principles, with all details of procedure to be in regulations. Consequently, it would be significantly different in structure from the Australasian and Canadian current statutes, and considerably shorter; it has only 43 sections. It has not been adopted in Canada, generally, although model provisions have influenced recent revisions in some provinces.
- 12.36 Part 1 is headed “Interpretation, Application and Purposes”. It contains definitions, including a definition of fraud (now used in Nova Scotia and, with modifications, in Ontario), application to Crown interests and generally to

613 Joint Land Titles Committee (Alberta, British Columbia, Manitoba, The Council of Maritime Premiers, Northwest Territories, Ontario, Saskatchewan, Yukon) *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (Edmonton, 1990).

parcels of land and interests, and the purposes of the Act. Part 2, headed “General” covers registration districts, public officers and employees, regulation-making powers and maintenance of records and copies.

- 12.37 Part 3 is entitled “Registers” and concerns the establishment and the content of parcel registers for all land within each district that is subject to the Act. Part 4 (“Recording”) is a lengthy part covering recording of interests, including the requirements for recording, time of recording, priority of interests (in order of time recorded), cancellation of recording and improper recording. Such interest recording would replace any caveat system. Alberta, British Columbia and Manitoba all have a caveat system that records priorities.
- 12.38 Part 5 is headed “Registration” and includes a list of “registrable interests”: a fee simple, life estate, leasehold, servitude, profit à prendre, a security interest, an interest under a postponed agreement and, optionally, the interest of a purchaser under an agreement to purchase land and an option to acquire a registrable interest. This part also covers registration and the effect of registration (the person registered as owner of an interest is the legal owner of the interest, subject to three specified situations). An owner displaced because of fraud or an unauthorised transaction may have the right to have the registration revised (the possibility of “deferred indefeasibility”). There are sections on reliance on improper and invalid transactions, and entitlement to revision.
- 12.39 Part 6 is headed “Interests Overriding Register” and lists five such interests, including “an interest created under an Act which expressly refers to this Act and expressly provides that the interest is enforceable with priority otherwise than as provided in this Act”. Part 7 is headed “Compensation” and includes grounds for, and amount of, compensation, when it is not payable, agreement, judgments and liability of wrongdoers. Finally, Part 8 is headed “Powers of Court”.

#### COMMENT ON THE MODELS FOR REFORM

- 12.40 Using the existing LTA structure as a base would retain most of the existing parts and headings, with some re-positioning. This would involve reviewing each section of the present Act and rewriting those that should be retained. It would probably not involve too much change of the positioning of sections within the parts, so would have the advantage of familiarity of structure within parts, although the parts themselves may be in a different position in the Act.
- 12.41 Research of modern overseas models could assist in producing a more rational and clearer structure for the New Zealand Act by virtue of considering more alternatives and more modern provisions, some of which may more clearly reflect Torrens principles and principles of clear drafting, as outlined above.
- 12.42 A model based on the Canadian Model Titles Act would lead to the most comprehensive change to structure and a much shorter, principled-based Act as a model, with most of the detail in regulations.<sup>614</sup> It would require considerable consultation because it would be a significant change to the status quo.

<sup>614</sup> Questions would need to be considered such as to what extent the details are purely procedural and are liable to change. See generally Legislation Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation* (2001 addition and amendments) chapter 10 [www.justice.govt.nz/lac](http://www.justice.govt.nz/lac) (accessed 4 September 2008).

Q72 What do you think would be an appropriate structure for the new LTA?

Q73 Are any of the models discussed in this chapter a useful basis for the new Act?

Q74 What provisions of the current LTA might be more appropriately placed in regulations?





## Part 2

# TECHNICAL ISSUES



LAW COMMISSION  
TE AKA MATUA O TE TURE

# Chapter 13

## Registration and provisional registration

### REGISTRATION: PART 3 OF THE LTA AND PART 2 OF THE 2002 ACT

#### Background

- 13.1 Registration and related matters under the Land Transfer Act 1952 (LTA) are spread across two Acts, the LTA itself and the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 (the 2002 Act). The LTA continues to address the traditional aspects that are still current, while the 2002 Act adds authority to keep the register in electronic form and to present instruments for registration electronically.
- 13.2 A new Land Transfer Act will have to consolidate both Acts, presenting the provisions for electronic registration and both electronic and manual presentation in a coherent manner. It must also exclude obsolete provisions.
- 13.3 This chapter will outline the manual and electronic aspects of presentation and registration of instruments contained in the LTA and 2002 Act, discuss the rationalisation of these provisions within the new structure of a new Land Transfer Act, and identify potential areas for improvement.

#### History

- 13.4 Parts 3 and 4 of the LTA contain provisions relating to registration and certificates of title (now computer registers), which are largely repeated from previous Land Transfer Acts going back to the Land Transfer Act 1870.
- 13.5 The LTA still provides for registration of instruments presented by hand, issuing certificates of title and recording in a paper-based register. Some of the provisions have been updated to account for electronic registration and electronic lodgement, while others relating to paper records and certificates and instruments of title are, or may be, redundant.

- 13.6 The Land Transfer (Automation) Amendment Act 1998 (the 1998 Act) was the first Act to provide for automation of the land titles system, including the creation of computer registers. As part of the new electronic registration process, paper documents presented manually for registration were entered in the Landonline system, bar-coded and scanned, then returned to the presenter. The scanned images became the definitive form of the instrument and authoritative for search purposes in place of the former paper-based register. An updated certificate of title was generated automatically and returned to the lodging party on completion of the registration process. This Act removed the requirement for documents to be registered in duplicate.
- 13.7 The 2002 Act repealed and replaced the 1998 Act from 1 June 2002. Most of the existing provisions enabling the register to be held and maintained in electronic form were brought forward from the 1998 Act, with some minor amendments, into the 2002 Act. New provisions for electronic lodgement of documents, the abolition of duplicate certificates of title, provision for electronic instruments and the use of electronic signatures and certifications for authentication purposes, were introduced.

### The register

- 13.8 Section 33 of the LTA requires the Registrar-General of Land to keep a register, and to record instruments and other matters required to be registered in the register. Originally the register comprised large bound volumes, which contained the duplicates of every grant and certificate of title for land in a land registration district. Details of registered instruments and other matters (memorials) were recorded in this register.
- 13.9 In 1961, the form of the register was altered; the bound folders were replaced by a loose-leaf system. Section 33 was amended at that time to allow the Registrar to keep the register “in the form of a book or otherwise”. This amendment conveniently allows the Registrar to keep the register in electronic form. The 1998 Act introduced provisions for the computerisation of the register and these were brought forward in the 2002 Act.
- 13.10 Section 5 of the 2002 Act allows the Registrar to authorise registration and recording in any medium. Section 6 provides that, if land is subject to the 2002 Act, then matters required to be registered and recorded under section 33 and other provisions of the LTA must instead be done under the 2002 Act; but the land continues to be subject to the LTA and the LTA, and every other relevant enactment still have effect.
- 13.11 On the creation of a computer freehold register (section 7 of the 2002 Act) or a computer unit title register (section 11 of the 2002 Act) the relevant folium established under section 33 of the LTA is closed. No similar provision is made for computer interest registers or computer composite registers, however.

- 13.12 The LTA, as amended by the 2002 Act, defines register to include a computer register.<sup>615</sup> Whilst the definition is not comprehensive it does indicate that the computer register is part of the “register”. The “register” in its wide sense (instrument of title, registered instruments, deposited plan) is not defined in any single provision but in a number of provisions.<sup>616</sup>
- 13.13 Given the longstanding use of the term “register” it is arguably best to retain that term, although a case can be made for a comprehensive definition in the interpretation section of the new Act.

### Computer registers

- 13.14 Certificates of title when converted into electronic form became computer registers and all dealings involving the land comprised in them are recorded electronically. The 2002 Act allows a considerable degree of flexibility as to the manner in which computer registers are stored: section 14 allows any medium or combination of media to be used so long as the computer registers can be maintained and accessed for the purposes of the land transfer legislation or other lawful purpose.
- 13.15 “Computer register” is defined as all or any of a computer freehold register, computer interest register, or computer unit title register, as the case requires.<sup>617</sup>

### Computer freehold register

- 13.16 The creation of computer freehold registers is authorised under section 7 of the 2002 Act. This is intended to cater for freehold interests registered under the LTA, including fee simple or life estates. When a computer freehold register is created the relevant folium established under section 33 of the LTA is closed.
- 13.17 Section 8 sets out in detail the information that must be included in each computer freehold register, namely:
- (a) the unique identifier for that computer freehold register; and
  - (b) a description of the land in a form determined by the Registrar from time to time; and
  - (c) the unique identifier for each instrument relevant to the land and the information necessary to enable its priority to be determined; and
  - (d) the name of the registered proprietor of the freehold interest in the land; and
  - (e) any minority or other restriction on the legal capacity of the registered proprietor that is known to the Registrar; and
  - (f) any other information or matter –
    - (i) that is required to be included by any Act or regulations; or
    - (ii) that is set out in any form prescribed by the principal Act for certificates of title and that the Registrar considers appropriate to include; or

615 Land Transfer Act 1952, s 2. See also Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, s 36.

616 See Land Transfer Act 1952, ss 2, 33(2) and 168(2).

617 Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, s 4.

(iii) that the Registrar considers appropriate to give effect to the requirements of any Act or regulations.

13.18 This level of detail may not need to be specified in the new Act, and could be set out in regulations.

#### *Computer interest register*

13.19 Computer interest registers, which are provided for under section 9 of the 2002 Act, may be created for the following matters:

- a leasehold interest;
- a non-freehold interest embodied as a folium of the register;
- an interest embodied in the provisional register;
- any matter incorporated or embodied in any other register;
- certain proclamations or gazette notices.

13.20 Section 10 sets out in detail the information that must be included in each computer interest register issued under section 9.

#### *Computer unit title register*

13.21 To accommodate unit titles issued under the Unit Titles Act 1972, section 11 of the 2002 Act also provides for the creation of computer unit title registers. These cater for stratum estates in freehold or leasehold and provide for additional matters specific to unit titles developments, such as a reference to the supplementary record sheet. Section 12 sets out in detail the information that must be included in each computer unit title register.

#### *Composite computer registers*

13.22 Under section 13 of the 2002 Act, there is authority to create composite computer registers, comprising all or any of a computer freehold register, computer interest register and computer unit title register. This enables the different forms of computer registers to be combined to cater for cross lease or time share titles.

13.23 The level of prescription of types of computer registers and the information that must be comprised in each type was necessary in the 1998 Act and 2002 Act, at the time when the paper-based register was being converted into electronic form. This level of prescription may or may not be necessary on an ongoing basis, or it could be specified in a lower level of enactment, such as regulation or specification by the Registrar.

Q75 Should the current provisions describing the register be redrafted, so as to be “generic” about the format the register is held in and would it be helpful if “the register” was comprehensively defined in one place?

Q76 Is the retention of the term “the register” appropriate?

Q77 Should all or part of the detailed prescription of the computer registers in sections 7 to 14 of the 2002 Act be removed from the Act and specified in the Regulations?

## Certificates of title and electronic transactions land

### *Certificates of title*

- 13.24 Under the LTA and previous Land Transfer Acts, the Registrar issued certificates of title to registered proprietors of land. Certificates of title were held by the registered proprietors as evidence of ownership or by mortgagees as security, and were produced to the Registrar whenever new transactions dealing with the land needed to be registered.
- 13.25 As mentioned above, the register comprised duplicates of these certificates of title, although the certificates of title that had to be produced for registration purposes are often referred to as “outstanding duplicates”.
- 13.26 The LTA still includes several instructions for the Registrar to issue certificates of title. For example, under section 12 the Governor-General may by warrant direct the Registrar to issue a certificate of title. For electronic lodgement to be possible, the requirement to produce certificates of title had to be abolished. To this end, section 25 of the 2002 Act provides for land to be “electronic transactions land”. Section 18 provides that the Registrar must not issue certificates of title for electronic transactions land, and if land is declared to be electronic transactions land all certificates of title are cancelled.

### *Electronic transactions land*

- 13.27 All land in computer registers is now electronic transactions land.<sup>618</sup> However, there is a tiny and decreasing amount of land that has not yet had computer registers created for it. This land remains, for the time being, in part-cancelled certificates of title awaiting a survey of the residue before the titles are cancelled and replaced with computer registers.
- 13.28 Section 19 of the 2002 Act provides that, for electronic transactions land, the Registrar’s functions in relation to certificates of title are satisfied by creating and making entries on computer registers, and that requirements in other enactments to produce certificates of title do not apply. Section 20 of that Act provides that, regarding electronic transactions land, references in other enactments to a certificate of title or folium of the register must be read as references to computer registers.
- 13.29 Section 25(2) of the 2002 Act provides that the Registrar can cause land to cease to be electronic transactions land.

618 “Designating Land Transfer Offices and Declaration of Land as Electronic Transactions Land” (10 October 2002) *New Zealand Gazette Wellington* 3895.

- 13.30 Sections 15, 16 and 17 of the 2002 Act were inserted in case land had to cease to be electronic transactions land due to circumstances that meant the land was not capable of being sustained in a computer register. Some form of title was needed to replace the cancelled computer register. Those circumstances have not materialised so the provisions are probably not required in their present form.
- 13.31 However, special provision may still be necessary to deal with the possibility that a computer register may become “corrupted” or unserviceable, even if temporarily, so that it becomes necessary to reconstitute it in some other form to enable it be dealt with. There is provision in the current LTA for a record to be reconstituted.<sup>619</sup> It may be better to describe the replacement title in a way that does not confuse it with a former type of title.

### Conclusions

- 13.32 In light of the above, the new Land Transfer Act will need to:
- restate existing requirements in the LTA for the Registrar to issue certificates of title and replace them with requirements to issue computer registers;
  - amend other enactments that refer to certificates of title instead of computer registers;
  - accommodate land (if any) subject to the Act for which computer registers have not been created, and for which certificates of title have not been cancelled; and
  - provide for the possibility of land ceasing to be electronic transactions land and the issue of some new form of title for the land.
- 13.33 The new LTA will need a definition of electronic transactions land. However, it will no longer be based on a future declaration of status.<sup>620</sup> The 2002 declaration of electronic transactions land included all land that becomes comprised in a computer register on or after 14 October 2002.<sup>621</sup> A new definition of electronic transactions land will have to provide for the issue of some new form of instrument of title when land ceases to be electronic transactions land.

### Presentation for registration

- 13.34 There are now two modes of presenting instruments for registration:
- manual presentation of paper instruments under the LTA;
  - electronic lodgement (e-lodgement) under the 2002 Act.
- 13.35 Land Information New Zealand (LINZ) anticipates that 100 percent e-lodgement capability and mandatory e-lodgement for conveyancers will be effective by the time a replacement Act comes into force. E-lodgement will be the “default” mode of presentation, and manual presentation by non-conveyancers will be the exceptional mode.

619 Land Transfer Act 1952, ss 215A and 215B.

620 See Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, s 25.

621 “Designating Land Transfer Offices and Declaration of Land as Electronic Transactions Land”, above n 618.



### *E-lodgement*

- 13.36 The 2002 Act provides for registration of electronic instruments. An electronic instrument is an instrument of a class specified in the Land Transfer Regulations 2002 that has been prepared in a Registrar-approved electronic workspace facility.<sup>622</sup>
- 13.37 The present electronic workspace facility is a secure internet site that conveyancers use to set up and present electronic instruments for registration. Included in the design of the electronic workspace facility are templates for entering or attaching key data describing the transaction to be registered and identifying affected land and registered proprietors to allow Landonline, and in some cases LINZ staff, to correctly record the electronic instruments against the relevant computer registers.
- 13.38 An electronic workspace facility must be one approved by the Registrar, who must be satisfied that adequate provision is made to ensure that:<sup>623</sup>
- (a) instruments prepared in the facility comply with the requirements of this Act and the principal Act when lodged; and
  - (b) the Registrar is able to carry out his or her functions under this Act.
- 13.39 These requirements may appear to be vague about what an electronic workspace facility does and how it works. Against this, the statutory provisions have to avoid prescribing details or limiting the solutions that an electronic workspace facility provider might develop to meet these requirements.

### *Manual presentation*

- 13.40 Section 47 of the LTA allows paper instruments to be presented for registration:
- (a) by hand at the public counter; or
  - (b) by depositing the instrument in a secure facility provided for that purpose; or
  - (c) by posting it to that office.

### *Electronic lodgement but manual processing*

- 13.41 Some electronic instruments are capable of being processed electronically from preparation and lodgement through to registration or refusal; these are called “Auto-Reg”. From late 2008, further types of electronic instrument will be provided for. These will be instruments that are lodged electronically but processed manually by LINZ staff and scrutinised in the same manner as paper instruments; these are called “Lodge”.

### *Allocation of priority*

- 13.42 Section 37 of the LTA provides that instruments must be registered in the order of time in which they are presented for registration. The concept that instruments are registered and have legal effect in the order in which they are presented, and not by the date of the instruments themselves, is fundamental to land transfer registration.

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622 Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, s 22.

623 Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, s 22(2).

- 13.43 The act of registration, whether under the LTA or the 2002 Act, creates or transfers a legal interest in registered land. This principle is implemented through section 41(1) of the LTA by:<sup>624</sup>
- specifically denying instruments any effectual power to transfer any estate or interest in land or render it liable as a security; and
  - specifically providing that it is “upon the registration of the instrument” that the estate or interest passes or the land becomes liable as a security.
- 13.44 Originally, when all instruments had to be presented by hand at the designated land registry offices for the land registration district, this was simple to administer. It has become complicated as the number of LINZ offices has decreased, other modes of presentation have been provided, and e-lodgement has been introduced.
- 13.45 A paper instrument lodged via the post or by drop-box is deemed to have been presented “on the business day after the day on which it is received ... and before any other matter presented on the day of registration in relation to the same land”.<sup>625</sup> As the prescribed lodgement hours are between 9 am and 4 pm, priority is deferred until 9 am on the next working day after the day upon which the instrument was originally received in the land registry office. The delay in deemed presentation is necessary to cope with the time needed to process instruments presented manually as against the “instantaneous” presentation of electronic instruments.
- 13.46 Electronic instruments are registered as at the date and time they are submitted, even though an instrument affecting the same computer register may have arrived at LINZ via the post or in the drop-box earlier on the same day, but was not entered into Landonline by LINZ staff.
- 13.47 Anyone who has concern about securing priority for their transaction in a more immediate fashion can do so by presenting the instrument by hand under section 47(1)(a) of the LTA.
- 13.48 Once e-lodgement is extended to caveats there should be less need for this provision. However, because people must have the option not to use conveyancers and the ability to present their own caveats and other instruments manually, this provision must be retained.
- 13.49 If two competing instruments are lodged via the post or drop-box on the same day in respect of the same land, priority must be determined in accordance with section 47(5) and (6) of the LTA. These provisions:
- relegate competing caveats and notices of claim; and
  - require priority of other instruments to be allocated according to the stamped date and time of receipt by the Registrar.
- 13.50 Section 41(2) of the LTA deals with the situation where two or more instruments executed by the same proprietor and purporting to transfer or encumber the same estate or interest in any land, are simultaneously presented for registration. The subsection provides that the Registrar shall register and endorse the instrument which is accompanied by the grant or certificate of title.

624 See Struan Scott and others *Adams' Land Transfer* (loose leaf, LexisNexis, Wellington, 2007) para S41.2.

625 Land Transfer Act 1952, s 47(4).

- 13.51 Section 41(3) states that section 41(2) does not apply to any electronic instruments intended to be registered against any electronic transactions land. However, with the abolition of certificates of title, section 41(2) is virtually obsolete.<sup>626</sup> This leaves the Registrar with no rule for resolving simultaneous manual lodgements, other than to requisition for evidence to prove that lodgement should take priority.
- 13.52 The 2002 Act does not say expressly how electronic instruments are presented for registration. It is implicit that they are presented by the operation of the electronic workspace facility, and once presented, Landonline ensures they are registered in accordance with section 37 of the LTA.
- 13.53 When considered side by side, the detailed provisions for determining priority of manually presented instruments and the lack of detail in relation to e-lodgement seems incongruous. However, this is not so surprising given that the present section 47 was only inserted in the LTA in 2002. Prior to that, presentation of instruments was very simply regulated by regulation 15 of the Land Transfer Regulations 1966, amended in 2000 to allow documents to be presented by post.

Q78 Are the current provisions for an electronic workspace facility sufficiently prescriptive?

Q79 Section 41(2) of the LTA is no longer relevant, but is it necessary to provide some other rule to determine priority between simultaneous paper lodgements affecting the same computer register?

Q80 Should any parts of sections 41 and 47 of the LTA, which are still applicable, be relegated to regulations? If this does happen, should provision for physical presentation be retained in the principal Act itself, so that it continues to have prominence?

### Rejections and requisitions

- 13.54 Section 43 of the LTA deals with the situation where an instrument lodged for registration is not in order for registration. While the wording of the section suggests that it is directed at paper instruments (for example, the references to returning or retaining the instrument), it also applies to electronic instruments.
- 13.55 Section 23 of the 2002 Act sets out the requirements for an electronic instrument to be in order for registration. This section also provides that, if an electronic instrument is not in order for registration, section 43 of the LTA applies with any necessary modifications. Under section 43(1) the Registrar can either return

<sup>626</sup> See “Designating Land Transfer Offices and Declaration of Land as Electronic Transactions Land” (10 October 2002) *New Zealand Gazette*, Wellington, 3895.

an instrument that is not in order (“rejection” under section 43(1)(a)) or retain it pending its rectification (“requisition” under section 43(1)(b)). Returned instruments are deemed not to have been presented for registration.

- 13.56 Where the Registrar chooses to retain the instrument, notice of the defect (a “requisition”) is given to the person who lodged the instrument and a time in which the defect is to be rectified is specified.
- 13.57 As discussed above, while some instruments are registered automatically (Auto-Reg), some instruments will be lodged electronically but processed manually (Lodge). That means that there will potentially be an incongruity in the way some defective instruments may be dealt with. Electronic instruments of the Auto-Reg variety will be automatically rejected if they are defective. Other instruments (Lodge or paper) will be capable of either being rejected or requisitioned if defective. That could be seen as being somewhat inconsistent. On the other hand, the removal of the requisition option from the new Act could also lead to undesirable results and may not provide the flexibility needed to deal even-handedly with some transactions.
- 13.58 Section 43(1A) addresses the situation where an instrument is manually presented, scanned into Landonline and then returned. If staff examining the image find that it is not in order, they can still treat the instrument as having been returned or retained under section 43(1)(a) or (b).
- 13.59 Section 23 of the 2002 Act provides that, if an electronic instrument is not in order for registration, the Registrar must notify the person who submitted the instrument, and that notification constitutes an effective return of the instrument under section 43(1)(a) of the LTA.
- 13.60 Section 28 of the 2002 Act provides power to refuse to register, in addition to the powers conferred by section 43 of the LTA. Section 28 deals with two situations. The first arises when a paper instrument has been lodged for registration and, while it is in order, it proves to be impracticable to image it into an electronic form. The second situation is when the instrument is submitted as an electronic instrument, but it proves to be impracticable for the Registrar to capture the data from it. In both of these situations, section 28 empowers the Registrar to notify the person for whom the instrument was received and arrange for it to be resubmitted. Section 28(2) preserves the priority of such instruments for a period of two months or any other period the Registrar may allow.

Q81 Should the Act continue to provide for the requisition option for dealing with defective instruments?

### Registration procedure

- 13.61 The legislation still provides for two modes of effecting registration:
- (a) manual recording of paper instruments against paper records under the LTA; and
  - (b) creating computer registers and updating them under the 2002 Act.

*Manual registration no longer applicable*

- 13.62 Manual recording ceased from 1999, and all registration is now effected by electronic recording (whether instruments are presented manually or lodged electronically using the electronic workspace facility). A new Act should no longer refer to manual recording, and only refer to electronic recording against computer registers.
- 13.63 Manually processed instruments were considered to be registered when memorials were entered on the register and authenticated in accordance with section 39 of the LTA, but were deemed to have been registered at the time they were presented in their order of presentation (section 37 of the LTA).
- 13.64 The now obsolete section 34 of the LTA provides that the registration of Crown grants and certificates of title are deemed to have occurred as soon as they have been marked by the Registrar with the folium and volume as embodied in the register. In relation to instruments, the act of registration is deemed to have occurred when the appropriate memorial has been entered in the register.
- 13.65 Section 39 describes the contents of the memorial to be entered in the register. These are (a) the nature of the instrument; (b) the time of production of the instrument for registration; (c) the name of the person benefiting; and (d) the instrument's number and/or symbol. That provision was updated in 2002 and is still relevant.
- 13.66 The now obsolete section 40 requires the Registrar to memorialise duplicate titles and instruments and also manually endorse on a registered instrument particulars as to registration.
- 13.67 Under section 41(1), instruments are not effectual until registration. This was updated in 2002 to include registration under the 2002 Act.

*Electronic registration*

- 13.68 For all practical purposes, since 1 February 1999, the provisions of section 34 of the LTA have ceased to apply. Section 30 of the 2002 Act provides that “[t]he registration of an instrument or other matter under this Act is effected when a unique identifier for the instrument or matter is entered in the relevant computer register”, and that section 34 of the LTA does not apply if registration is effected under the 2002 Act.
- 13.69 The term “unique identifier” is defined in section 4 of the 2002 Act as “a combination of letters or numbers, or both, by which a computer register or an instrument or other document is, or is to be, uniquely identified”. So, registration now occurs when a unique identifier is entered in a computer register, instead of a memorial on a certificate of title and folium of the register.
- 13.70 Sections 37, 39 and 41 continue to apply, in full or in part, although their wording and their position in the legislation require review.

- 13.71 Section 19 of the 2002 Act provides, for electronic transactions land, that the Registrar may create and make entries in computer registers, instead of making entries in and endorsing paper records and documents and filing registered documents. Section 36(4) of the LTA provides that instruments presented for registration under the 2002 Act do not have to be presented in duplicate.
- 13.72 The Registrar has declared virtually all land to be “electronic transactions land” under section 25 of the 2002 Act. This has removed the requirements for the issue and noting of duplicate titles and is a key and necessary element of the electronic system (sections 18 to 20 of the 2002 Act). This applies to transactions lodged electronically and manually. Thus, sections 36, 40 and 44 of the LTA are obsolete.
- 13.73 Section 38 of the LTA sets out the registration procedure. Subsection (1) which requires the Registrar to “file” registered instruments, may be redundant as subsections 19(6) and 19(7)(e) of the 2002 Act provide that any requirement to file or deposit any instrument is satisfied by creating or making an entry in a computer register. Subsection (2) is still applicable to paper instruments (except memoranda under section 155A of the LTA) so should be retained. Subsection (3) has been repealed. Subsection (4) provides that the Registrar’s filed copy of a registered instrument prevails over a conflicting copy. This provision should probably be retained because many past-registered instruments still contain current interests.
- 13.74 Section 31 of the 2002 Act mirrors section 38(2) of the LTA, by providing that all information registered at any time under the 2002 Act (except a section 155A memorandum) is part of the register.
- 13.75 Section 7(3)(c) of the 2002 Act says that, when a computer freehold register is created, any registered instrument “may be held in its definitive form as determined by the Registrar”. Section 11(2)(d) of that Act is a similar provision for computer unit title registers. Section 9 of the 2002 Act (computer interest registers) does not have a similar provision. However, perhaps there should be such a provision for computer interest registers, since instruments can be registered against these registers just as for the other two types.
- 13.76 Section 41(4) of the LTA provides that, if an instrument does not contain an operative provision that gives effect to the object of the instrument, on registration the instrument has “deemed” effect as described in that section, subject to section 41(5). This provision (inserted in 2002) contemplates electronic instruments (of the type then prescribed), where operative provisions are not required by section 26(3) of the 2002 Act. Despite the generic wording used in section 41(4), this provision should be reviewed to ensure it provides the greatest possible coverage.
- 13.77 In relation to the implementation of electronic lodgement of title and survey transactions, if arrangements for public access to LINZ offices or counters are to be dispensed with, the provisions in sections 33, 46 and 47 may require repeal, amendment or replacement.

Q82 What provisions in the LTA need to be retained in order to cater for land that ceases to be electronic transactions land?

Q83 Are there any other issues that require attention in relation to the register and registration?

*Checks in the electronic system*

- 13.78 Landonline replicates the manual decision-making process in determining whether an instrument is registrable or defective. Pre-programmed business rules are built into the Landonline lodgement and registration system. These business rules mirror statutory requirements and restrictions that impact on the registration process. In other words, Landonline scrutinises the dealing and the computer register in the same way that a LINZ staff member would do.
- 13.79 The business rules consist of:
- (a) Data matching that aligns instrument details (for example, the computer register reference, the registered proprietor's name and the details of the registered instrument details) with computer register details to ensure that the right estate or interest is being transacted on the right computer register.
  - (b) Identification of "stop" documents (caveats, notices of claim, charging orders) that potentially prevent registration. The system recognises a removal (for example, a withdrawal or release) of the stop documents if they are lodged in the same dealing as instruments that would otherwise be stopped. In some other cases, the conveyancer is given the option of either getting the offending instruments taken off the register by release, or by certifying that he or she holds consent if that is an alternative to removal.
  - (c) Flags that warn conveyancers that a particular status, such as Māori freehold land, or entry on the register, for example, of a mortgage or a charge, may require compliance with certain statutory requirements. These may apply in some instances but not others and invite the conveyancer to investigate whether compliance is necessary, and, if so, what is needed in order to comply with those requirements. These are programmed to target relevant instruments that may be affected but raise special certifications that allow the conveyancer to certify that requisite consent or approval has been obtained and evidence of that is retained on file (it is not possible or necessary to produce such documentation with the e-dealing).
  - (d) Ensuring that all section 164A certifications have been given.
- 13.80 Pre-validation is provided as an early-warning notice for those preparing to lodge instruments for which problems exist that would prevent registration.
- 13.81 If the dealing is electronically lodged and fails to meet the business rules, it will be automatically rejected and returned to the submitting party's electronic work-tray with reasons why it was rejected, (section 23 of the 2002 Act).

## Searching the register

### *Register to be open for search*

- 13.82 A fundamental feature of the paper-based land transfer register was the availability of title information for search purposes. Provisions confirming equivalent rights of access to information held in the Landonline automated register are contained in section 33 of the 2002 Act. Access to the various search products in electronic form is authorised by the Chief Executive of LINZ.<sup>627</sup>
- 13.83 In respect of computer registers, section 33(1) of the 2002 Act provides that the right of access to the register for the purpose of inspection conferred by section 46 of the LTA does not apply to computer registers. This recognises that computer registers are held as electronic data, incapable of “inspection” in a practical sense, and only viewable on a computer screen or as a printout from Landonline.
- 13.84 Section 45A of the LTA authorises the searching of the computer register and registered instruments. This provision has to be read in conjunction with sections 20 and 33 of the 2002 Act. This complicated set of links is unsatisfactory and the new Act should describe the process in a more transparent manner.
- 13.85 There is an alternative right to receive a paper document that records the content of an instrument contained within the computer register.<sup>628</sup>

### *Information to be retained*

- 13.86 The Registrar is required to maintain a complete record of all information registered in the Landonline system. This includes details of past transactions and estates or interests registered in electronic form that have since expired or become extinguished. Any entries made to correct registration errors are recorded and can be traced by searching the historical view of the computer register.<sup>629</sup>

### *Evidentiary provisions*

- 13.87 With respect to registered instruments that are in a “paper” format (of which there are millions that are not imaged and probably never will be), section 45 provides a means by which a person can obtain a certified copy of that instrument. While this section is still current, its importance has decreased with the creation of computer registers and the electronic lodgement and retention of instruments. In the situation where instruments have been lodged manually and retained electronically or lodged electronically, section 35 of the 2002 Act provides that an “official” computer printout of an instrument certified by or on behalf of the Registrar is admissible in evidence.
- 13.88 Under section 34 of the 2002 Act, copies of certificates of title for non-electronic transactions land and computer printouts of computer registers for electronic transactions land must be received in a court as conclusive evidence of the

627 Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, s 33(4).

628 Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, s 33(3).

629 Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, s 32.



information they contain and of the recording of that information on the register as long as they appear unaltered. In addition, there is provision for certification by or on behalf of the Registrar of such records to verify their authenticity.<sup>630</sup>

Q84 The searching and evidentiary provisions should be reviewed and consolidated in the new Act. Are there any particular issues or problems that need addressing?

### Authorisation

13.89 The LTA and previous Land Transfer Acts sought to ensure that instruments were accompanied by evidence of authorisation by registered proprietors and interest-holders and of the bona fides of the transactions before the transactions were effected by registration. The evidence consisted of:

- production of certificates of title;
- execution by registered proprietors and attestation by witnesses;
- mortgagees' and lessees' consents; and
- certificates of correctness by the applicants or parties claiming or their solicitor or landbroker.

13.90 With the two modes of presentation described earlier, there will be three schemes for evidencing authorisation and bona fides of instruments, depending on whether they are lodged electronically, with or without conveyancer certifications, or presented manually.

### Conveyancers' certifications

13.91 The e-dealing system relies upon certifications given by authorised conveyancing practitioners in place of the traditional execution methods, as provided for in sections 164A to 164E of the LTA. An electronic instrument cannot be accepted for registration unless it is certified in accordance with these provisions.<sup>631</sup> The requisite certifications provide confirmation as to the following matters:

- that the person on whose behalf the certifying practitioner is acting has authorised the transaction and has the legal capacity to do so;
- that the certifying practitioner has taken reasonable steps to confirm the identity of the person who provided that authority;
- that the instrument to which the certification relates complies with all applicable statutory requirements (specific certification to address special circumstances is included within this category); and
- that the certifying practitioner has supporting documentation to verify the above matters and will retain that material for the prescribed period.

13.92 The specific wording of the certifications required for electronic instruments lodged via the e-dealing system is prescribed by regulation. The Land Transfer Regulations 2002 also set out the parties in respect of whom certifications must be given for each instrument type.

630 Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, ss 34(3) and 35.

631 Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, s 23(1)(c).

13.93 Even though the current provisions were inserted as recently as 2002, the introduction of 100 percent electronic lodgement of LTA transactions may highlight areas where the provisions relating to authorisation of electronic instruments could be improved.

#### *Electronic lodgements without conveyancer certifications*

13.94 There may be continued reliance on the Electronic Transactions Act 2002 (ETA). Section 3 of the ETA provides that the purpose of the Act is to facilitate the use of electronic technology by:

- (a) reducing uncertainty regarding the legal effect of information that is in electronic form or that is communicated by electronic means, and by reducing the uncertainty as to the time and place of dispatch and receipt of electronic communications; and
- (b) providing that certain paper-based legal requirements (for example, execution and witnessing) may be met by using electronic technology that is functionally equivalent to those legal requirements.

13.95 The ETA may be needed to legitimise lodgement of instruments that do not warrant full conveyancer certifications. This means that instruments will still only be submitted electronically by conveyancers. However, it may be preferable to provide for these instruments in the body of the reviewed LTA and its regulations. This might involve, for example, a lower level of conveyancer certification; or provision for LINZ to call for additional evidence to supplement the electronic data in some cases.

#### *Authorisation of paper instruments*

13.96 The provisions for execution,<sup>632</sup> and for certifying the correctness of paper instruments<sup>633</sup> will continue to be relevant, for paper instruments presented manually, and for some instruments lodged electronically relying on the ETA.

13.97 For manual lodgements, there is no longer the requirement for the certificate of title to be produced, and this means authorisation is less assured than before. This is especially true because manual lodgements will be by non-conveyancers, who are not controlled by professional bodies which can discipline members for misconduct.

13.98 LINZ can require execution to be supplemented by statutory declarations under regulation 16 of the Land Transfer Regulations 2002, but, from an operational point of view, this is unwieldy and may still be ineffective to prevent fraudulent instruments. This is an appropriate time to review the present provisions and enact provisions that give equivalent assurance to the section 164A certifications provisions.

13.99 For electronic lodgement, Landonline may provide for images of executed instruments to be submitted, in which case the requirements of section 157 of the LTA and regulation 6 of the Land Transfer Regulations 2002 (and possibly section 164 and regulation 15) will still be applicable.

<sup>632</sup> Land Transfer Act 1952, s 157 and Land Transfer Regulations 2002, regs 6 and 16.

<sup>633</sup> Land Transfer Act 1952, s 164 and Land Transfer Regulations 2002, reg 15.

Q85 The specification provisions for LTA forms will need to be reviewed and carried forward into the new Act. Do these need to be retained in the Act or can they be dealt with in regulations?

Q86 Should there be different levels of certification, based on the class of permissible electronic instruments?

*Post-registration audit or compliance review*

- 13.100 LINZ must satisfy itself that conveyancers are authorised to electronically lodge instruments and have met applicable statutory requirements.
- 13.101 Section 164A of the LTA requires certification of electronic instruments in accordance with section 164A(3)(a)–(d). The form of these certificates is set out in regulation 12 of the Land Transfer Regulations 2002. These cover:
- the authority of the conveyancer to act for, and the legal capacity of, the party;
  - the confirmation as to identity of the authorising party;
  - compliance with specified statutory requirements (this can be general and specific);
  - the truth of the other three certifications and retention of evidence for the prescribed period.
- 13.102 Section 164C of the LTA requires any conveyancer giving a certification under section 164A of the LTA to retain evidence showing the truth of the certifications and, if required, to produce that evidence to the Registrar within the prescribed time. The production of that evidence is prompted by a LINZ audit or compliance review request.
- 13.103 Such audits and reviews are usually conducted routinely and are based on a sample of e-dealings that the conveyancer has lodged over the preceding period. However, “higher risk” transactions such as transfers and mortgages where the same conveyancer has acted for both parties can be readily identified and targeted for audit, if it is necessary. Similarly, other information may come to light that warrants a non-routine audit of a conveyancer.
- 13.104 A conveyancer who gives a fraudulent or materially incorrect certification, or who fails to retain and supply evidence in support of certification, risks the removal of certifications by the Registrar under section 164B of the LTA. That sanction effectively stops a conveyancer from using the e-lodgement system. Because the electronic system is compulsory, removal of an e-lodgement licence would have serious repercussions on a conveyancer’s business.

**Background**

13.105 Provisional registration is covered by sections 50 to 54 of the LTA.<sup>634</sup> The purpose of provisional registration, as described by EC Adams, is:<sup>635</sup>

... to permit of dealings with land sold by the Crown under the Land Acts, or with Maori land, the title to which has been investigated by the Maori Land Court, until such time as a certificate of title in lieu of grant has been issued – or, in other words, until such time as the land has in due course been put on to the Land Transfer Register, sometimes called the permanent register to distinguish it from the provisional register.

13.106 Regarding provisional registration, Professor Whalan has said:<sup>636</sup>

One of the excuses, if not one of the reasons, for the abandonment of compulsory registration in 1866 ... was that there were delays in the issue of Crown grants and thus difficulties about recording intermediate transactions between the date of the contract of alienation from the Crown and the time of the issue of the Crown grant. In 1871 the concept of provisional registration was devised to cover this gap; if this had not been devised the Land Transfer Act could well have failed.

13.107 Provisional registration played a key role in the successful implementation of the early land transfer legislation. However, very little provisional registration has taken place in modern times, as the problem, which the process was put in place to solve, has largely disappeared. The process is still used for Māori land. A project involving the registration of unregistered Māori Land Court orders is currently underway and a significant number of those orders can only be provisionally registered. Therefore, there is a need to retain a provisional register or some equivalent for this purpose for the immediate future (see chapter 10).

**The statutory provisions**

13.108 Generally speaking, the provisions relating to provisional registration are out of date and their terminology needs modernisation.<sup>637</sup> Some provisions are now obsolete.<sup>638</sup>

*The provisional register (section 50 of the LTA and section 9 of the 2002 Act)*

13.109 Section 50 of the LTA provides that, until a register (now a computer register) has been duly constituted for any land under the LTA, all dealings, memorials and entries affecting the land must be provisionally registered. Where there is no Crown grant for the purposes of provisional registration it is sufficient to have

634 The provisional register was introduced by the Land Transfer Amendment Act 1871 (for Crown alienations) and then extended by the Land Transfer Act 1870 Amendment Act 1874 (for Māori land).

635 EC Adams *Land Transfer Act 1952* (2 ed, Butterworths, Wellington, 1971) para 70.

636 Douglas Whalan “Immediate Success of Registration of Title to Land in Australasia and Early Failures in England” (1967) 2 NZULR 416, 435–436, footnote 70.

637 See, for example, Land Transfer Act 1952, section 50(a) which refers to the Director-General of Lands (now the Chief Executive of LINZ) and section 50(b) and (c) that refer to duplicate certificates.

638 For example, Land Transfer Act 1952, s 51(2).

either certification from the (now) Chief Executive of LINZ to the effect that purchase money has been paid; or an order of the Māori Land Court declaring land to be freehold.<sup>639</sup>

13.110 Section 51 enables the Registrar to close the provisional register once the register is fully constituted and, having done so, to then transfer the record of all memorials and entries from the former on to the latter.

13.111 Pursuant to section 9(1)(c) of the 2002 Act a provisional register can now be a computer register.

#### *Provisional registration and indefeasibility*

13.112 Sections 52 and 54 have the combined effect that the estate or interest of the proprietor named on the provisional register is indefeasible only against the person named in the original certificate (by the (now) Chief Executive of LINZ) or order (of the Māori Land Court), and all persons claiming through or under that person.

13.113 Section 52 is for the provisional register the equivalent of section 75 for the main register (now virtually obsolete). Within the limitations of provisional registration it makes conclusive any entries on the provisional register.<sup>640</sup>

13.114 Section 54 enables routine transactions to be registered against the provisional register. The section also provides that fundamental sections in the LTA (such as sections 62, 63, 75, 182 and 183) apply to provisional registers.

#### *Section 53 – special provisions*

13.115 This section only applies to land contracted to be sold under the Canterbury Educational Reserves Sale and Leasing Act 1876, which is still in force, or any Act amending or replacing that Act. Because of the prescriptive nature of the 1876 Act, there are differences between the type of evidence of purchase from the Crown supplied to the Registrar and the requirements for closing the provisional register and issuing a fully constituted register.

13.116 It is probable that this provision has served its purpose, given the passage of time and its narrow focus. An examination of the affected land discloses that most (if not all of it) is contained in full registers or provisional registers.

#### **Option: qualified registration**

13.117 Although provisional registration was designed to overcome an historical problem, which has essentially vanished, the relevant provisions have been important in recent times to support the Māori land registration project, and for that reason, some form of qualified registration needs to be retained. However, the current sections need to be modernised. It is probable that provisional registration as

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639 Land Transfer Act 1952, s 50(a).

640 This was considered in *Boyd v The Mayor of Wellington* [1924] NZLR 1174, 1199 (CA) Stringer J, and *Assets v Mere Roihi* [1905] AC 176 (PC).

prescribed has run its course. It is an ideal time to review this part of the LTA and reconsider whether “provisional registration” is the right mechanism to deal with the remaining situations that the provisions are being applied to.

- 13.118 In addition to a provisionally registered title, another qualified form of title is provided for in Part 12 of the LTA, that is, title limited as to title or as to parcels. The need to retain limited titles is discussed below (see chapter 20).
- 13.119 If there is to be an end to both provisional registration and the issue of limited titles there may be good reasons for developing modern and generic forms of “qualified” titles that are more suited to the needs of the current and foreseeable future environment.
- 13.120 Such a title would need to be given a new name in order to distinguish it from limited titles, provisional registers or interim titles (Land Transfer (Hawke’s Bay Earthquake) Act 1931). For this reason, the term “qualified title” is suggested.
- 13.121 There are several situations where some form of qualified title would be necessary or useful:
- To enable computer registers to issue from Māori Land Court orders bringing land under the LTA for the first time where the land is insufficiently surveyed to sustain fully guaranteed title.
  - Under sections 215A and 215B of the LTA, if registers, plans or instruments become obliterated or unfit for use, the Registrar is able to reconstitute such a record. Computer registers are included. However, it would be useful to have an additional interim provision that would allow a “qualified” title or computer register to be issued if there was some corruption of data that prevented a full guarantee from applying.
  - Section 167 of the LTA permits the Registrar to give exemption (on the grounds of hardship) from the requirements of full survey and to issue a limited as to parcels title instead of a fully guaranteed title. That exemption may no longer be appropriate for retention in the new Act. However, if it is retained, some form of qualified title would be needed.
- 13.122 The relationship of qualified titles to principles of indefeasibility, state guarantee of title, Crown liability, resolution of title conflicts and other fundamental aspects would have to be specified clearly.
- 13.123 Also, the new legislation would need to retain some residuary provisions to deal with provisional registers that would continue beyond the repeal of the old and commencement of the new LTA.

Q87 Should a modern form of qualified title be adopted?

# Chapter 14

## Vesting by operation of law

**INTRODUCTION** 14.1 A transmission is defined in the LTA as “the acquirement of title to an estate or interest by operation of law”.<sup>641</sup> A small number of provisions cover the registration of vesting of land by operation of law.<sup>642</sup>

14.2 From the perspective of the LTA any vesting at law is not recognised until registration takes place. Registration is achieved by the person entitled to proprietorship making application, with evidence of the vesting in support of that application.

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**APPLICATION FOR TRANSMISSION: SECTIONS 122 AND 123**

14.3 Sections 122 and 123 of the LTA deal with different aspects of registering a transmission. Section 122(1) of the LTA provides that “any person claiming to be entitled to any estate or interest under this Act by virtue of any transmission” may apply in writing to have it registered.

14.4 Section 122(2) of the LTA is more prescriptive and describes what the application must contain. The statements in the application must be verified by the oath or statutory declaration of the applicant.

14.5 The applicant is required to state “so far as is within the knowledge of the applicant, the nature of every estate or interest held by any other person at law or in equity” affecting the land. The section assumes that these matters are within the knowledge of the applicant to some extent. Where the interests are registered or noted on the register their existence is clear and does not depend on the knowledge of the applicant. Where the interests are equitable, they will not be obvious to the Registrar. However, it is debatable whether the Registrar needs to know about such interests.<sup>643</sup>

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<sup>641</sup> Land Transfer Act 1952, s 2.

<sup>642</sup> Land Transfer Act 1952, ss 99, 99A, 122, 123, 125 and 126.

<sup>643</sup> Under section 123(2) of the Land Transfer Act 1952, the registered proprietor takes the interest subject to any equities.

- 14.6 Applicants must also state that they truly believe themselves to be entitled to the estate or interest. While important to the application, the death or insolvency of a registered proprietor (or the event that gives rise to the entitlement) are matters of public record that can be verified independently.
- 14.7 Section 123(1) is more mechanical and directs the Registrar to register the applicant as proprietor once satisfied that entitlement is proven.

Q88 What details should be included in an application for transmission? For example, is it necessary that equities be covered?

### Electronic documents: problem of the statutory declaration

- 14.8 A written application verified by oath or statutory declaration is compatible with a paper-based system but is inappropriate in an electronic environment.
- 14.9 The LTA, as amended by the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 (the 2002 Act), provides that electronic instruments do not have to meet the certification requirements of paper instruments.<sup>644</sup> An electronic application has the same status as a paper application for the purposes of the LTA. However, these provisions do not permit the oath or declaration that is required by way of verification, to be replaced by an electronic process.
- 14.10 The Electronic Transactions Act 2002 (ETA) generally regulates the use of electronic transactions. Part 3 of that Act provides for legal requirements relating to written communication or information to be met by an electronic equivalent. This Part does not apply to affidavits, statutory declarations or other documents given on oath or affirmation.<sup>645</sup>
- 14.11 Initially this section did not apply to instruments or other documents presented to, deposited with, entered on the register or filed by, the Registrar-General of Land or the Registrar of Deeds.<sup>646</sup> However, this prohibition has been recently repealed to permit certain documents to be lodged electronically using the ETA.<sup>647</sup> This will mean some electronic documents can be lodged without following all the procedures set out by the 2002 Act. However, the prohibition against it applying to oaths and declarations will remain.

<sup>644</sup> Land Transfer Act 1952, s 164D. This means that the instrument does not have to comply with the execution and attestation requirements (section 157 of the LTA and regulation 16 of the Land Transfer Regulations 2002) and requirement of a certification as to correctness (section 164 of the LTA). Under section 164E(3) of the LTA, an electronic instrument certified under section 164A of the LTA is to be regarded as though it had been made in writing.

<sup>645</sup> Electronic Transactions Act 2002, s 14(2)(d) and sch, Part 3(d).

<sup>646</sup> Electronic Transactions Act 2002, sch, Part 3(i) (now repealed).

<sup>647</sup> See Electronic Transactions Act 2002, s 14(3).



- 14.12 Ultimately the Registrar would not want to have to rely on the ETA to support the electronic lodgement of instruments and other documents. It would be preferable to control this process under the new Land Transfer Act and associated Regulations.
- 14.13 The problems highlighted above could be addressed in the following ways:
- (a) remove the requirement for applications for transmission to be supported by statutory declarations and review the elements that need to be covered in the application; or
  - (b) provide for declarations to be lodged electronically;<sup>648</sup> or
  - (c) retain the declaration but enable the Registrar to rely on the application and certification for registration purposes.<sup>649</sup>

Q89 How should the issue of statutory declarations be addressed in an electronic environment?

#### TRANSMISSION UNDER SECTIONS 125 AND 126

- 14.14 The infrequently used section 125 of the LTA provides that, where a lessee is declared bankrupt, upon the application of the mortgagee and a statement by the Official Assignee refusing to accept the lease, the Registrar shall enter the refusal in the register and the interest of the bankrupt in the lease will vest in the mortgagee.
- 14.15 Section 126 of the LTA applies if the mortgagee neglects or declines to make an application under section 125 of the LTA. In that event, the lessor may apply to the Registrar to have the refusal of the Official Assignee to accept the lease noted on the register. The lessor must also supply:
- proof of the mortgagee's neglect or refusal to make application; and
  - proof of "the matters aforesaid".<sup>650</sup>

#### Insolvency Act: interaction with the LTA

- 14.16 It is unclear how these sections interact with the Insolvency Act 2006. Section 122 of the Insolvency Act provides that a lease subject to a mortgage vests in the Official Assignee. In the event of disclaimer by the Official Assignee, section 119 of that Act provides for a person suffering loss as a result of the disclaimer or for the bankrupt to apply to the court for (amongst other things) an order vesting the disclaimed property. This could be interpreted in such a way as to render sections 125 and 126 of the LTA redundant.

<sup>648</sup> The formalities would be covered off in the section 164A certifications in the same way that signatures, attestation and section 164 certification are dealt with in respect of existing electronic instruments.

<sup>649</sup> There could be a certification by the conveyancer that he or she has a statutory declaration made by the applicant and that declaration would then be viewable in the course of any post-registration audit.

<sup>650</sup> That is, other matters referred to in section 125: evidence that the lease was subject to a mortgage; evidence that the lessee was adjudicated bankrupt; evidence that the Official Assignee has refused to accept the lessee's interest in the lease.

- 14.17 Commentators have considered that sections 75(5) and (7) of the Insolvency Act 1967, the predecessor of the current Act, preserved the effect of sections 125 and 126.<sup>651</sup> However, these sections were clear that the vesting was subject to any liabilities and obligations the lease was subject to at the date of adjudication.
- 14.18 Section 119 of the Insolvency Act 2006 does not make any statement about interests to which the lease was subject. It seems likely that the legislation would be seen as complementary and that sections 125 and 126 of the LTA would still be considered relevant.

Q90 Should the relationship with the Insolvency Act 2006 be clarified?

### Other issues

- 14.19 Because sections 125 and 126 of the LTA have been used so infrequently, it is unclear what, if any, practical problems could arise from their application.
- 14.20 One issue is that it is unclear whether sections 125 and 126 stand alone or whether the applications must be verified by a statutory declaration as required by section 122 of the LTA, which is seemingly applicable to all transmission applications.
- 14.21 Another potential issue is raised by suggestions that section 125 is wide enough to cover both disclaimers and abandonments by the Official Assignee.<sup>652</sup> The use of the words “refusal to accept the lease” is probably appropriate to cover a formal disclaimer as contemplated by the Insolvency Act 2006 or inaction that amounted to abandonment. However, it is unclear whether this would cause any problems.
- 14.22 Also, the wording of section 125 implies that the mortgagee takes the lessee’s interest subject to any mortgages and other interests and that this process is not analogous to a mortgagee exercising power of sale.<sup>653</sup> This may benefit from reconsideration when the section is redrafted.
- 14.23 The application under section 125 must be in writing. However, this does not preclude the possibility of an electronic version being lodged.<sup>654</sup> Section 126 (unlike section 125) does not stipulate that the application by the lessor must be in writing.
- 14.24 In section 126, there is lack of clarity surrounding what matters need to be proved before the Registrar. It is also unclear what the fate of any interests registered against that lease is, if the lease is effectively “surrendered”. It seems that by implication any such interests are extinguished.

Q91 Are sections 125 and 126 of the LTA self-contained or does section 122 of the LTA also apply?

651 Tom Bennion and others *New Zealand Land Law* (Brookers, Wellington, 2005) 165.

652 *Ibid*, 165.

653 Struan Scott and others *Adams’ Land Transfer* (loose leaf, LexisNexis, Wellington, 2007) para S126.3.

654 Land Transfer Act 1952, ss 164A and 164E(3).

Q92 How could these sections be altered to make them more clearly expressed?

## SECTIONS 99 AND 99A OF THE LTA

14.25 On these sections it has been said:<sup>655</sup>

Although not included under the rubric “transmissions” in the Land Transfer Act 1952 the entry of memoranda of vesting orders in the register under section 99, and the notification of vestings by statute under section 99A are, in effect, methods of effecting the transmission of estates and interests on the register.

### Section 99: vesting orders

14.26 This section provides:

Whenever any order is made by any Court of competent jurisdiction vesting any estate or interest under this Act in any person, the Registrar, upon being served with a duplicate of the order, shall enter a memorandum thereof in the register and on the outstanding instrument of title, and until such an entry is made the said order shall have no effect in vesting or transferring the said estate or interest.

14.27 Many enactments, which authorise the court to make orders vesting estates or interests in land, expressly provide for the registration of such orders under the LTA. Therefore, section 99 of the LTA is a default provision in the absence of a specific registration provision in an enactment. It can be overridden by specific provisions that state that the legal estate passes by virtue of the court order (see chapter 9).

14.28 There is an issue about whether this provision should be self-contained or whether the general transmission procedure should apply. A vesting order is self-contained and should not require an application. Thus, there are valid reasons for treating this section separately.

14.29 The wording is slightly deficient as it should say that the order shall be registered rather than the Registrar “shall enter a memorandum thereof in the register”. Also, this procedure may need to be aligned with electronic registration, although, in the short-term, it is not proposed that court orders should be lodged electronically.

### Section 99A: vesting by statute

14.30 This section covers situations where land is vested by a statute:

- generally, a formal application must be made to the Registrar in order to describe the land sufficiently clearly so as to enable the Registrar to record that vesting;
- however, no formal application is required where the land is so well-defined that the Registrar can identify it in his or her records.

<sup>655</sup> Hinde McMorland & Sim *Land Law in New Zealand* (loose leaf, LexisNexis, Wellington, 2005) para 9.103.

- 14.31 The main issue regarding this section is whether a stand-alone provision is appropriate. Currently, a statutory vesting that requires an application could be adequately covered by section 122 of the LTA because it is materially the same as other types of vesting by operation of law. This would impose a requirement for a declaration that is not required under the current section 99A.
- 14.32 However, where the land is well-identified and no formal application is required under section 99A, it seems appropriate that these documentary requirements do not apply and there is a strong argument for providing for this situation separately.

Q93 Should sections 99 and 99A of the LTA be retained as stand-alone provisions or be merged with other provisions relating to transmissions?

Q94 Is it appropriate to treat a statutory vesting, where the land is clearly specified, as different?

# Chapter 15

## Mortgages (variation of priority and mortgagee consents)

### VARIATION OF PRIORITY OF MORTGAGES

#### Background

- 15.1 Under section 37(2) of the LTA, registered instruments affecting the same estate or interest take priority according to the date of registration. The priority of mortgages can, however, be varied under section 103 of the LTA. A variation of priority only relates to the ranking of mortgages, not to the priority of dollar sums.<sup>656</sup>
- 15.2 Without this statutory provision, mortgagees wishing to alter their priority between themselves would be obliged to discharge their respective mortgages and register fresh ones in the desired order. It would be time-consuming and expensive. It may also upset the priority order against other registered interests.

#### Mortgage priority instrument

- 15.3 The Land Transfer Regulations 2002 prescribe a form for a mortgage priority instrument.<sup>657</sup> Section 103(4) of the LTA provides that the covenants, conditions and powers set out in Schedule 3 of the LTA are implied in every mortgage postponed by the mortgage priority instrument, except as otherwise expressed in the priority instrument.<sup>658</sup> Execution provisions provide that a mortgage priority instrument must be executed by:
- the mortgagor (section 103(6)(a)); and
  - every mortgagee under every mortgage that, as a result of the mortgage priority instrument, will be ranked after any mortgage over which it previously had priority (section 103(6)(b)).

656 *Amalgamated Roofing Limited v Chris Larsen Limited* [1990] 1 NZLR 185 (HC).

657 See Land Transfer Regulations 2002, Sch 2, form 10.

658 These implied covenants refer to Sch 2, Part 1, clause 10(3) of the Property Law Act 2007. There is additional provision in clause 4 of Sch 3 to the LTA relating to the interpretation of certain provisions in the postponed mortgage.

- 15.4 Consent provisions provide that if any mortgage so postponed is subject to a sub-mortgage, the mortgage priority instrument is not effective unless the sub-mortgagee has consented (section 103(3)).

### Issues with the current provisions

#### *Consent of sub-mortgagee: section 103(3) of the LTA*

- 15.5 It would be desirable to align section 103(3) with the other LTA mortgagee consent provisions as discussed below.

#### *Definition of "mortgage"*

- 15.6 "Mortgage" is defined in section 2 of the LTA but section 103(7) of the LTA seems to expand the definition for the purposes of the section. But it is not immediately obvious why the definition has been expanded in section 103(7) since it appears that the instrument varying priority can only apply to existing mortgages within the section 2 definition.

Q95 Is there anything in Schedule 3 of the LTA that could be improved?

Q96 How could the definition of "mortgage" in section 103(7) be improved?

## MORTGAGEE CONSENTS

### Background

- 15.7 The consent of a mortgagee to the registration of a subsequent instrument is necessary because of the effect that the subsequent instrument has on the relevant mortgage.
- 15.8 The subsequent instrument (for example, surrender of an easement in gross) may bring an end to the interest against which the mortgage is registered, hence extinguishing the mortgage. Or, the interest created by a subsequent instrument may be placed in jeopardy should the mortgagee later exercise power of sale under that mortgage, unless the mortgagee has consented to that subsequent instrument.

### Mortgagee consent requirements in the LTA

- 15.9 The introduction of the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 (the 2002 Act) made significant changes to the mortgagee consent provisions. The provisions that previously provided for optional mortgagee consent have all been replaced or amended. In addition provision was made for the entry on the register of restrictive and positive covenants using the

easement instrument as the vehicle for their creation. The regime for mortgagee consent was extended to those covenants. In each case, mortgagee consent is now expressed to render the instrument binding on the mortgagee.<sup>659</sup>

- 15.10 In the following provisions, mortgagee consent is now required and consent expressly binds the mortgagee:
- easements and profits à prendre (sections 90, 90A, 90B and 90E of the LTA) – by transfer or easement instrument;
  - variations of easements and profits à prendre (sections 90C and 90E of the LTA);
  - surrenders of easements and profits à prendre (sections 90, 90A, 90B and 90E of the LTA);
  - restrictive and positive covenants (sections 90A, 90B, 90E and 90F of the LTA);
  - leases (section 115(4) (new) and 119 of the LTA); and
  - discharge or variation of and exercise of power of sale under a mortgage subject to sub-mortgage (section 114(1) and (2) of the LTA) – consent from the sub-mortgagee is mandatory for registration purposes in both cases. In the case of a variation, consent binds the consenting sub-mortgagee. In the case of a discharge or exercise of power of sale, the mortgage will be extinguished so the consent is a form of “agreement” to that (see the discussion below).
- 15.11 In the following cases, although mortgagee consent is mandatory, that consent only binds the mortgagee by implication. There is no express provision to this effect:
- variation of mortgage (section 102(4) of the LTA) – this provision makes no distinction between prior or subsequent mortgages unlike its predecessor;
  - variation of lease (section 116(7) of the LTA).<sup>660</sup>
- 15.12 There are some dealings for which mortgagee consent is mandatory but the effect is to terminate the mortgage, for example, with a surrender of lease under section 120(2) of the LTA (sub-lessee consent is also required) the consent of the mortgagee is “agreement” to the termination of the mortgage.
- 15.13 Finally, there is section 103(3) (Variation of priority of mortgages) under which the variation “shall not be effective” without such consent. The wording of this subsection is substantially identical with the one it replaces (see the comments below).

### Aim of the amendments

- 15.14 Although the abolition of certificates of title and the change in mortgagee consent requirements both occurred simultaneously, the latter was not a measure that was designed to compensate for the former. The intention was to better deal with the situation when a mortgagee exercised power of sale and the fate of subsequently registered estates and interests had to be resolved in terms of

<sup>659</sup> However, section 103 of the LTA states that a mortgage priority instrument is “not effective” unless a submortgagee has consented. See discussion below.

<sup>660</sup> Note that there may be an ambiguity in the context of cross leases.

section 105 of the LTA. There should no longer be any concern over whether the absence of express consent was offset by some other action off the register that amounted to constructive consent.

- 15.15 Because mortgagee consent is mandatory in those instances where it was formerly optional, the Registrar is in a better position to determine whether an estate or interest survives or is extinguished when a transfer pursuant to a mortgagee sale is registered.

### Where the instrument consented to extinguishes the mortgage

- 15.16 As mentioned above, in some instances the consent of the mortgagee or sub-mortgagee is tantamount to affirmation that the registration of the instrument will extinguish that mortgage. That is the case with:
- a discharge of mortgage that is subject to a sub-mortgage;
  - an exercise of power of sale under a mortgage that is subject to a sub-mortgage;
  - a surrender of an easement or profit à prendre that is subject to a mortgage;
  - a surrender of a lease that is subject to a mortgage.
- 15.17 The mortgagee or sub-mortgagee could instead discharge the mortgage or sub-mortgage prior to the registration of the instrument, thus avoiding the need for consent. There is thus duplication in the legislation.
- 15.18 The rationale for consent in these cases is unclear. A refusal to consent will prevent the discharge, surrender or transfer in exercise of power of sale from being registered.

### Option – to remove consent requirement

- 15.19 If the consent requirement was removed and instead the discharge, surrender or transfer in exercise of power of sale was prohibited from being registered whilst the mortgage or sub-mortgage remained registered, the mortgagee or sub-mortgagee would be in no better or worse position. And the seemingly unnecessary duplication would be eliminated.
- 15.20 In the case of electronic instruments, the Registrar will not necessarily need written mortgagee consent and instead may rely on certification under section 164A(3)(c) and (d) of the LTA. Where such consent is mandatory a special form of certification that transparently details the nature of the statutory requirement that the certification relates to can be devised in accordance with regulation 12 of the Land Transfer Regulations 2002.<sup>661</sup>
- 15.21 The elimination of the mortgagee consent requirements would mean fewer electronic instruments for which the special certification was necessary. This would simplify matters for both conveyancers and LINZ staff responsible for the registration of dealings.

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<sup>661</sup> Such a certification exists for electronic instruments the registration of which may require mortgagee consent.



- 15.22 Conversely, if these provisions are retained, the consequence of mortgagee consent and the registration of the instrument consented to could be more transparent.<sup>662</sup>

### Some problems with the legislation

- 15.23 The objective of mandatory mortgagee consent in this context is to remove any doubt as to the fate of the subsequently registered instrument if the power of sale is exercised under that mortgage.
- 15.24 Again, for electronic instruments, the consent is not presented to the Registrar but the special section 164A of the LTA certification is used. The consent in written form continues to accompany paper instruments. However, the current wording could be revisited and improved where appropriate.

### *Section 102(4) – variation of mortgage*

- 15.25 Arguably the pre-2002 version of the LTA was more accurate. There is no statement about whether the mandatory mortgagee consent binds that party, although by implication it must do so. Now mortgagees under prior mortgages must also consent, which does not make much sense from a priority order viewpoint should power of sale be exercised under that prior mortgage. What effect does that consent have on the fate of the subsequent varied mortgage if power of sale is exercised under the prior mortgage? Was that intended?

### *Section 103(3) – variation of priority of mortgages*

- 15.26 Unlike the other provisions discussed earlier there is no unequivocal statement requiring mortgagee (in this case sub-mortgagee) consent. Rather “the mortgage priority instrument is not effective” unless the sub-mortgagee has consented. Given the consequences of a failure to obtain such consent it is highly unlikely that a mortgagee would attempt to improve their ranking ahead of another mortgage that was sub-mortgaged without procuring that consent. To align this mortgagee consent requirement with the other provisions, it would be desirable to state expressly that the consent of the sub-mortgagee must be obtained.

### *Section 116(7) – variation of lease*

- 15.27 This is a new subsection and its meaning is generally clear. However, in the context of cross leases this has led to debate as to what is required. Where land (meaning a parcel of land) is subject to several cross leases and one of them is being varied, if that or any other cross lease is subject to a mortgage, the mortgagee is required to consent. That is how the Registrar interprets the provision. However, more than one conveyancer has argued that “the land” means (in the context of cross leases) only the share in the fee simple share and the lease of the building associated with it in a common composite title. In this view, if there are mortgages registered against the other cross leases, the consent

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662 Extinguishment of the mortgage is not stated but is assumed by necessary implication. Compare the LTA provisions with the Resource Management Act 1991, ss 224(b)(i) and 238 and 239, which specifically set out the consequences of consent.

of those mortgagees is not required. Is this a genuine alternative interpretation of an ambiguous provision? A case can be made for a rewording of that provision so as to eliminate the possibility of any misinterpretation.

Q97 Should the new LTA retain a requirement for mortgagee consent where the instrument consented to extinguishes the mortgage upon registration?

Q98 If not, should the relevant provisions simply prohibit the registration of such instruments whilst the interest affected is subject to a mortgage or sub-mortgage, thus forcing the mortgage or sub-mortgage to be discharged?

Q99 If a consent requirement is retained, should the relevant provisions be clearer as to the fate of the mortgage or sub-mortgage upon the registration of the instrument that has been consented to?

Q100 Assuming that mortgagee consent is still required in order to bind that party and avoid problems later if power of sale is exercised, are the current provisions adequate? Should the consent continue to be mandatory in all cases?

Q101 Do the deficiencies identified in relation to sections 102(4), 103(3) and 116(7) of the LTA justify amendment and, if so, to what extent?

# Chapter 16

## Leases and life estates

### ACQUISITION OF FEE SIMPLE BY LESSEE: SECTION 118A

#### Bringing down encumbrances

- 16.1 Section 118A of the LTA provides for the bringing down of encumbrances where a lessee acquires the fee simple estate and merges<sup>663</sup> the fee simple and leasehold.<sup>664</sup>
- 16.2 The bringing down of encumbrances from the lease onto the fee simple is not automatic. It is triggered by a request from the transferee. On receiving that request by the transferee, the Registrar records on the fee simple title the registered encumbrances and interests (in their registered priority order) to which the lease is or was subject at the time of the transfer's registration or at the time of expiry of the lease (whichever is earlier).
- 16.3 If no request is made to the Registrar and the lease, on the acquisition of the fee simple by the lessee, is, for example, subject to a mortgage, the title to the fee simple estate will remain subject to the lease and the mortgage of that lease, until the mortgage is discharged.<sup>665</sup>

#### Priority of registered interests

- 16.4 Section 118A(2) of the LTA provides that any registered encumbrances, liens and interests to which the fee simple estate was subject at the time of registration of the transfer take priority over those interests brought down from the lease pursuant to section 118A(1), regardless of the time when they were respectively registered. This is an exception to the priority rules in section 37 of the LTA.

663 The doctrine of merger applies whenever the proprietor of a greater estate in land (for example, fee simple) acquires a lesser estate in that land (for example, a lease). At law, the merger of the lesser estate into the greater estate takes place automatically upon the acquisition of the other estate. In equity, however, it is recognised that outstanding equitable interests may operate to prevent the merger. For a detailed discussion on this subject see EC Adams *Land Transfer Act 1952* (2 ed, Butterworths, Wellington, 1971) para 628.

664 This provision was inserted, as from 25 October 1960, by section 2 of the Land Transfer Amendment Act 1960. For a comprehensive explanation on the rationale for this amendment see an article by EC Adams "Legislation in 1960" (1961) 37 NZLJ 22, 22–23. The section was inserted to provide for the bringing forward of encumbrances (particularly mortgages) on the acquisition of the fee simple by a lessee in the context of ordinary registered leases in the same way that other legislation provided for this in relation to Crown or local government leases, licences and agreements.

665 *Bevan v Dobson* (1907) 26 NZLR 69 (SC).

### The fee simple proprietor acquires the lease?

- 16.5 Section 118A of the LTA only operates when the lessee acquires the fee simple, not when the fee simple proprietor acquires the lease. This is because the purpose of section 118A was to echo a number of provisions in other Acts<sup>666</sup> permitting the acquisition of the greater interest (fee simple) by the holders of the lesser interest (registered leases, licences or agreements). There was never a question of the reverse occurring (acquisition of the lesser interest by the holder of the greater interest).
- 16.6 Whilst it may be logical to extend the section to also provide for the acquisition of a lease by the registered proprietor of the fee simple, there may be few, if any, occasions when it would be used. It is more likely that the fee simple owner would want to acquire that estate freed from the lease or, if not, the lease would be on-sold rather than merged.

### Caveat or notice against the lease not “brought down” on merger

- 16.7 Section 118A does not provide for a caveat, a notice of claim or anything except “encumbrances, liens and interests” that are registered against the lease, to be brought down onto the fee simple title upon merger. By implication, things that are entered on the register, but not registered, are excluded.
- 16.8 The risk in extending the coverage to unregistered interests is that this might unwittingly bestow on the holders of those unregistered interests something that is more than they are entitled to.

### Lease has the benefit of an interest

- 16.9 Section 114 of the Land Act 1948 provides that if a lessee or licensee acquires the fee simple to the land that was held under the lease or licence, then the fee simple estate is subject to (or has or had the benefit of) the same interests that existed when the land was leased or licensed. The addition of the words “or has the benefit of” was made specifically to overcome the problem highlighted by the decision in *Cruickshank’s Farms v Registrar-General of Land* in relation to the acquisition of the fee simple under the Land Act.<sup>667</sup>

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666 See Land Act 1948, Housing Act 1955, Municipal Corporations Act 1954, and Counties Amendment Act 1961 in which there are, or were, provisions whereby lessees, licensees or purchasers could act on their contractual or statutory right to acquire the fee simple.

667 In *Cruickshank’s Farms Ltd v Registrar-General of Land* [1994] 1 NZLR 211 (HC), the Court noted, obiter, that a lessee acquiring a fee simple estate in land previously held under lease, would obtain the fee simple subject to existing interests and encumbrances, but not having the benefit of rights and interest appurtenant to the land (pursuant to the previous section 114 of the Land Act 1948).

- 16.10 Consideration could be given to amending section 118A of the LTA to provide that if the lease has the benefit of an interest it may be brought down on the title to the fee simple estate at the request of the transferee. This would enable an appurtenant interest such as an easement to be carried forward in the same manner as an easement to which the lease is subject.

### Updating the language

- 16.11 The expression “encumbrances, liens and interests”, which appears several times in section 118A as well as in other sections in the LTA, may need modernisation and the reference in subsection (3) to entries on duplicate certificates of title is now obsolete.

Q102 Is there any reason why section 118A of the LTA should be amended so that it can operate when the fee simple proprietor acquires the lease?

Q103 In relation to notices of unregistered interests, such as caveats against the lease, should there be provision for these to be brought down onto the fee simple title upon merger?

Q104 Should the equivalent of section 118A in the new LTA provide for the bringing down of interests appurtenant to the lease where a lessee acquires the fee simple estate?

### LEASES: BRINGING DOWN OF ENCUMBRANCES ON THE REGISTRATION OF A NEW LEASE

#### Section 117 of the LTA

- 16.12 This provision clarifies and codifies the position of mortgagees and others with registered interests over leases that expire or are surrendered, but are replaced by new leases in renewal or substitution of the former leases.
- 16.13 The rationale for section 117 of the LTA is that the common law regards renewals of leases as new leases so that a mortgage of a lease would not extend to the renewal of the lease. Whilst equity would confer an equitable mortgage over that renewed lease, that cannot be assumed to apply to a statute-based land registration system. In order to avoid the need to prepare and register new encumbrances, the LTA provides for the bringing forward of encumbrances on registration of a lease in renewal or substitution.<sup>668</sup>
- 16.14 Section 117 of the LTA provides:

#### **Bringing down encumbrances on registration of new lease**

- (1) Where upon the registration of a lease—
- (a) The Registrar is satisfied that—
- (i) It is in renewal of or in substitution for a lease previously registered; and

<sup>668</sup> See Struan Scott and others *Adams' Land Transfer* (loose leaf, LexisNexis, Wellington, 2007) para S117.3.

- (ii) The lessee is the person registered as the proprietor of the prior lease at the time of the registration of the new lease or at the time of the expiry or surrender of the prior lease, whichever is the earlier, or the personal representative of that person; and
  - (iii) The lessee or the registered proprietor of any encumbrance or lien or interest to which the prior lease was subject at the time of its expiry or surrender or the personal representative of the registered proprietor so requests,—
- (b) the Registrar shall state in the memorial of the new lease that it is in renewal of the prior lease or in substitution for the prior lease, as the case may be.

In every such case the new lease shall be deemed to be subject to all encumbrances, liens, and interests to which the prior lease is subject at the time of the registration of the new lease or at the time of the expiry or surrender of the prior lease, whichever is the earlier.

- (2) For the purposes of the foregoing provisions of this section, all references in any Act or in any agreement, deed, instrument, notice, or other document whatsoever to the prior lease or to the estate of the lessee thereunder shall, unless inconsistent with the context or with the provisions of this section, be deemed to be references to the new lease or to the estate of the lessee thereunder, as the case may be.
- (3) Upon the registration of a new lease in any case to which subsection (1) of this section applies, the Registrar shall record on the new lease all encumbrances, liens, and interests to which it is deemed to be subject as aforesaid in the order of their registered priority.
- (4) The provisions of this section are in addition to and not in derogation of the provisions of section 114 of the Land Act 1948, section 25 of the Rural Banking and Finance Act 1974 [repealed] and section 26 of the Housing Corporation Act 1974, and any other enactment.

### Points to consider under section 117 of the LTA

- 16.15 There are four points to consider in the application of section 117 of the LTA.
- the provision requires a request under section 117(1)(b) of the LTA, by the lessee or registered proprietor of an encumbrance, interest or lien to which the prior lease was subject when it terminated;
  - the Registrar must be satisfied that the new lease is in renewal of, or in substitution for, the prior lease as he or she cannot rely entirely on the statement to that effect in the request required by section 117(1)(b);
  - section 117(4) does not authorise the bringing forward of interests appurtenant to those prior leases; and
  - the lessee must be the same under both prior and new lease (or the new lessee may be the personal representative of the prior lessee) and by implication the leased land must be the same.

### Problems and issues

- 16.16 The bringing forward of “encumbrances, liens and interests” is not automatic because it is with similar statutory provisions in other enactments, for example, section 114(2) of the Land Act 1948. The reason for the need for a request is that either the lessee or those with such encumbrances, liens or interests (or both) may not want encumbrances brought forward.

- 16.17 There is no definition of “lease in renewal” or “lease in substitution” so there is the potential for dispute between the Registrar and the parties seeking to register as to whether or not the prerequisites have been met.
- 16.18 The bringing forward of “encumbrances, liens or interests” has been interpreted liberally rather than literally. Easements and profits à prendre to which the lease is subject have been treated as being included in those categories. However, there has always been doubt about notices and other matters that are entered on the register but that create no legal estate or interest in land (for example, caveats, notices of claim, restrictive and positive covenants).
- 16.19 The authors of *Adams’ Land Transfer* suggest that an easement appurtenant to a prior lease cannot be brought forward under section 117 of the LTA, and that if the easement is still required a re-grant will be necessary.<sup>669</sup> In comparison, section 114(2) of the Land Act 1948 was amended to include appurtenant rights following the decision in *Cruickshank’s Farms Ltd v Registrar-General of Land*.<sup>670</sup>
- 16.20 The words used to describe the things that can be brought forward are no longer appropriate and need to be revisited. Furthermore, “encumbrances” has more than one meaning. A more useful description of what can be carried forward may be better than the mixed description of vague and specific things that is currently in subsection (2). Similarly, a general non-derogation provision may be preferable to the one in subsection (5) that refers to provisions current (and known) at a point in time, which may be repealed or changed later.
- 16.21 Section 216 of the Property Law Act 2007 contains the concept of the surrender and replacement of a head lease whilst a sublease is still in place. That provision applies to registered head leases and subleases. This new provision makes section 117 of the LTA apply to that scenario by deeming the sublease of the former head lease to be an interest to which the replacement lease is subject.

Q105 Is it sufficiently clear what the essential characteristics are of a “lease in renewal” or a “lease in substitution”? For instance, does the term of the lease in renewal have to commence on the day after the expiry of the prior lease or can there be a gap? Must the land be exactly the same, no more and no less?

Q106 If a regulatory intervention is necessary, does it need to be at the level of the LTA or would a regulation be more appropriate?

Q107 What estates, interests and other matters should be capable of being brought forward from a prior to a new lease? Should this include appurtenant rights? Should it extend to notices or things that are entered on the register but which do not amount to registered interests?

669 *Ibid*, para S117.4.

670 *Cruickshank’s Farms Ltd v Registrar-General of Land*, above n 667.

Q108 Would general non-specific language be better than the current subsection (5) to protect the operation of comparative provisions in other Acts?

Q109 Should the language used in section 117(2) of the LTA be amended to provide a more useful description of what can be carried forward?

Q110 Does the special deeming provision in section 216(5) Property Law Act 2007 need reinforcement in the section that replaces section 117 of the LTA by a specific cross-reference to the former?

## EXTENSION OF TERM OF LEASE

### Background

16.22 Section 116 of the LTA allows the term to be extended or contractual provisions to be varied for a registered lease, by the registration of a lease variation instrument. The provision was reviewed and restated in 2002. Where only the contractual provisions – the covenants, conditions and restrictions contained in the lease – are being varied, the provision is straightforward. However, when the duration or term of the lease is being extended, there may be value in considering the provisions further.

### Section 116 of the LTA

16.23 Subsection (2) provides that a lease variation instrument extending the term of a lease must be registered before the expiry of the then current term of the lease.<sup>671</sup> This can create problems when parties do not complete and present an instrument before the end of the last day of the current term of the lease. For example, an instrument may be presented for registration before the last day, and then rejected under section 43(1)(a) of the LTA, in which case the parties do not have enough time to rectify the instrument and lodge it again before the lease expires.

16.24 Section 116(4) provides that an instrument extending the term has the same effect as if it was a lease instrument for the extended term subject to the same provisions as the original lease. Section 116(5) provides that, when an instrument extending the term is registered, the estate of the lessee is subject to the same

<sup>671</sup> It had not always been possible to extend the term of a registered lease, or otherwise vary the lease terms. Under the Land Transfer Act 1915, there was no provision for extending or renewing the term of a registered lease, or varying its provisions. The parties were obliged to register a fresh lease if they wished to continue the lease arrangement after the original lease term had expired or if they wished to enter into a lease with different provisions from the original registered lease. Section 4 of the Land Transfer Amendment Act 1939 permitted the extension of the term of a registered lease by memorandum of extension. This included the condition that the memorandum of extension be registered before the expiry of the then current term of the lease (Land Transfer Amendment Act 1939, s 4(4)). Section 4 was amended in 1947 by inclusion of a new subsection (3A), making it possible to vary the covenants of a registered lease without extending the term, by a memorandum of variation.



interests as the lease was subject at the time of registration of the extension, and all references to the lease in any document shall be read as references to the lease as varied by the lease variation instrument.

- 16.25 In other words, when registered, the lease variation instrument creates a new leasehold estate for the extended term in favour of the lessee, on the same terms and conditions and subject to the same interests as the extended lease was at the time of registration.

### Comparison with renewals of lease

- 16.26 Section 5 of the Land Transfer Amendment Act 1939 provided for registration of a lease in renewal, which, if the lessee so requested, was deemed to be subject to the same interests as the original lease, and all references to the lease in any document would be read as references to the new lease.
- 16.27 The Land Transfer Amendment Act 1963 substituted a new section 117,<sup>672</sup> which, unlike its predecessors, no longer specified a time period in which the lease in renewal had to be registered.<sup>673</sup> The 1963 amendment means that a lease in renewal can be registered at any time after the expiry of the prior lease.
- 16.28 The fact that the time period for leases in renewal was twice changed,<sup>674</sup> while the time period for registration of an extension of term remained unchanged,<sup>675</sup> indicates a continuing deliberate distinction between the two situations.
- 16.29 Section 116(4) of the LTA as originally enacted required a memorandum of variation of covenants without extending the term to be registered before expiry, bringing forward the condition from section 4 of the 1939 Act.<sup>676</sup> Section 116, as re-enacted in 2002, repeats this condition for a lease variation instrument extending the term of a lease, but is silent as to variations of covenants. The new Act needs to address this incongruity.

### Section 50(4) of the Maori Trustee Act 1953

- 16.30 There is an exception to section 116(2) in section 50(4) of the Maori Trustee Act 1953. Section 50 provides that a lease for which the Maori Trustee will execute a lease variation instrument as lessor can be extended even though the lease has expired before the instrument is executed. This clearly means section 116(2) of the LTA cannot apply to such a variation. There does not appear to be an obvious rationale for this provision and no commentators offer any explanation for the exception.

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672 Land Transfer Amendment Act 1963, s 25.

673 In the Land Transfer Amendment Act 1939, the lease in renewal had to be registered not later than one year after the expiry of the prior lease, and this was carried over into section 117 of the LTA. Section 117 was amended by section 4 of the Land Transfer Amendment Act 1959, so that a lease in renewal had to be registered not later than three years after the expiry of the prior lease.

674 First one year, then three years, and then discarded under the 1963 Amendment Act.

675 Always prior to the expiry of the interest.

676 As amended by the insertion of subsection (3A) by the Land Transfer Amendment Act 1947.

## The reason for section 116(2) and its inconsistency with other provisions

- 16.31 As soon as a lease expires, its entry in the register, and any computer register for the leasehold estate, can be cancelled.<sup>677</sup> This cancellation action might not occur until a long time after the date of expiry, but equally it could occur within days. For example, the lessor could request it, or the entry could be consigned to historic status when the computer register is updated on registration of some other transaction against the lessor's estate.
- 16.32 On the one hand, a searcher or someone acquiring a registered estate or interest in the lessor's land would be entitled to rely on the register at face value and treat it as free of any lease that is expired. On the other hand, the registration requirements in section 116 of the LTA, including the requirements for execution by lessor and lessee and for mortgagee consent, also ensure that new registered proprietors of estates or interests in the leased land are not involuntarily bound by a lease extended after its expiry.
- 16.33 Section 117 of the LTA allows a lease to be renewed after its expiration, as noted above. Again, new registered proprietors of estates or interests in the leased land would not be involuntarily bound by a lease renewal registered after the former lease's expiry.
- 16.34 Perhaps the real reason for the difference in approach is that, while a lease variation instrument has the same effect as a new lease instrument, it still relies on the continued existence of a memorial of the original lease, and, if applicable, the leasehold computer register to properly record the lease so extended in the register. If the LTA allowed an expired lease to be extended, it would be necessary to revive the notation of the expired original, and any leasehold computer register, in order to fully record the lease and its provisions. On the other hand, a lease instrument in renewal of a prior extended lease is not deemed to be the prior lease. It is a new lease in its own right, and section 117 merely serves to bring forward mortgages and other encumbrances without the necessity of registering new ones, and to update other documents without the necessity of actively amending those documents.
- 16.35 It may be that sections 116 and 117 were always planned as complementary provisions. If the parties wanted the lease to continue in its present form an extension could be prepared and presented for registration very quickly. If the parties wanted to renegotiate conditions on expiry they could prepare a new lease with new conditions, and would need time to do that. However, they could still obtain the benefits of bringing forward encumbrances by satisfying the Registrar that section 117 could apply. If it was too late for the parties to extend the lease under section 116, they could still prepare and lodge a lease on identical terms as the prior expired lease and obtain the benefit of section 117.

Q111 Should the question of why an extension cannot be registered after the lease expiry be investigated further?

<sup>677</sup> See discussion below on "Noting the register – expired leases and other expired interests".

Q112 Or, are the current provisions adequate and any problems best addressed by education of customers to ensure extensions of lease are presented for registration before expiry, and of LINZ personnel not to reject extensions, if that will cause them to miss that deadline?

NOTING THE REGISTER  
– EXPIRED LEASES AND OTHER EXPIRED INTERESTS

**No provision for removal of expired interests**

- 16.36 The LTA has no general provision for the removal of estates and interests from the register once they have come to an end through the natural passage of time.
- 16.37 Such a provision may have been regarded as being unnecessary as a lease or other interest that terminates or lapses through passage of time is self-evidently at an end. Both the instrument creating the estate or interest and the memorial recording that instrument contain sufficient information to enable someone searching the register to deduce that termination has occurred.

**The problem: need for a “current view” up-to-date title**

- 16.38 The computer register consists of two different parts with each being separately viewable. The so-called “current” view shows only “live” or current estates and interests and their proprietorship. The “historic” view shows, in sequential order, every registered instrument or document affecting a particular register including estates and interest that have expired.
- 16.39 Thus there is now more focus on cleansing the “current view” of the register of expired interests. However, in the absence of lodgement of an instrument or other triggering event, the memorial for an expired estate or interest will remain on the current register view. Landowners are often dissatisfied with a title (computer register) that still shows a terminated estate or interest because they prefer a “clean” title. The presence of a memorial recording an expired interest can cause concern.
- 16.40 Consequently, the Registrar receives a significant number of requests to expunge from the register memorials recording expired leases and other “dead” interests. Because there is no formal process for dealing with such requests they are often refused unless there is a compelling reason why the entry should be removed from the register.

**Informal noting of expired interest**

- 16.41 When such entries are removed it is done without any clear authority. The power of correction contained in section 80 of the LTA does not seem to apply. Section 80 of the LTA empowers the Registrar to correct errors and supply omissions to the register and this includes cancelling, correcting and creating computer registers.

16.42 Although there is little risk in acting informally (as the removed interest will clearly be at an end), the lack of a provision enabling the Registrar to tidy up the records in non-contentious circumstances is unsatisfactory. It has also led to a lack of consistency in the way requests to remove redundant entries from the register have been handled.

### A possible solution: section 70

16.43 There is one notable exception to the situation outlined above. In the case of easements and profits à prendre of fixed duration, section 70 of the LTA provides a rudimentary process for their removal from the register. This section reads:

#### Removal of easements and *profits à prendre* from register

- (1) If any easement or *profit à prendre* has been determined or extinguished, or appears to the Registrar to be redundant, the Registrar must, on proof to his or her satisfaction of the determination or extinguishment or that the easement is redundant, make an entry to that effect in the register.
  - (2) For the purposes of subsection (1), an easement may be regarded as redundant if—
    - (a) the dominant tenement or any part of it has become separated from the servient tenement as a result of a subdivision or otherwise; and
    - (b) the easement no longer benefits the dominant land.
  - (3) A person who wishes the Registrar to make an entry to the effect that an easement is redundant must apply to the Registrar, and give the Registrar a statutory declaration or declarations to the effect that specific circumstances exist that meet—
    - (a) the criteria set out in subsection (2); or
    - (b) any other criteria specified by the Registrar for determining that easements are redundant.
  - (4) The Registrar may make an entry that an easement is determined, extinguished, or redundant if he or she—
    - (a) has given notice of his or her intention to do so to all persons appearing to him or her to be entitled to any interest under the easement; and
    - (b) has given the prescribed period of public notice of his or her intention to do so; and
    - (c) No objections have been received.
  - (5) The estate or interest of the registered proprietor of the easement or *profit à prendre* and of every person claiming through or under the registered proprietor ceases and determines on the making of the entry in the register, but does not release any person from any liability to which that person is subject at the time of the entry.
  - (6) The requirement to give notice under subsection (4) does not apply if the determination or extinguishment was by effluxion of time or merger.
- 16.44 Subsection (1) catches all easements and profits à prendre that have come to an end by one means or another including such rights that have determined by passage of time (see subsection (6)). Because such termination is self-evident the proof required for the purposes of subsection (1) does not have to be elaborate. In fact, a simple request to note the register accordingly will usually suffice.

Q113 Is it desirable for the new LTA to contain a general provision authorising the updating of the register by the Registrar, independently of a formal application?

Q114 If so, in what circumstances would the Registrar be empowered to act on his or her own initiative?

Q115 If a specific provision is warranted, does section 70 of the LTA provide a useful model? Does this require a formal application to the Registrar or is evidence of termination sufficient to satisfy the Registrar a better formula?

Q116 Alternatively, is this a non-contentious matter that could be provided for in the Land Transfer Regulations?

## LIFE ESTATES – Introduction

### SECTION 95

- 16.45 In recent years there has been a marked increase in the creation of life estates by LTA registration, for estate planning purposes and, recently, to grant title to residences in retirement villages.
- 16.46 The current LTA provisions are framed in relatively arcane, common law terminology. They provide little guidance on what transactions are acceptable for creating, and subsequently dealing with, life estates and reversions or remainders.
- 16.47 Section 95 of the LTA reads:
- 95 Estates for life, or in reversion, or remainder
- (1) The registered proprietor of land under this Act may create or execute any powers of appointment, or limit any estates, whether by remainder or in reversion or by way of executory limitation, and whether contingent or otherwise, and for that purpose may modify or alter any form of transfer hereby prescribed.
  - (2) In case of the limitation of successive interests as aforesaid the Registrar shall cancel the grant or certificate evidencing the title of the transferor, and shall issue a certificate in the name of the person entitled to the freehold estate in possession for such estate as he is entitled to, and the persons successively entitled in reversion or remainder or by way of executory limitation shall be entitled to be registered by virtue of the limitations in their favour in that instrument expressed, and each such person upon his estate becoming vested in possession shall be entitled to a certificate of title for the same.

- 16.48 The most commonly registered form of limitation of estate is the transfer to a life tenant of an estate for life. A person entitled to the remainder will be named in the transfer instrument, or if the transferor retains the reversion, that may be expressly stated or implied by silence.<sup>678</sup>
- 16.49 Upon registering the transfer instrument, the Registrar cancels the computer register for the transferor's fee-simple estate and issues a new life estate computer register in the name of the life tenant with a notation referring to the remainder person (if applicable).<sup>679</sup>
- 16.50 The references in subsections 95(1) and (2) to "executory limitation" appeared for the first time in the LTA 1952. An executory interest in property means any future interest in property, whether real or personal, that is not a reversion or remainder.<sup>680</sup>

### Problems with section 95

- 16.51 Section 95 requires an understanding of limitations of estates, and it is not completely clear how to create the various estates or powers of appointment<sup>681</sup> in modern land transfer terms.
- 16.52 The Property Law Act 2007 gives express authority for: powers of appointment (section 16); future estates and interests (section 59); and contingent remainders and interests (section 63). The LTA still prescribes the manner in which these powers and limitations can be registered. However, it may be timely and useful to redraft the LTA provisions to match the Property Law Act 2007. Subsections 95(1) and (2) of the LTA could be reworded to reflect the simplified terminology used in the Property Law Act.

Q117 Should the new LTA refer explicitly to the creation of various life estates?

### Lease for life: the section 115 alternative

- 16.53 Section 115(1) of the LTA provides: "[a] lease instrument is required for the purposes of registering under this Act the lease or demise of any land". Section 61 of the Property Law Act 2007 provides "[a]n estate for life may be created in relation to a leasehold estate in land".<sup>682</sup>

678 Precedents 13.23, 13.24, 13.25 and 13.26 in SI Goodall and FM Brookfield *Goodall and Brookfield's Law and Practice of Conveyancing with Precedents* (4 ed, Butterworths, Wellington, 1980) follow this general approach.

679 See *In re the Land Transfer Act 1908, ex parte Matheson* (1914) 33 NZLR 838, 840–841 (SC) Edwards J.

680 EC Adams (ed) *Garrow's Law of Real Property* (5 ed, Butterworths, Wellington, 1961) 434.

681 The registered proprietor can give or reserve a power of appointment to a person, who is not the owner, to dispose of property for his or hers or someone else's benefit. It seems that powers of appointment can only be created or executed in the LTA register by using the prescribed transfer form.

682 Until amended on 1 January 2008, section 115(1) of the LTA provided: "A lease instrument is required for the purposes of registering under this Act the lease or demise of any land for a life or lives, or for a term of not less than 3 years." (emphasis added).

*Problem re a lease for life: cross leases and retirement villages and so on*

- 16.54 An ongoing source of confusion arises from the creation of life interests in relation to long-term leases. Some owners are reorganising cross-leased properties for estate planning purposes, and retirement villages may be set up with cross-leased residential units. The view has been expressed that a life interest may be created out of a leasehold estate by a sub-lease in terms of section 115.<sup>683</sup> In *Amalgamated Brick & Pipe Co Ltd v O’Shea*,<sup>684</sup> Perry J suggested that the section 95 procedure should be used where the estate for life was one without covenants, while section 115 of the LTA is appropriate when there were to be covenants. It has also been noted that sections 95 and 115 of the LTA are only alternatives where the life estate is created out of a fee simple; the sub-lease for life in a cross lease must be dealt with under section 115.<sup>685</sup>

Q118 Should section 95 and section 115 of the LTA be amended to clarify the appropriate instrument for creating life interests in relation to leasehold estates?

**Termination of life estates – a gap in the regulations**

- 16.55 The LTA and Land Transfer Regulations 2002 provide for the registration of life estates and leases for life, but do not provide express direction on registration requirements when life tenants die.
- 16.56 Various commentaries confirm that, when a life tenant dies, the remainder or reversion passes by operation of law, whether the life tenancy was created in freehold or leasehold.<sup>686</sup> If so, the acquisition of title by a remainder person or a reversioner should be registered by application for transmission under sections 122 and 123 of the LTA.
- 16.57 The Registrar published an interim ruling in November 2007 in order to reconcile inconsistent national practices. The ruling states the requirements for an application to register the determination of a life estate or lease for life upon the death of the life tenant or lessee are as follows:
- (a) The person entitled to the estate in remainder or reversion (the applicant) must apply in writing for the RGL to:
    - (i) record the determination of the life estate, and
    - (ii) issue a new computer register in the name of the applicant, where applicable.
  - (b) The applicant must provide evidence of death of the life tenant.
  - (c) The applicant must provide a statutory declaration verifying that the deceased and the registered life tenant were the same person, and that the applicant is entitled to be registered as proprietor.

683 These issues are discussed in Brian Hayes “Registrar-General of Land’s Column” (1998) 8 BCB 79. See also, Brendan Boyle “RGL Rulings – Are Life Estates Child’s Play” (June 1998) 5 *Torrenstalk* 2–12. A life estate is a freehold estate so could not, in theory, be carved out of a lease. But see now the Property Law Act 2007, s 61.

684 *Amalgamated Brick & Pipe Co Ltd v O’Shea* (1966) 1 NZCPR 580, 583. See *Adams’ Land Transfer*, above n 668, para S115.6.

685 Brian Hayes “The Creation of Life Estates in Family Trusts and Estate Planning” (1998) 8 BCB 79.

686 For example see EC Adams *The Land Transfer Act 1952* (2 ed, Wellington, Butterworths, 1971) para 181.

- (d) The applicant must pay any:
  - (i) registration fee, and new title (computer register) fee, where applicable.
  - (ii) the lodgement code must be "TSM".<sup>687</sup>

16.58 The interim ruling also suggests forms of application and statutory declaration that cover these requirements. These are not prescribed forms under section 238 of the LTA. The level of debate that preceded this ruling suggests that either the LTA or regulations should provide for the manner of registering the determination of life estates. The interim ruling seems to have been readily accepted by practitioners.<sup>688</sup>

16.59 It may be that it is inappropriate for the LTA to prescribe how to register the termination of life estates. If the commentators' view, that upon death the reversioner or remainder person acquires a present estate by transmission is correct, then it may be no more necessary to codify that by legislation than it is for other estates. Any confusion may be better resolved by a lower level of regulatory intervention.

Q119 Should the new LTA or the new land transfer regulations prescribe the registration requirements for termination of life estates?

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<sup>687</sup> TSM means "transmission".

<sup>688</sup> The LTA and regulations do not specifically mention the manner of registering acquisition of title when registered proprietors die, and transmissions upon death of registered proprietors are unproblematic. Perhaps a prescribed form similar to Forms 15 and 16 (Schedule 2 to the Land Transfer Regulations 2002) will resolve any remaining doubt.



# Chapter 17

## Easement termination and implied covenants

### REMOVAL OF EASEMENTS AND PROFITS À PRENDRE

#### Section 70 and grounds for removal

17.1 Section 70(1) of the LTA provides:

If any easement or *profit à prendre* has been determined or extinguished, or appears to the Registrar to be redundant, the Registrar must, on proof to his or her satisfaction of the determination or extinguishment or that the easement is redundant, make an entry to that effect in the register.

17.2 In 2002, this section replaced the former section 70, which dealt only with situations where the easement or *profit à prendre* had been determined or extinguished. The current section was designed to overcome the common practical problem of ineffective easements, caused by the severance of dominant and servient titles usually through a subdivision, by recognising the concept of a redundant easement.<sup>689</sup> The extension of the power to remove redundant easements is not replicated in other jurisdictions.<sup>690</sup>

17.3 Like the former section 70, the current section is regarded as a machinery provision, applying only when an easement or profit has been extinguished at law or in equity.<sup>691</sup>

17.4 An application can be based on the following grounds:

- determination by effluxion of time, that is where the easement instrument specifies a finite term of days, months, or years from the commencement date, or a specific expiration date;<sup>692</sup>

689 Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, s 42 with effect from 12 June 2003.

690 For example, compare with the Real Property Act 1900 (NSW), s 47.

691 See Hinde McMorland & Sim *Land Law in New Zealand* (loose leaf, LexisNexis, Wellington, 2005) para 16.092.

692 See Struan Scott and others *Adam's Land Transfer* (loose leaf, LexisNexis, Wellington, 2007) para S70.4.1.

- determination by specified event, that is, where the easement instrument provides that it shall determine or be extinguished, without any requirement for execution of a surrender instrument, upon the happening of a specified event;<sup>693</sup>
- merger;<sup>694</sup> and
- redundancy.

17.5 The common law doctrine of abandonment does not apply to registered easements. Abandonment is expressly included in certain Torrens systems in Australia. For example, in New South Wales an easement may be treated as abandoned if the Registrar-General is satisfied it has not been used for at least 20 years before the application for the cancellation of the recording is made to the Registrar.<sup>695</sup>

Q120 Should there be any other grounds for removal of easements or profit à prendre, for example, abandonment?

### Issues

- 17.6 Subsection 70(2) of the LTA provides, for the purposes of subsection (1), that an easement may be regarded as redundant if:
- (a) the dominant tenement or any part of it has become separated from the servient tenement as a result of a subdivision or otherwise; and
  - (b) the easement no longer benefits the dominant land.
- 17.7 Under subsection 70(3) where a person seeks an entry on the register that an easement is redundant they must make a declaration to the effect that:
- (a) the criteria in subsection (2) are met; or
  - (b) any other criteria specified by the Registrar for determining that easements are redundant are met.<sup>696</sup>
- 17.8 To date, the Registrar has not specified any other criteria under paragraph (b).<sup>697</sup>

693 Ibid; Tom Bennion and others *New Zealand Land Law* (Brookers, Wellington, 2005) 797.

694 It appears that, at common law, for an easement to be merged the same person must own both the dominant and servient tenements and also possess both, although this is not entirely clear. See Hinde, McMorland & Sim, above n 691, para 16.087 and *Adams' Land Transfer*, above n 692, para S70.4. See also Land Transfer Regulations 2002, reg 25.

695 Real Property Act 1900 (NSW), s 49(2). See also Land Titles Act 1980 (Tas), s 108(2)(c); Transfer of Land Act 1958 (Vic), s 73(1).

696 In the *New Zealand Gazette* in accordance with Land Transfer Act 1952, s 240A.

697 For additional guidance as to the removal of redundant easements see Land Information New Zealand *Guideline for the Application for Removal of Redundant Easements* (LINZG20707) [www.linz.govt.nz/docs/titles-and-records/rgl-publications/guideline-application-removal-redundant-easements.pdf](http://www.linz.govt.nz/docs/titles-and-records/rgl-publications/guideline-application-removal-redundant-easements.pdf) (accessed 18 April 2008).

- 17.9 The Registrar published a note in LINZ publication *Torrenstalk* on the process for removal of redundant easements. On the role of the Registrar he said:<sup>698</sup>

This provision does not impose on the Registrar any obligation to determine disputes between parties, or to act in a quasi-judicial manner. In situations where the continuing existence of the easements is contentious or uncertain it is still necessary for the applicant for removal to apply to the Courts if a surrender cannot be obtained.

- 17.10 It may be unclear what circumstances constitute separation of the dominant and servient tenements under subsection (2). While practitioners have argued that a wall or a building separating the two tenements is sufficient to constitute separation, LINZ is of the opinion that there must be a spatial gap between the two tenements.
- 17.11 Section 70 of the LTA appears to draw a distinction between easements and profits à prendre that have been determined or extinguished on the one hand, and redundant easements on the other. The fact that subsection (2) only refers to easements supports this. The requirement for a declaration in subsection (3) also only applies to redundant easements.
- 17.12 Subsection (4) sets out notice requirements where an easement is determined, extinguished or redundant. These do not apply where the determination or extinguishment of the easement is by effluxion of time or merger.<sup>699</sup> Subsection (4) also does not mention profit à prendre.
- 17.13 Although easements in gross, that is, easements where there is no dominant tenement, are recognised under the Property Law Act 2007<sup>700</sup> and can be registered under the LTA, the criteria set out in subsection (2) cannot be applied where there is no dominant tenement.

Q121 Should the circumstances that constitute separation of dominant and servient tenements be stated more explicitly?

Q122 Is it acceptable to leave it to the Registrar to specify additional criteria for redundancy in relation to easements or should all criteria be set out in the new LTA?

Q123 Should section 70 of the LTA explicitly distinguish between expiry and determination of easements and profits à prendre and redundancy of easements? Should redundant easements be provided for in a separate section?

698 Robbie Muir “RGL Rulings” (June 2003) 25 *Torrenstalk* 5, 5.

699 Land Transfer Act 1952, s 70(6).

700 Property Law Act 2007, s 291.

Q124 Should section 70 of the LTA set out a procedure for applications for entry on the register to the effect that an easement or profit à prendre has been determined or extinguished as well as for an easement that has become redundant?

Q125 Should there be provision for removal of redundant easements in gross?

Q126 Are any other amendments to section 70 of the LTA necessary or desirable?

## COVENANTS: RIGHTS AND POWERS

### Background

17.14 The LTA contains a number of provisions that create implied covenants, conditions, powers and rights. The scope of this discussion is to identify those provisions, briefly describe what they do and comment on them where appropriate.<sup>701</sup>

### Covenants implied in mortgages postponed by a variation of priority

17.15 Section 103(4) of the LTA provides:

Upon the registration of the mortgage priority instrument, there is implied in every mortgage so postponed the covenants, conditions, and powers set out in Schedule 3, except as otherwise expressed in the priority instrument.

17.16 The covenants, conditions and powers cover:

- payment of principal, interest, and other moneys and performance of covenants and conditions;
- the mortgagee's power to pay default moneys and perform unperformed covenants or conditions;
- compliance with insurance provisions; and
- the deeming of any provision referring to any particular mortgage having priority to refer to any mortgage at any time having priority.

17.17 Apart from a consequential change to Schedule 3 in 2007 that replaced references to the Property Law Act 1952 with references to its successor, the Property Law Act 2007, this schedule has remained untouched since it was inserted in 1952. Although the schedule is relatively small it might be better located in regulations.

### Covenants for lessee's right to purchase

17.18 Section 118 of the LTA provides that, where a lease contains a covenant to purchase the land, and the lessee pays the money and observes the covenants in the lease, the lessor is bound to transfer the fee simple estate in the land to the lessee.

<sup>701</sup> For a brief discussion of positive and restrictive covenants see chapter 6, above.

17.19 The wording has survived unchanged since it appeared in section 87 of the Land Transfer Act 1885.

### Covenants implied in instruments generally – Part 9 of the LTA

17.20 Section 154 – covenants for further assurance implied – provides that the creator of an estate or interest impliedly covenants with every person taking any estate or interest under the transfer, charge or other instrument that he or she will:

- do everything necessary on his or her own part to give effect to all covenants, conditions, and purposes expressed in the instrument or implied by the LTA; and
- at the request and cost of the person taking any estate or interest, execute any further instrument necessary for further and better assuring and perfecting the title intended to be transferred, charged or created.

17.21 This provision has not been amended since it appeared in the LTA.

17.22 Section 155(1) – short forms of covenants – provides that covenants implied in paper instruments, in accordance with the covenants set out in Schedule 4, take effect as if they were set out in the instrument in full, but adapted to the particular instrument concerned.

17.23 The subjects of these covenants are matters such as use, insurance, decoration, and cultivation. They describe a short form set of covenants that define a wide range of terms and expressions that are likely to appear in various instruments; the most likely candidates are mortgage and lease instruments or variations thereof. As “default” covenants, they only apply if a specific instrument does not contain a definition of the term or expression and does not exclude the implied covenants. They apply to both paper and electronic instruments.

17.24 This schedule has not been changed in substance since 1952 so it merits re-examination and revision where necessary. Current practice seems to prefer schedules of this size and content to be placed in regulations rather than in the body of the Act.<sup>702</sup>

17.25 Section 156 – action for breach of covenant – provides that, in an action for breach of implied covenant, the statement of claim can set out the allegedly breached covenant and allege that the defendant covenanted precisely in the same manner as if the covenant had been expressed in words in the instrument, any law or practice to the contrary notwithstanding.

17.26 In other words, this puts implied covenants on the same footing as express covenants if an action for breach is brought. Once again this provision has not been altered since 1952.

Q127 What parts of Schedules 3 and 4 of the LTA require revision?

<sup>702</sup> For example, the former Schedule 7 to the LTA (implied rights and powers in easements) has now been transplanted into Schedule 4 of the Land Transfer Regulations 2002.

Q128 Would these Schedules be more appropriately positioned within regulations rather than in the new LTA?

Q129 Do the other sections referred to above require revision?

### Fencing covenants

17.27 Under section 5 of the Fencing Act 1978, fencing covenants relating to LTA land may be registered against the title to that land. Section 71 of the LTA requires the Registrar to cancel the registration of fencing covenants, on application, if he or she is satisfied that there is no one who is, or may become, entitled to the benefit of the covenant. These provisions have not given rise to any particular issues.

Q130 Does section 71 of the LTA require revision?

# Chapter 18

## Caveat against dealings: technical problems

**INTRODUCTION** 18.1 Chapter 7 discussed the issue of what interests are caveatable, and, in particular, whether unregistrable interests and interests held by registered proprietors are caveatable. However, there are several technical issues relating to caveats against dealings, which need to be addressed in a review of the LTA, and will be canvassed in this chapter.

**PARTICULARS OF THE CAVEATOR'S CLAIM** 18.2 Subsection 137(2) of the LTA is designed to specify the essential information elements of caveats for both paper and electronic lodgement. Under subsection 137(2), a caveat against dealings must contain the following information:

- (a) the name of the caveator; and
- (b) the nature of the land or estate or interest claimed by the caveator, which must be stated with sufficient certainty; and
- (c) how the land or estate or interest claimed is derived from the registered proprietor; and
- (d) whether or not it is intended to forbid the making of all entries that would be prevented by section 141 or a specified subset of them; and
- (e) the land subject to the claim, which must be stated with sufficient certainty; and
- (f) an address for service for the caveator.

18.3 Several of these requirements are clear and uncontentious,<sup>703</sup> but some merit comment. Paragraph (b) requires a caveat against dealings to state the nature of the land or estate or interest claimed “with sufficient certainty”. This is an important requirement as it enables the Registrar to determine what the caveat will prevent from being registered.

<sup>703</sup> That is, s 137(2)(a), (d) and (f) are sufficiently clear and have not caused problems.

18.4 However, the expression “with sufficient certainty” has been the subject of judicial consideration. Two views have emerged: one is that strict compliance with the requirements is essential;<sup>704</sup> the other is that the purpose of the caveat would be thwarted if those requirements were imposed too rigidly.<sup>705</sup>

18.5 A strict interpretation risks losing the simplicity and speed afforded by the caveat procedure.<sup>706</sup> This was recognised by a recent Court of Appeal decision, *Zhong v Wang*, which held:<sup>707</sup>

The underlying purpose of the caveat regime could be undermined if too strict an approach were taken to the detail required to describe the interest claimed and its derivation from the registered proprietor.

18.6 Section 137(2)(c) of the LTA requires the caveator to show how the claim is derived from the registered proprietor. However, it is unclear whether the registered proprietor must be named or can be referred to in a generic way. Section 148A of the LTA would tend to provide some support for the latter view (see below for an explanation of this provision). Not naming the registered proprietor can cause difficulties where the entitlement is derived from a former proprietor or someone yet to become registered as proprietor. The new land transfer regulations could require all parties in the chain of entitlement to be named and any form (prescribed in those regulations) could make that clear.

Q131 Should there be any changes to the particulars required in section 137(2) of the LTA?

Q132 Should any of these requirements be set out in regulations?

Q133 Should there be a requirement that the registered proprietor be named?

## Execution and entry on the register

18.7 The interpretation of subsection 137(4) of the LTA causes some difficulty. This section provides:

Caveats under this section must be entered on the register as of the day and hour of their receipt by the Registrar.

704 See, for example, *NZ Mortgage Guarantee Co Ltd v Pye* [1979] 2 NZLR 188, 197 (SC) Vautier J.

705 See, for example, *Buddle v Russell* [1984] 1 NZLR 537 (HC) Casey J; *Norrie v Registrar-General of Land* (2005) 6 NZCPR 94 (HC) Ellen France J; *Zhong v Wang* (2006) 5 NZ ConvC 194,308, para 58 (CA) Wild and Heath JJ.

706 *Buddle v Russell*, above n 705, 539.

707 *Zhong v Wang*, above n 705, para 58.



- 18.8 As matters stand, caveats must be lodged in paper form. Where a caveat is lodged in person in the Land Registry Office, section 137(4) of the LTA will apply. However, where a caveat is presented by depositing the instrument in a secure facility provided for that purpose, or by posting it to the Land Registry Office, subsection (4) needs to be read in conjunction with the subsections 47(4) and (5) of the LTA. In these situations, a caveat:
- is deemed to have been presented for registration on the business day after the day on which it is received by the Registrar and before any other matter presented on the day of registration in relation to the same land;<sup>708</sup> and
  - is deemed to have been presented for entry after any other instrument presented to the Registrar in the same manner on the same day.<sup>709</sup>
- 18.9 The relationship between the sections is not clear. However, once caveats can be lodged electronically, they will be entered in strict accordance with section 137(4) of the LTA.

#### EFFECT OF A CAVEAT AGAINST DEALINGS

#### Subsections 141(1) and (2) of the LTA

- 18.10 The general effect of lodging a caveat against dealings is that, as long as the caveat remains in force, the Registrar shall not make any entry on the register, which will have the effect of charging, transferring, or otherwise affecting the estate or interest protected by the caveat.<sup>710</sup> However, the Registrar is not prevented from making any entry necessary to complete the registration of an instrument that has been accepted for registration before the receipt of the caveat.<sup>711</sup>
- 18.11 Subsection 141(1) of the LTA requires the Registrar to make a judgement as to whether or not the caveat has the effect of preventing the registration of the instrument or document presented for registration. The phrase, “affecting the estate or interest protected by the caveat”, has been construed as meaning that the registration of the instrument presented must in some way prejudicially affect the estate or interest protected.<sup>712</sup> The inclusion of subsection 141(5) of the LTA is an attempt to identify instrument-types that will not be stopped by the caveat.
- 18.12 The interpretation of subsection (2) has caused some difficulties. The authors of *Adams’ Land Transfer* comment:<sup>713</sup>

It is submitted that it must be construed as if the word “properly” were interpolated between the words “been” and “accepted”. An instrument previously presented for registration, but not in order for registration when the caveat was subsequently lodged, cannot, if it is submitted, obtain priority over the caveat.

This is probably stating the obvious, because the prior instrument can only be registered, if it is capable of registration.

<sup>708</sup> Land Transfer Act 1952, s 47(4).

<sup>709</sup> Land Transfer Act 1952, s 47(5).

<sup>710</sup> Land Transfer Act 1952, s 141(1).

<sup>711</sup> Land Transfer Act 1952, s 141(2).

<sup>712</sup> *Bank of New Zealand v Tannadyce Investments Ltd* (1994) 2 NZ ConvC 191,897; *Re Roberts* (1997) 3 NZ ConvC 192,615.

<sup>713</sup> Struan Scott and others *Adams’ Land Transfer* (loose leaf, LexisNexis, Wellington, 2007) para S141.3.

## Effect of caveat and mortgagees' sales

- 18.13 Subsection 141(3) of the LTA deals with caveats in relation to the exercise of power of sale by a mortgagee. This section was enacted in 1982 to override the decision in *Stewart v District Land Registrar*, which held that a caveat against dealings lodged against the mortgagor's title prevented the registration of a transfer following a mortgagee's sale.<sup>714</sup> The position is that, the transfer will be registered and the caveat is deemed to have lapsed, where the following factors are met:<sup>715</sup>
- the caveat was lodged after the registration of the empowering mortgage; and
  - the estate or interest claimed by the caveator arises under an unregistered mortgage or an agreement to mortgage, which is dated later than the date of registration of the empowering mortgage; and
  - the caveat relates to the same estate or interest to which the empowering mortgage relates.
- 18.14 The transfer must be expressed to be made under either a power of sale conferred on the transferor by virtue of a registered mortgage, or the power conferred on the Registrar of the High Court.<sup>716</sup>
- 18.15 The purpose of this subsection is to put the unregistered mortgagee protected by a caveat in the same position as a registered mortgagee whose mortgage is registered after the empowering mortgage. The only issue that has arisen is the use of caveats to protect such interests that inadvertently or deliberately fail to disclose the date of the unregistered mortgage or agreement to mortgage.
- 18.16 Subsection 141(4) of the LTA lapses the caveat protecting the subsequent unregistered mortgage or agreement to mortgage.

## Transactions not prevented by caveats

- 18.17 Section 141(5) identifies various transactions that may be registered despite the presence of a caveat. This was an attempt to codify what had become clear and uncontested exemptions. Although this subsection was added recently there may be aspects that require further consideration. There are minor issues regarding this subsection. For example, the phrase "secondary interests", as used in paragraphs (c) and (f), could be defined.<sup>717</sup>
- 18.18 It is unclear whether the exceptions listed in subsection (5) are exhaustive. It should be considered whether the subsection should state whether this is the case or not. Another issue is whether the list should be expanded or modified to include other obvious transactions. For example, the list of transmission types may not be complete.

<sup>714</sup> *Stewart v District Land Registrar* [1980] 2 NZLR 706, 707 (HC) Barker J.

<sup>715</sup> Land Transfer Act 1952, s 141(3)(b) and (c).

<sup>716</sup> Land Transfer Act 1952, s 141(3)(a).

<sup>717</sup> Paragraph (c) provides for the registration of "dealings having the effect of discharging or extinguishing secondary interests if the caveat affects the fee simple (such as a discharge of a mortgage or surrender of a lease)". Paragraph (f) provides for "dealings with secondary interests if the caveat affects the fee simple (such as the transfer of a mortgage)".

Q134 Should the interpretation given to subsection 141(1) of the LTA (that is, that the instrument can be registered if it does not *prejudicially* affect the estate or interest protected by the caveat) be expressly incorporated?

Q135 Should the insertion of mortgage date details in a caveat be mandatory?

Q136 Should the equivalent of subsection (5) make it clear whether or not the list is exhaustive?

LAPSE OF  
CAVEATS  
AGAINST  
DEALINGS

**Statutory provisions: should they be merged?**

18.19 Sections 145 and 145A of the LTA provide for the lapse of caveats against dealings.<sup>718</sup> The two sections differ as follows:

- section 145 relies on the application for registration of an accompanying dealing to trigger its provisions; and
- section 145A permits a registered proprietor, whose property is subject to a caveat, to apply to the Registrar for the caveat to lapse independently of any proposed dealing with the property.<sup>719</sup>

18.20 There are minor differences in the wording of the two sections, because of the recent enactment of section 145A. However, it has been said that:<sup>720</sup>

Other than the change to the gateway process, there is no material difference between sections 145 and 145A that would justify the latter being interpreted in any different manner to the former.

18.21 Once an application has been made under sections 145 or 145A of the LTA, the Registrar must give notice to the caveator. The caveat will lapse, under sections 145(1) or 145A(3), with the close of the first prescribed period of 14 working days after the date of the caveator’s receipt of the notice, unless the caveator:

- gives notice to the Registrar, within that period, that the caveator has applied to the High Court for an order that the caveat not lapse; and
- serves the order on the Registrar within the “second prescribed period” of 28 working days after the Registrar has received the notice of application to the High Court.<sup>721</sup>

718 Section 147 also provides for the removal of caveats where the caveator or his or her attorney or agent withdraws the caveat. Except for the need to make this section compatible with electronic lodgement, this provision appears to be uncontroversial.

719 This section was inserted by the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, s 52. It was inserted to provide a cheap and quick alternative to section 143. It also got around the need for a registered proprietor to create a “dummy” instrument (usually a mortgage) to enable section 145 to be used.

720 *Raiser Developments Ltd v Trefoil Properties Ltd and Grafton Oaks Motels (1999) Ltd* [2008] NZCA 73, para 32, Heath J for the Court.

721 The “prescribed periods” are set out in the Land Transfer Regulations 2002, reg 39.

- 18.22 The procedure in section 145A has proved popular. It is clear that the terminology in the two provisions should be the same. However, the two sections could also be collapsed into one provision that deals with both processes.
- 18.23 Neither the LTA nor the Land Transfer Regulations 2002 prescribe any particular form for applications under sections 145 or 145A. At the beginning of 2008, LINZ issued a guideline that outlines procedures to ensure compliance with the statutory requirements governing stop notices, including caveats, and suggests formats for applications under the two sections.<sup>722</sup> It may be useful for forms for applications under these sections to be prescribed in regulations.

### Prescribed periods

- 18.24 Currently, the prescribed periods are set out in regulations.<sup>723</sup> They may be better placed and more easily accessible in the legislation. There is no need for them to be easily amended. However, regulation 39 has the advantage of setting out all the prescribed periods under the LTA in one place.
- 18.25 There are often timing difficulties regarding applications to the court. Sometimes caveats lapse because of the caveator not getting a sealed order within the statutory time frame. The court has no jurisdiction to extend the second prescribed period.<sup>724</sup> A copy of an oral judgment, or the judge's minute is insufficient for the purposes of sections 145(1)(b) or 145A(3)(b) of the LTA. Therefore, if an order has not been issued, or the court has been unable to give a hearing date within the period, the caveat will lapse. The court has no jurisdiction to revive a caveat that has lapsed,<sup>725</sup> and once a caveat has lapsed, a caveator is prevented from lodging a second caveat under section 148 (see discussion below).
- 18.26 However, orders often sustain a caveat "until a further Order of this Court". The practical effect of this is to extend the second prescribed period until after the result of the second, or substantive, hearing of the case is known. The court has jurisdiction to make a conditional order, as is the case with an application to the court under section 143.<sup>726</sup>

### Withdrawal of caveat notices

- 18.27 If the dealing that triggered a caveat notice under section 145(1) of the LTA is withdrawn within the first prescribed period, the caveat will not lapse. Withdrawal of the instrument stops the lapsing process. If the instruments in that dealing are subsequently re-presented for registration, the Registrar must give a fresh caveat notice to the caveator.<sup>727</sup>

<sup>722</sup> Land Information New Zealand *Guideline for Stop Notices* (LINZG20706, 2008) [www.linz.govt.nz/apps/rg/publicationssearch/DocumentSummary.aspx?document=206](http://www.linz.govt.nz/apps/rg/publicationssearch/DocumentSummary.aspx?document=206) (accessed 21 July 2008).

<sup>723</sup> Land Transfer Regulations 2002, reg 39.

<sup>724</sup> *Wigglesworth v Mitri* (1979) 1 NZCPR 127, 128–129 (SC) Chilwell J; *Metcalfe v Skyline Holdings Ltd* (1982) 1 NZCPR 480, 484–485 (HC) Vautier J.

<sup>725</sup> *Wigglesworth v Mitri*, *ibid*, 128; *Metcalfe v Skyline Holdings Ltd*, *ibid*, 484–485; *Leather v Church of the Nazarene* [1984] 1 NZLR 544, 551 (HC) Savage J.

<sup>726</sup> For discussion on this point see *Raiser Developments Ltd v Trefoil Properties Ltd and Grafton Oaks Motels (1999) Ltd*, above n 720, paras 30–43.

<sup>727</sup> *Butler v Fairclough* (1917) 23 CLR 78 (HCA).

- 18.28 By contrast, there is no provision in the Act permitting the withdrawal of an application under section 145A after a caveat notice has been served. The caveat notice sets in train the statutory procedure, which must be left to run its course. The fact that section 145A is sometimes used for tactical reasons to bring caveators to negotiation, may suggest that there is a need for a provision to stop the process.

Q137 Should the processes contained in sections 145 and 145A of the LTA be contained in a single provision?

Q138 Should the prescribed periods be set out in the new LTA or in regulations?

Q139 Is the second prescribed period sufficiently long?

Q140 Should the court have the power to extend the second prescribed period?

Q141 Should there be a provision that allows an application under section 145A of the LTA to be withdrawn? If so, how would this operate?

PERSON  
ENTERING  
CAVEAT  
WITHOUT  
REASONABLE  
CAUSE LIABLE  
FOR DAMAGES

- 18.29 Section 146 of the LTA provides:

- (1) Any person lodging any caveat without reasonable cause is liable to make to any person who may have sustained damage thereby such compensation as may be just.
- (2) Such compensation as aforesaid shall be recoverable in an action at law by the person who has sustained damage from the person who lodged the caveat.

- 18.30 There has been some judicial comment about aspects of this section. The expression “reasonable cause” has been interpreted as not requiring there to be an actual caveatable interest as long as at the time the caveat was lodged the caveator had an honest belief that there was a caveatable interest.<sup>728</sup> Conversely, even if there is a caveatable interest there might not be reasonable cause to lodge a caveat.<sup>729</sup>

- 18.31 Liability is directed at the person who lodged the caveat. Therefore, a solicitor or an agent may be liable for damages. Regarding this matter, Blanchard J has stated:<sup>730</sup>

If this were not so the client might be protected by taking advice from the solicitor, however wrong the advice proved to be, and the solicitor would be protected by acting in accordance with the instruction which was given because of the incorrect advice. It would be unsatisfactory if in this circular way a person affected by the lodging of a caveat could be deprived of any claim under section 146.

728 *Holmes v Australasian Holdings Ltd* [1988] 2 NZLR 303 (HC) and affirmed in *Cotton v Keogh* [1996] 3 NZLR 1 (CA).

729 *Taylor v Couchman* [1995] 3 NZLR 336 (HC).

730 *Gordon v Smith* [1996] 3 NZLR 281, 288 (CA) Blanchard J for the Court.

18.32 It appears that this section has been interpreted as excluding claims for mental distress or punitive damages.<sup>731</sup>

Q142 Do you have any comments on section 146 of the LTA?

## SECOND CAVEATS (SECTION 148 OF THE LTA)

### *Statutory provisions*

148 – No second caveat may be entered

(1) If a caveat has been removed under section 143 or has lapsed, no second caveat may be lodged by or on behalf of the same person in respect of the same interest except by order of the High Court.

(2) For the purposes of verifying that a caveat does not contravene the prohibition in subsection (1), the Registrar is not obliged to inquire further than the current folium of the register or computer register for the land.

18.33 This applies to all caveats, and is not limited to caveats against dealings. The prohibition only applies where the caveat has been removed under section 143 of the LTA, or lapsed. It does not apply where the caveat has been withdrawn.<sup>732</sup> This may, however, have an effect on priorities and it may be preferable to consent to the dealing.

18.34 Regarding the court’s discretion as to whether to allow a second caveat, the Court of Appeal has held that:<sup>733</sup>

A Court does not lightly consent to the lodgement of a second caveat. It is in the nature of an indulgence and the applicant’s claim is scrutinised carefully.

18.35 Three factors should be considered in the exercise of this discretion:<sup>734</sup>

- (a) the strength of the case made by the applicant to support the claimed interest in the land;
- (b) any explanation for failure to exercise the caveator’s rights under section 145 (and now section 145A); and
- (c) whether unavoidable prejudice would be suffered by those who have acted in reliance on the register and in the belief that the caveator was not pursuing the claim.

### **Duty of Registrar**

18.36 Section 148(2) of the LTA does not oblige the Registrar to research any further than the current view of the computer register for the land. Thus, it relaxes the terms of the original provision, which made it unlawful for the “Registrar to receive any second caveat ...”. This role is reinforced by section 148A of the

<sup>731</sup> See commentary in Tom Bennion and others *New Zealand Land Law* (Brookers, Wellington, 2005) 284.

<sup>732</sup> This may be appropriate, for example, “where the land is purchased or mortgaged subject to an existing lease, and the lessee – or a mortgagee of the lease – has lodged a caveat. Such a caveator may withdraw the caveat to allow registration of the transfer or mortgage, and then lodge a fresh caveat”, Shannon Lindsay *Caveats against Dealings: in Australia and New Zealand* (Federation Press, Sydney, 1995) 39.

<sup>733</sup> *Cotton v Keogh and Others*, above n 728, 9.

<sup>734</sup> *Muellner v Montagnat* (1986) 2 NZCPR 520, 523–524 (HC) Thorp J.

LTA (see below). Therefore, where the Registrar has checked the register and is satisfied that it is not a second caveat, arguably he or she does not commit a breach of statutory duty by entering a second caveat on the register.

- 18.37 It often may be difficult for the Registrar to determine whether a caveat is, in fact, a second caveat. For example, it is sometimes unclear whether the caveat is, in fact, lodged by the “same person” to protect the “same interest”.<sup>735</sup>
- 18.38 An additional problem arises where one of the documents is a notice of claim under the Property Relationships Act and the other is a caveat.<sup>736</sup> A notice of claim has the same effect as a caveat against dealings and most provisions in the LTA that apply to such caveats apply also to notices of claim, including section 148.<sup>737</sup> However, the problem arises because a notice of claim needs only to specify the relationship between the claimant and the registered proprietor.
- 18.39 In checking whether a caveat is a second caveat, in practice the Registrar goes beyond the statutory requirements.<sup>738</sup> LINZ internal procedures provide for the additional check of the historic view and also of the image view, if appropriate, to see if there is a record of lapsed or removed caveats. If a lapsed or removed caveat is found, a search is made of the caveat. If it appears that the caveat clearly contravenes section 148(1) of the LTA, even if its wording is different from the first caveat, it will be rejected. In borderline cases, processing centres seek further information from the caveator. If the caveator can justify the terms of the caveat, the caveat is entered on the register. If not, the caveat will be rejected. In cases of doubt, processing centres refer the caveat to the Registrar’s team at the national office for further investigation.
- 18.40 It seems clear that whether a caveat constitutes a second caveat will always involve an exercise of judgement by the Registrar. If the Registrar makes an error, LINZ is liable for compensation. However, it should not be forgotten that section 148(1) of the LTA also places the primary onus on the caveator to not lodge second caveats.
- 18.41 A possible solution to these problems might be to make it clearer that the prime responsibility for failure to observe the requirements that no second caveat be lodged lies with the caveator or claimant with reduced liability on the Registrar as long as the latter takes all reasonable steps to verify that there has been no contravention of the prohibition. The link to section 146 of the LTA (liability of caveator for lodging caveats without reasonable cause) could be strengthened.

735 For example, see *Jireh Customs Ltd v Grafton Road Building Ltd* (18 December 2007) HC AK CIV-2007-404-007586 Harrison J. In this case, five caveats were entered on the same computer register, which all derived from the same sale and purchase agreement and clearly related to the “same interest”. Although there were five different caveators, it was clear that these persons, though “different”, were closely connected. It transpired that the benefit of the sale and purchase agreement had been assigned by the first caveator to one, and then another, of the “new” caveators. Harrison J restrained the caveators from lodging any further caveats and the Registrar from entering any further caveat by the caveators or their agents, without leave of the court. LINZ removed the offending caveats and the property was transferred to a new registered proprietor.

736 Property (Relationships) Act 1976, 42(3).

737 Property (Relationships) Act 1976, 42(3).

738 *Customer Operations Technical Circular* 2003.T10 (27/11/03).

Q143 What should be the role of the Registrar in relation to second caveats, and is this role adequately expressed in the current provisions?

Q144 Should the responsibility of caveators not to lodge second caveats and the liability for non-compliance be increased?

## ROLE OF THE REGISTRAR IN RECEIVING CAVEATS

18.42 Section 148A of the LTA provides that:

Except to the extent of ensuring that a caveat lodged under any provision of this Act complies on its face with the requirements of this Act and with the requirements of any regulations made for the purposes of this Act, the Registrar is not required to be satisfied that the caveator is in fact or at law entitled to the estate or interest claimed in the caveat.

18.43 This section and section 137 do not require the Registrar to look behind the caveat. However, the caveat must, on its face, show compliance with the requirements of the LTA including those stipulated in section 137(1).

Q145 Is it desirable to clarify the role of the Registrar in receiving caveats?

## REGISTRAR'S CAVEATS

18.44 Section 211(d) of the LTA empowers the Registrar to enter caveats:

He may enter caveats for the protection of any person who is under the disability of infancy or unsoundness of mind or is absent from New Zealand, or, on behalf of the Crown, to prohibit the transfer or dealing with any land within his district belonging or supposed to belong to any such person, and also to prohibit the dealing with any land within his district in any case in which it appears to him that an error has been made by misdescription of that land or otherwise in any certificate of title or other instrument, or for the prevention of any fraud or improper dealing.

18.45 There appear to be three elements covered in these powers:

- first, the Registrar may enter a caveat to protect someone with a legal or mental disability, or who is absent from New Zealand or on behalf of the Crown;
- secondly, the Registrar can prohibit dealings with any land on discovery of some error;
- thirdly, the Registrar can lodge a caveat to prevent fraud or improper dealing.

18.46 It is still likely that there will be situations where the Registrar will need to enter a caveat. The issues regarding this section are whether:

- (a) all of those grounds are still relevant; and
- (b) other grounds ought to be added.

18.47 It may be inappropriate for the Registrar to enter a caveat where a person is capable of lodging a caveat in his or her own right. For example, modern technology has rendered it unnecessary for the Registrar to have the power to enter a caveat to protect someone who is absent from New Zealand. However,



although there are other ways to protect the interests of persons under legal disability,<sup>739</sup> the immediate impact of a Registrar's caveat may, in some instances, be the most effective one.

- 18.48 The powers under section 211 of the LTA are discretionary and thus capable of limited challenge through the courts both as to entry of caveats<sup>740</sup> and their withdrawal.<sup>741</sup>
- 18.49 The meaning of “improper dealing” in section 211(d) of the LTA is unclear. Clearly, it is something less than fraud in severity.<sup>742</sup>

Q146 Are the criteria for the entry of a Registrar's caveat still appropriate?

Q147 What changes should be made to the section? For instance, is the term “improper dealing” appropriate?

739 See for example, Protection of Personal and Property Rights Act 1988.

740 See *re Griffen (dec'd) Flynn and Griffen v District Land Registrar Invercargill* (1898) 1 GLR 101; *In re Taupo Totara Timber Co Ltd* [1943] NZLR 557 (CA).

741 *Fleming v District Land Registrar for Canterbury* [1969] NZLR 430 (SC).

742 One commentary attempts to give examples of an “improper dealing”, that is, “presentation for registration of a document held in escrow or one executed by a person under a disability”: *Adams' Land Transfer*, above n 713, para S211.7.

# Chapter 19

## Adverse possession

### PRESCRIPTIVE TITLE TO LAND UNDER THE LTA

#### Adverse possession as an exception to indefeasible title

- 19.1 Adverse possession at common law was based on the rule that title to land was relative, and where there were rival claims to the same land the claimant who proved the stronger title obtained the land. In a system where title is conferred by registration, there should, in theory, be no rival claimant to the registered proprietor. But since the early Torrens Acts, exceptions have been permitted, and adverse possession is now “firmly entrenched” in most Australian states<sup>743</sup> and in New Zealand. In New Zealand, until 1963, a claim could only be made if a person was in adverse possession prior to the land being brought under the Act.<sup>744</sup>
- 19.2 Discussing the position prior to the enactment of the Land Transfer Amendment Act 1963 (the 1963 Act), Professor Whalan noted that:<sup>745</sup>
- Unless there is a change in the law the number of defective Land Transfer titles must tend to increase, as it is submitted that there is at present no satisfactory way of clearing the defects.
- 19.3 The justifications for allowing a claim in adverse possession generally have been listed as follows:<sup>746</sup>
- (a) protecting those in possession from stale claims;
  - (b) encouraging holders of documentary title not to sleep on their rights;
  - (c) facilitating a conveyance of land in the event the holder of the documentary title has disappeared or when the documentary title no longer reflects the accurate state of title;
  - (d) facilitating the investigation of title to unregistered land.

743 Les A McCrimmon “Whose Land is it Anyway? Adverse Possession and Torrens Title” in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 157, 160. However, the Northern Territory and Australian Capital Territory prohibit acquisition of title to Torrens land by adverse possession.

744 Land Transfer Act 1952, s 64.

745 DJ Whalan “Title by Adverse Possession and the Land Transfer Act” [1963] NZLJ 524, 525.

746 McCrimmon, above n 743, 159 referring to, inter alia, Law Commission and HM Land Registry *Land Registration for the Twenty-first Century: A Consultative Document* (LC 254, the Stationery Office, London, 1998) 204 and M Dockery “Why do we Need Adverse Possession?” [1985] Conv 272, 272–277.

- 19.4 The justifications for allowing a claim in adverse possession to a registered proprietor rely more on (b) and (c) above than (a) and (d). Another important justification was the increasing numbers of defective titles noted by Professor Whalan. This was clearly a problem, and since 1963 such claims have been permitted in New Zealand to those in adverse possession occurring after the first bringing of the land under the LTA.

### Origins of the 1963 Act

- 19.5 EK Phillips, former Registrar-General of Land, noted that:<sup>747</sup>

Until 1963, however, for all practical purposes there was no method available of obtaining title by means of adverse possession to land held under the provisions of the Land Transfer Act. The new amendment [the Land Transfer Amendment Act 1963] enables this but has been drawn in such a way that it still offers those who are interested in maintaining their rights under the Act the same absolute security, but removes this privilege from the registered proprietor who has abandoned his land or allowed others to occupy it and fails to observe in any way the acts and obligations of ownership.

- 19.6 The 1963 Act was a significant piece of legislation. Whilst it represented an inroad into the principle of indefeasibility, it enabled abandoned land that was under the LTA to be acquired by persons with longstanding and continuous possession of that land.<sup>748</sup>
- 19.7 It also provided a simple mechanism whereby the registered proprietor of the fee simple could defeat claimants to title and so preserve that registered proprietorship. In addition, anyone with a registered estate or interest against the fee simple could preserve that estate or interest under the same mechanism.

### The 1963 Act – salient features

- 19.8 The term “adverse possession” does not appear in the 1963 Act although it is clear from the key provisions<sup>749</sup> that the possession that forms the basis of any application must be adverse to the registered proprietor. The applicant must have been, and must continue to be in, continuous possession of the relevant land for a period of not less than 20 years, but such possession need not be personal to the applicant. The possession must be such that the applicant would have been entitled to apply for title on the ground of possession if the land had not been subject to the LTA. It can include the possession of prior adverse possessors although the amalgamated period must be unbroken. If the registered proprietor is under a legal disability (infancy or unsoundness of mind), the period of possession must be 30 years or more.<sup>750</sup>

747 EK Phillips “The 1963 Amendments to the Land Transfer Act and Property Law Acts” [1964] NZLJ 110, 129.

748 See Whalan, above n 745, a comprehensive and informative discussion that was published shortly before the 1963 Act came into force but (presumably) after the content of that pending legislation was known. The situation in other jurisdictions was traversed with emphasis on the Australian position.

749 Land Transfer Amendment Act 1963, ss 3–4.

750 Land Transfer Amendment Act 1963, ss 3–4.

- 19.9 The application process does not apply to certain categories of land, as discussed below.<sup>751</sup>
- 19.10 The registered proprietor of the land claimed, and anyone with a registered or equitable estate or interest, can preserve their respective legal or equitable ownership by lodging caveats.<sup>752</sup> In the case of the registered proprietor, the caveat will immediately bring the application to an end, and in the case of someone with a registered interest, the caveat will still allow the applicant to procure title provided he or she recognises that registered interest so as to permit it to be brought forward onto the title.
- 19.11 Those caveators alleging equitable estates or interests are given the opportunity to advance their claimed entitlement within a fixed or extended time, by registering their estate or interest or satisfying the Registrar their interest is valid but not capable of registration.
- 19.12 The successful applicant takes title free from any encumbrances or interests registered or recorded on the register, save those preserved under section 11 of the 1963 Act by agreement between caveator and applicant.<sup>753</sup>
- 19.13 A detailed form for applications under Part 1 of the 1963 Act has been prescribed.<sup>754</sup> However, the Registrar may dispense with information or evidence that the applicant is required to provide, or, conversely, require additional information or evidence.<sup>755</sup>
- 19.14 The 1963 Act has not been the subject of significant litigation. Those cases that have involved adverse possession have generally dealt with how particular claims have met (or not met) the requirements of that Act or the meaning of the term “possession” or nature of possession.<sup>756</sup>

## ISSUES AND OPTIONS

### Legislation favours the registered proprietor – reversal of this principle?

- 19.15 FM Brookfield has said that:<sup>757</sup>

[M]ost New Zealand lawyers would share in some measure the view of one of the early Torrens supporters that adverse possession is not “to be welcomed by an intelligent and moral community as a means ... to prevent confusion of titles ...” and would regard the compromise systems of South Australia, Queensland and New Zealand, as going far enough in re-introducing limitative or prescriptive doctrines of the general law.

751 Land Transfer Amendment Act 1963, s 21.

752 Land Transfer Amendment Act 1963, ss 8–12.

753 Land Transfer Amendment Act 1963 s 15.

754 Land Transfer Regulations 2002, sch 2, Form 22. This is designed to assist an applicant in providing relevant information and corroborative evidence in order to comply with the various requirements of the Act.

755 Land Transfer Amendment Act 1963, ss 5(2)–(3).

756 *Tong v Car Conditioners Ltd* (1965) 1 NZCPR 587 (SC); *Duncan v Aongatete Quarry Ltd* (1959) 1 NZCPR 558 (SC) (argument over whether there was sufficient adverse possession); *Whaanga v District Land Registrar* (2 November 2001) HC NAP CP12/97 (status change to land subsequent to application being made but before title issued). See also Tom Bennion and others *New Zealand Land Law* (Brookers, Wellington, 2005) para 2.17.03.

757 FM Brookfield “Prescription and Adverse Possession” in GW Hinde (ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971) 162, 209. The author was examining some of the aspects excluded from the 1963 Act, including Crown-owned land, boundary encroachments and prescriptive easements and profits à prendre.

- 19.16 On the other hand, APS Alston has argued that the ability of the registered proprietor to stop an adverse possession application simply by lodging a caveat, irrespective of the circumstances, can lead to unfair results.<sup>758</sup> He suggested reversing the principle enshrined in the 1963 Act that gives priority to the registered proprietor over the person in adverse possession, where the latter can establish long and continued possession. In other words, the suggestion is that if the criteria in Part 1 of the 1963 Act are met by the applicant, he or she would become the registered proprietor unless someone claiming an estate or interest (such as the current registered proprietor) can demonstrate that the applicant's claim is defective, for example, possession is less than the prescribed time.
- 19.17 Alston conceded that there will be cases where true abandonment by the registered proprietor will not have occurred, and someone in possession through the generosity of the registered proprietor might take opportunistic advantage of the licence to occupy and attempt to claim title accordingly. He recommends that in such a case the registered proprietor should be available to caveat to prevent the application.

### Land Registration Act 2002 (England and Wales) – a balanced approach?

- 19.18 Recently this issue was explored in the context of the Land Registration Act 2002 (England and Wales), Schedule 6 of which sets out the prerequisites and processes for applications for adverse possession. Under the English Act, adverse possession of land, regardless of length of possession, does not in itself defeat the registered proprietor's title. Nevertheless, a person is still able to acquire registered title after 10 years' adverse possession if certain conditions are met (see below).
- 19.19 Professor Les McCrimmon has suggested that the process in England and Wales would be a useful blueprint for reform of Australian Torrens legislation, but notes that the New Zealand and South Australian regimes also warrant consideration.<sup>759</sup> McCrimmon summarises the Land Registration Act 2002 (England and Wales) thus:<sup>760</sup>

The Land Registration Act attempts to strike a balance between the abolition of an adverse possessor's right to acquire a registered estate in land, and the application of rules relating to possessory title developed for a system of unregistered land.

- 19.20 McCrimmon noted that it is difficult to justify adverse possession as a general exception to a registered proprietor's title, but considers that, were they alive today, Torrens and Dr Hubbe would likely be heartened to discover that South Australia, New Zealand and now England have enacted adverse possession provisions that have not deviated unnecessarily from the concept of indefeasibility (unlike those jurisdictions that permit the passage of time to extinguish a registered proprietor's title).<sup>761</sup>

758 APS Alston "Prescriptive Title – Protecting the Possessor" [1978] NZLJ 421.

759 McCrimmon, above n 743, 158.

760 *Ibid*, 171.

761 *Ibid*, 175–176.

19.21 The Law Commission and LINZ agree with Professor McCrimmon that, even in a Torrens system, there needs to be a mechanism for registration based on possessory title, where, for example, land is abandoned deliberately by a registered proprietor, or there is lack of registration of a successor in title,<sup>762</sup> provided all those with a superior claim to title, as evidenced by the register, have been given an opportunity to object. To put a burden on an existing registered proprietor to demonstrate that an adverse possessor's claim is defective, as Alston suggests, would be an unnecessary deviation from indefeasibility. The Commission and LINZ agree with Professors Brookfield and McCrimmon that the New Zealand (South Australian, Queensland and now England and Wales) provisions strike the right balance and go far enough in introducing the prescriptive doctrines of the general law.

### Land Registration Act 2002 (England and Wales) – distinctions from the 1963 Act (NZ)

19.22 Whilst claims based on adverse possession under the Land Registration Act 2002 (England and Wales) (see Part 9) share common features with those in the 1963 Act (NZ), there are distinct differences. In the English legislation:

- an objection by the registered proprietor will not automatically stop the application if the applicant can demonstrate that it would be unconscionable for the registered proprietor to dispossess the applicant (taking into account the former's behaviour and how that caused the latter to act) and that the circumstances are such that the applicant ought to be registered as proprietor – this can be called the “equitable estoppel” or “equity” exception;
- the applicant has some other right to the land other than that arising from a possessory title (entitlement by will, intestacy or equitable entitlement not perfected by registration); and
- adverse possession in relation to adjoining pieces of land where there has been a reasonable mistake as to the boundary where the exact line between those pieces has not been determined (subject to complicated qualifications).<sup>763</sup> This may be described as the “mistake as to boundaries” exception.

19.23 In addition, if the registered proprietor successfully objects to the adverse possession application, the applicant may make a further application if the latter remains in possession, and:

- (a) the registered proprietor has failed to enforce any judgment for possession against the applicant within two years from the date the application was rejected;
- (b) possession proceedings taken by the registered proprietor have been discontinued or struck out more than two years after the applicant's initial application was refused.

<sup>762</sup> *Re Johnson* [2000] 2 Qd R 502: a Queensland case involving an applicant who held an unregistered conveyance from his great-great-grandfather (the registered proprietor) to the latter's daughter, but who could not prove succession or intestacy.

<sup>763</sup> McCrimmon, above n 743, 169–170.

- 19.24 If the applicant can establish that any of those circumstances apply, he or she is entitled to be registered as proprietor and defend that registration against any proceedings by the former registered proprietor for possession where a passive registered proprietor has failed within two years to take active measures to regain possession after the first application.
- 19.25 Comparing the legislation of England and Wales with equivalent Australasian Acts, McCrimmon thought that the “equity exception” and the “mistake as to boundaries” exceptions in the Land Registration Act 2002 were defensible, although he could foresee litigation before the parameters of the exceptions are established.<sup>764</sup>

Q148 Should a registered proprietor be able to stop an adverse possession claim simply by objecting (lodging a caveat) irrespective of the circumstances?

Q149 If not, should that registered proprietor be required to take active measures to assert ownership or demonstrate that an adverse possessor’s claim is defective in order to defeat an adverse possession application?

Q150 Should an adverse possessor be able to apply a second time based on the same adverse possession? If so, after how long and in what circumstances?

Q151 Should an “equity exception” and “mistake as to boundaries exception” be incorporated into the new LTA?

#### OTHER POSSIBLE CHANGES TO THE LEGISLATION

#### The qualification period for adverse possession

- 19.26 The minimum period of adverse possession is 20 years, subject to the qualification that, if the registered proprietor is under a legal disability, the period commences on the cessation of that disability. That qualification is, however, irrelevant if there is 30 years’ continuous adverse possession. However, applications under the Limitation Act 1950 for adverse possession for non-LTA land required only 12 years’ possession. The 20-year period was chosen based on the South Australian legislation and “it was felt that the 20-year period was the most suitable in relation to land under the Land Transfer Act”.<sup>765</sup>

#### Exclusions from adverse possession

- 19.27 There are several statutory exclusions from adverse possession applications, listed in section 21 of the LTA:
- (a) any land owned by the Crown (save if the registered proprietor is a dissolved body corporate whose property has vested *bona vacantia* but has been disclaimed by the Crown);

<sup>764</sup> Ibid, 176.

<sup>765</sup> Phillips, above n 747, 112.

- (b) Māori land within the meaning of Te Ture Whenua Maori Act 1993;
- (c) land owned by a local authority;
- (d) land held in trust for any public purpose (being a trust noted or deemed to be noted as such on the register);
- (e) land occupied together with adjoining land because a fence or other artificial demarcation is not on the common boundary;
- (f) land occupied together with adjoining land because of a change of course of a waterway or because the land is isolated by a waterway, road or other natural feature.

19.28 The exclusions relating to Crown land, land owned by a local authority and Māori land seem reasonable and non-controversial.

19.29 Land possessed adversely because of a structure that encroaches over the common boundary was excluded presumably because it did not signify abandonment but rather indicated a mistaken assumption as to where that boundary lay. There are adequate remedies to address this.<sup>766</sup> However, other Torrens jurisdictions recognise “encroachment” in terms of adverse possession claims as does the Land Registration Act 2002 (England and Wales); the difference in effect between “encroachment” and “abandonment” can be subtle and almost arbitrary if the adverse possession is over only part of the land in a title. There is also possible inconsistency between sections 21(e) and 16 of the 1963 Act (see commentary below) so a case can be made for removing the current exclusion in section 21(e). Note that the Property Law Act 2007 uses the expression “wrongly placed structures” (defined in section 321) instead of “encroachment”.

19.30 Land occupied together with adjoining land by virtue of the change of course of a waterway or because of its isolation from other commonly owned land by waterway, other natural feature or road, is able to be dealt with by other means, for example, by an accretion claim utilising the Registrar’s powers of correction under section 81 (as to misdescription of land or boundaries) of the LTA, or by voluntary transfer by the registered proprietor.

19.31 Prescriptive easements are excluded because the element of continuous possession required for a successful application would be absent. It was never intended to convert rights of user into registered proprietorship.

Q152 Are the special rules applying to land, which is in the registered proprietorship of persons with legal disabilities, appropriate?

Q153 Is the qualifying criterion of not less than 20 years’ continuous possession still an appropriate one? If not, what should that criterion be?

Q154 Are the exclusions set out in section 21 of the 1963 Act fair and reasonable? If not, what should be added or removed from that list?

<sup>766</sup> Property Law Act 2007, s 325.



Q155 For instance, should adverse possession based on the encroachment of structures over the common boundary (either because of a mistake as to boundary or a seeming abandonment of boundary land by a registered proprietor) be capable of supporting an adverse possession claim?

### Plan requirements

- 19.32 The Registrar is only able to call for a plan of the land claimed after the application has survived public notification and the objection process.<sup>767</sup> Even then, if all the land in the title is claimed, a plan may not be necessary if a licensed cadastral surveyor can certify that the occupation and title boundaries coincide. That process works well in most cases and removes the need to supply data that merely replicate satisfactory existing data. However, in some cases, whilst the application may allege occupation up to the title boundaries, it is disclosed later (after public advertisement and notification) that only part of land is so occupied. A plan at the outset would avoid the publication of inaccurate details as to the land claimed.
- 19.33 If a plan is required, section 14(3) of the 1963 Act prescribes how the plan is to be drawn up where the occupation and title boundaries do not coincide or are deemed not to coincide. In normal circumstances, if the occupation is inside the title boundary, the plan shall be drawn in terms of the occupation boundary. Conversely, if the occupation is outside the title boundary, the plan shall be drawn in terms of the title boundaries.
- 19.34 If the title boundary of the land claimed is the common boundary between that land and land owned by the Crown or a local authority, or land held for a public purpose, the plan is drawn in terms of the title boundary even if the applicant does not occupy up to that title boundary.
- 19.35 This prescriptive regime is designed to respect occupation boundaries where the land claimed adjoins privately owned land not held for a public purpose. Where the adjoining land is publicly owned or held for public purposes, even if occupation is inside the title boundaries of that adjoining land, the claimant is able to claim land outside that occupation.
- 19.36 The rationale for this has been explained partly in terms of practicalities and partly as public policy.<sup>768</sup>

The practical effect of these two subsections is that the applicant is allowed to claim all the land of the registered owner except any part to which any private individual may have a better claim....The applicant's claim is entirely dependent on possession and there could be no justification for giving him title to a strip occupied by some other private person.

<sup>767</sup> Land Transfer Amendment Act 1963, s 14(2).

<sup>768</sup> Phillips, above n 747, 129 quoted in EC Adams *Adams' Land Transfer Act 1952* (2 ed, Butterworths, Wellington, 1971) para 656.

- 19.37 Where the adjoining owner is the Crown or a local authority, however, it was considered more expedient to include such a strip in the applicant's title rather than include it in adjoining Crown land or public works. In such a case, there would normally be no computer register in which to include that strip and an untidy situation would result, with title to narrow strips unresolved.
- 19.38 The situation has changed somewhat since the time the above comment was written, however; it is now quite common for publicly owned land to be registered and in a computer register.

### Intervening land

- 19.39 Section 16 defines intervening land as the land that sits between the occupation boundary and the title boundary of the land claimed,<sup>769</sup> in circumstances where the plan is drawn in terms of the former, because that is the limit of the applicant's occupation.
- 19.40 Once title is issued to the successful applicant, the Registrar is directed to "offer" the intervening strip of land to the adjoining landowner who appears to be in occupation of that strip. If the adjoining owner takes up the offer, an amalgamated title for the strip and the adjoining land can be issued.
- 19.41 The rationale for this process is purely administrative tidiness. However, although the Registrar must be satisfied that the adjoining owner is in occupation of that intervening strip, and that the means of marking the occupation boundary was intended to coincide with or represent the title boundary, anomalies emerge.
- 19.42 First, if the adjoining landowner had been the one to lodge an application by virtue of adverse possession, the Registrar might be compelled to refuse it on the basis that section 21(e) of the 1963 Act prevented it. Secondly, the rigorous standard of proof required to support the application does not appear to apply to acquiring title to the intervening strip. Thirdly, the strip may not be revealed until after the application is publicly notified and notices are served, so the notice is likely to be inaccurate in describing the land applied for, and may mislead someone reading it.

Q156 Where occupation by the applicant is inside the title boundaries, are there sound reasons why there should be a different outcome depending on whether the adjoining land is privately or publicly owned?

Q157 Can a case be made for requiring the survey plan or surveyor's certificate as to occupation to be supplied before the application is advertised and notices sent rather than afterwards?

<sup>769</sup> "Occupation boundary" defines the limit of the actual occupation by some natural feature, such as a fence or ditch. "Title boundary" means the boundary shown on the certificate of title or latest official plan of survey: Land Transfer Amendment Act 1963, s 14.

Q158 Should the practical reasons for dealing with intervening land in the manner currently prescribed override the principle that encroachments by way of mistake as to common boundaries should not be the subject of adverse possession claims? Or should that principle be altered?

### Caveat issues

- 19.43 The caveat process, whereby someone with a registered or alleged equitable estate or interest in the land can object, seems to be largely satisfactory procedurally. A separate section is devoted to each type of claim, but that is logical given the distinct nature of the claims and the different consequences that can flow from that.
- 19.44 If the caveator is the registered proprietor of the land claimed, the application must be refused by the Registrar, as discussed above.<sup>770</sup>
- 19.45 A caveator who has a registered secondary estate or interest is protected because the applicant must agree to take title subject to that estate or interest otherwise the application will fail (see section 11 of the 1963 Act). If the caveator claims an equitable estate or interest, he or she must establish this, and either become registered as proprietor of the estate or interest, or satisfy the Registrar that the claim is valid but not capable of registration.<sup>771</sup> In this latter case, section 12(4) of the 1963 Act provides that, if the Registrar is so satisfied, section 11 (as modified) will apply, meaning that the applicant must agree to take title subject to the unregistered interest. However, sections 11 and 12 are not clearly worded.
- 19.46 The Registrar is required to fix a time to enable a caveator to establish entitlement to the claim (where applicable) but that time can be extended. That seems to be reasonable because a caveator may need several months to get the research and paperwork completed in order to become the registered proprietor of the estate or interest.
- 19.47 The successful applicant is issued with a clean new title except for any estates or interests preserved and accepted under section 11 of the 1963 Act. The former title is cancelled.

Q159 Do the caveat provisions adequately cover all the possibilities?

Q160 Are there any other matters that require consideration?

<sup>770</sup> Land Transfer Amendment Act 1963, s 9.

<sup>771</sup> Land Transfer Amendment Act 1963, ss 10 and 12.

# Chapter 20

## Bringing land under the LTA and deeds registration

- INTRODUCTION** 20.1 Prior to the adoption of the Torrens system in New Zealand, there was a deed registration system. Since 1870, when the Torrens system was adopted, the land transfer system has co-existed with a parallel deeds registration system. The Land Transfer Act contained a process by which landowners could voluntarily bring their land out of the deeds system and place it under the land transfer system. It had been envisaged that the advantages created by the land transfer system would be so manifest that land would be quickly brought out of the deeds system by those landowners, without the need for government compulsion.
- 20.2 However, 50 years later, when a significant proportion of privately owned land still remained within the deeds system, the Land Transfer (Compulsory Registration of Titles) Act 1924 was enacted. District land registrars were charged with the responsibility of bringing, without an application by the landowner or other competent person, all land alienated from the Crown for an estate in fee simple that was not yet registered under the land transfer system. Most land is now under the LTA and these virtually obsolete provisions now form Part 12 of the LTA.
- 20.3 First, this chapter will consider the process by which land is voluntarily brought under the LTA. Secondly, it will look at compulsory applications to bring land under the Act. Lastly, it will consider the continuing need for the Deeds Registration Act 1908.

### VOLUNTARY APPLICATIONS TO BRING LAND UNDER THE ACT

#### Current position

- 20.4 Sections 19 to 32 of the LTA set out a detailed process for persons who own land that is still in the deeds system. Section 19 provides:

Land which has not become subject to this Act ... may, if the same has been alienated or contracted to be alienated from the Crown in fee, be brought under this Act in manner hereinafter provided; but no application shall be received to bring under this Act land for which no Crown grant has been issued until the application has been

approved by the Surveyor-General, or by some person appointed by him for the purpose, and has been assented to by the Governor-General.

- 20.5 These sections have been largely unchanged and remain similar to their equivalents in the Land Transfer Act 1915.
- 20.6 These provisions cover documentary owners and people in adverse possession of the land. Most voluntary applications are not from documentary owners or persons deriving entitlement directly from documentary owners, but, rather, are applications for title to be based on the Limitation Act 1950, that is, based on adverse possession. However, some of the sections and the prescribed application form<sup>772</sup> assume documentary ownership or entitlement derived from documentary ownership.
- 20.7 The alienation prerequisites contained in section 19 of the LTA are still sound because the Crown grant (or later form of Crown alienation) is the root of private title to land.<sup>773</sup>
- 20.8 Section 20 of the LTA sets out both qualifying and disqualifying criteria for applicants. These criteria have not been substantially altered since their enactment.<sup>774</sup>

Q161 Should the list of those persons entitled to apply, or disqualified from applying, to bring land under the LTA be changed?

### Form of application and other requirements

- 20.9 The form on which applications are based is inadequate because it is formulated on the presumption that applicants are documentary owners and does not adequately provide for the typical applicant whose claim is based on adverse possession. For example, the declaration component requires the applicant to state that there is no person in adverse possession or occupation of the land, and there is no scope for the applicant to recite particulars of his or her possession. Informal processes have evolved to address these inadequacies.<sup>775</sup>
- 20.10 Therefore, the form needs to be updated to adequately cover an application based on adverse possession. A new form needs to deal with the possibility of both applications based on documentary ownership and adverse possession. The form should also be moved from a schedule to the Act, to the Land Transfer Regulations, where other LTA instruments and forms are found.

<sup>772</sup> Land Transfer Act 1952, sch 2, Form A.

<sup>773</sup> See also Land Transfer Act 1952, s 32.

<sup>774</sup> The only substantive changes have been to extend entitlement to apply to mentally disordered persons (application on their behalf by the Public Trust) and to persons in respect of whom a protection order has been made under the Protection of Personal and Property Rights Act 1988 (application by manager).

<sup>775</sup> For example, by borrowing segments from the form for applications under the Land Transfer Amendment Act 1963; or by verifying the possession by supporting evidence (usually in the form of a declaration or declarations) from a disinterested party with knowledge of the history of the land (regarding this process see EC Adams *Adams' Land Transfer Act 1952* (2 ed, Butterworths, Wellington, 1971) para 32).

- 20.11 Section 21 sets out several requirements. It needs to make it clear that the plan must be one capable of deposit by the Registrar and the other requirements need to be set out in a more orderly manner.

### Receipt of application by Registrar and giving of notice

- 20.12 Sections 23 to 26 of the LTA direct how the Registrar is to deal with an application once it is lodged. Section 24 applies where the applicant is the original Crown grantee. Because it is unlikely that there are any original Crown grantees still in existence,<sup>776</sup> the section is now practically redundant. Although the issue of a title for the original grantee should be a simple exercise and should not require complex evidence of entitlement, it is necessary to question whether such a provision is still necessary.
- 20.13 The sections also set out rules for the publication and service of notice. These may need to be updated and amended to modernise and future-proof the means of public notification. Publication and service of notice may be better placed in regulations rather than in the Act.
- 20.14 Section 25 of the LTA outlines the circumstances in which the Registrar may reject an application that is “deficient in any essential particular”. This section seems to presume that any deficiency will manifest itself before the application is advertised and notices are served. This section does not appear to give the Registrar sufficient flexibility to respond to such matters regardless of when they arise.

Q162 Should there still be a separate process for applicants that are original Crown grantees?

Q163 Is the power to reject deficient applications sufficiently flexible?

### Caveats

- 20.15 A caveat may be lodged against bringing land under the Act; the Registrar must specify a time limit in which the caveat can be lodged.<sup>777</sup> Under regulation 39 of the Land Transfer Regulations 2002, the minimum prescribed period for the lodgement of a caveat is one month after the date of publication of the advertisement in the *New Zealand Gazette*. The Registrar can set a period that suits the circumstances. Sections 136, 140, 142, 143, 144 and 147 of the LTA deal with caveats against bringing land under the Act.<sup>778</sup>
- 20.16 Section 136 of the LTA sets out the circumstances in which caveats may be lodged and the nature of the information required. As discussed above, there is a time limit for the lodgement of caveats and it can be implied that the Registrar cannot accept caveats outside that limit. It is particularly problematic if a serious issue comes to light after the expiry of the time fixed in which a caveat is permitted

<sup>776</sup> The only remote possibility of this section being used would be if the grantee was a body corporate or local authority that had survived the period (often over 100 years) since the grant.

<sup>777</sup> Land Transfer Act 1952, s 23.

<sup>778</sup> See also Land Transfer Regulations 2002, sch 2, Form 17.

to be lodged. It may force the Registrar to disregard caveats that could otherwise cast fatal doubt on the applicant's entitlement. A possible solution is to allow the Registrar to extend the time for the lodging of caveats as he or she is able to extend the time fixed by any notice of application under the Land Transfer Amendment Act 1963 (the 1963 Act).<sup>779</sup> At present, there is only a qualified ability for the Registrar to extend that time.<sup>780</sup>

- 20.17 Under section 140 of the LTA a caveat prevents the land being brought under the Act and prevents the applicant from withdrawing the application without consent of the caveator or the High Court. However, these caveats lapse after three months unless the caveator initiates court proceedings to establish his or her interest in the land and notifies the Registrar.<sup>781</sup> Neither the Registrar nor the court has the power to extend the three-month period.
- 20.18 The applicant can challenge the caveat sooner by applying for a court order under section 143(1) of the LTA to remove the caveat. In contrast, section 143 does not apply to caveats lodged under the 1963 Act.<sup>782</sup> This means an applicant seeking to claim prescriptive title under the 1963 Act cannot apply to have the caveat removed. There does not appear to be a logical reason for that difference.
- 20.19 Section 27(1) of the LTA directs the Registrar to bring land under the Act if:
- (a) All necessary notices have been given; and
  - (b) No caveats have been lodged; and
  - (c) No sufficient cause to the contrary appears.
- 20.20 There appears to be a gap here. This section does not cover situations where the caveat is lodged but then withdrawn, lapsed or is dealt with by the court in favour of the applicant. In these situations the Registrar must bring the land under the Act. The section should expressly provide for such situations.

Q164 Should the Registrar be able to extend the period in which caveats can be lodged?

Q165 Should the Registrar or the court be able to extend the caveat beyond its three-month lifespan?

Q166 Should section 143 of the LTA be available to applicants bringing land under the Act if their entitlement is founded on adverse possession?

779 Land Transfer Amendment Act 1963, s 7(4).

780 Land Transfer Act 1952, s 28.

781 Land Transfer Act 1952, s 144.

782 Land Transfer Amendment Act 1963, s 8(2).

## Outstanding estates and interests

- 20.21 Outstanding secondary interests affecting the land are dealt with in sections 58 to 60. They are separated from sections 19 to 32 because they apply to both compulsory (Part 12 of the LTA, see below) and voluntary applications. If compulsory applications are abolished, as discussed below, it would be logical for these provisions to be incorporated within the Part relating to voluntary applications to bring land under the Act.
- 20.22 Leases, mortgages, encumbrances or other estates or interests affecting the estate in question, which are disclosed in the application or otherwise ascertainable, will be noted on the register in a way that preserves their priority.<sup>783</sup> Therefore, this covers unregistered and registered interests. However, there is case law stating that nothing ought to be brought forward upon the title that could not be registered under the LTA.<sup>784</sup> This principle could be codified for greater clarity.
- 20.23 These provisions are based on the premise that the applicant has documentary entitlement and may be inadequate where the application is based on adverse possession. It seems that unless the applicant in adverse possession recognises other interests to which the land may be subject, such interests are extinguished. This should be compared with the 1963 Act, which is explicit about the consequences for unregistered interests.<sup>785</sup> The 1963 Act is, however, a self-contained code whereas voluntary applications under the LTA may be governed by other statutory provisions.

Q167 Should the effect of an application based on adverse possession on other interests be clarified and aligned with comparable provisions that deal with adverse possession applications in relation to land already under the LTA?

## COMPULSORY APPLICATIONS

### Background

- 20.24 As explained above, the Land Transfer (Compulsory Registration of Titles) Act 1924, was enacted to expedite the bringing of land under the land transfer system. By the late 1930s, almost all privately owned land in New Zealand was under the LTA and, by the beginning of the 1950s, the conversion from the deeds system was regarded as complete.
- 20.25 The only privately owned land that had not been so converted was land that:
- (a) had palpably defective title; or
  - (b) had been inadvertently missed; or
  - (c) had not been disclosed as existing until new survey work had been completed; or
  - (d) was certain Māori land held under Crown grant.<sup>786</sup>

<sup>783</sup> Land Transfer Act 1952, s 58.

<sup>784</sup> *Staples & Co v Corby* (1901) 19 NZLR 517, 523 (SC) Edwards J.

<sup>785</sup> Land Transfer Amendment Act 1963, s 18(2).

<sup>786</sup> Land Transfer Act 1952, s 185.



- 20.26 Despite the near obsolescence of the Land Transfer (Compulsory Registration of Titles) Act by 1952, its provisions were incorporated as Part 12 of the LTA.<sup>787</sup> Little if any land has been brought under the LTA by compulsory application for several decades.
- 20.27 For the purposes of this conversion a new breed of certificate of title was created. This was the limited title, which was limited as to title or limited as to parcels. Such titles were not state guaranteed to the extent of the limitation or limitations noted. The majority of titles issued under the 1924 Act were limited. This “inferior” type of title was acceptable given the benefit of conversion to the LTA system.

## Issues

### *Retention of compulsory applications?*

- 20.28 Sections 185 to 192 of the LTA require the Registrar to examine his or her records and bring land under the LTA of his or her own accord. These provisions are now virtually obsolete and rarely used. Whilst any remaining deeds land could be left to be dealt with by a voluntary application to bring land under the Act either by a documentary owner or a person in adverse possession, there may be some advantage in retaining the authority for the Registrar to unilaterally bring such land under the Act.
- 20.29 If this process was to be retained, however, the new provisions inserted to support this should be enabling rather than obligatory to reflect the reality of the situation. Any replacement provisions would also need to be modernised and streamlined in accordance with modern requirements.

Q168 Given that the compulsory application provisions in the current LTA are effectively no longer used, should they merely enable the Registrar to act or should they contain the same element of compulsion that currently exists?

### *Title limited as to title or parcels*

- 20.30 Whatever the new compulsory application provisions contain, many of the procedural elements will have to remain albeit in modified form.<sup>788</sup> Provisions relating to limited titles would need to remain in order to support existing limited titles as well as any new ones that may be issued. Limitations as to title currently expire after 12 years and affected titles are updated as and when they are converted into electronic form. This would continue for any new limited computer registers. By way of contrast, a significant number of limited as to parcels titles are still in existence and can be expected to remain in that state for some time to come.

787 One new provision, which was not in the 1924 Act, was inserted (s 197). For an explanation of this see EC Adams “Limited Certificate of Title: Proof of Non-Extinguishment of Limited Certificate of Title by Statutes of Limitation” (1951) 27 NZLJ 208.

788 See chapter 13 for discussion about a modern and generic form of qualified title to address situations which are now covered by provisional registration and limited titles.

- 20.31 Therefore, there appears to be a continued need for provisions that regulate such titles, for example:
- section 187 (“compulsory” applications dealt with in accordance with the same provisions that apply in respect of voluntary applications);
  - advertising and public notice (section 188);
  - the surrender of instruments of title (section 189);
  - the ability of the Registrar to issue limited or guaranteed computer registers (section 190), although the Registrar may decline to proceed if a limited title is the only possible outcome;
  - the definitions of limited titles (section 191);
  - notifying parties of issue of title (section 192);
  - the Registrar’s Minutes (section 193), although only in relation to legacy issues;
  - the Registrar’s power to make limited titles ordinary (sections 195 to 197);
  - the application of the LTA to limited titles (section 199);
  - the application of the same limitations to estates or interests less than freehold (section 203);
  - the consequences of the expiration of titles limited as to title after 12 years (section 204);
  - restrictions on the issue of ordinary title (section 207); and
  - the ability of the Registrar to amend the description of land in limited titles (section 208).
- 20.32 However, some sections or parts of sections in the current Act relating to limited titles may be unnecessary under a new LTA. Also, the language used needs to be updated and made consistent with other provisions in the Act.

Q169 Which provisions relating to limited titles need to remain and what changes are required?

### Section 200

- 20.33 Section 200 of the LTA enables a person claiming freehold title to land in a limited title to make applications under the LTA as if neither the Land Transfer (Compulsory Registration of Titles) Act 1924 nor Part 12 of the LTA had been passed and the limited title issued. This application may be based on:
- possession adverse to that of the person to whom that title was first issued; or
  - any title the existence of which is set out in the Registrar’s Minutes (see below).
- 20.34 The application would be made as a voluntary application to bring land under the Act under sections 19 to 32 of the LTA (see above).
- 20.35 This section applies where adverse possession occurred before the first limited title was issued. In contrast, the 1963 Act deals with claims of adverse possession that arise after the issue of title. However, this distinction may not be clear in paragraph (a).

- 20.36 Where an application is successful, the Registrar must cancel the limited title under the powers conferred on him or her by the LTA to correct errors, that is, sections 80 and 81. It is unclear whether this would be done under section 80 or section 81. However, given the nature of the rectification, section 81 seems more appropriate.<sup>789</sup>
- 20.37 It is possible that an application under this section could be made in the future. However, it may be more appropriate to locate any necessary provisions amongst the voluntary application provisions. In the alternative, it may be possible to rely on section 79 in a situation where section 200 would otherwise apply, rather than retain a special provision.

Q170 Should section 200 of the LTA be retained? If so, should it be located with voluntary applications to bring land under the LTA?

Q171 Should the powers of the Registrar to cancel limited titles or registers in an application under section 200 of the LTA be specific as to the authorising provision or rely on the general powers of correction?

#### *Registrar's Minutes*

- 20.38 Section 193 of the LTA requires the Registrar to create a set of records called the Registrar's Minutes in which details of "the acts or matters that ought to be done or proved, and the requisitions that ought to be complied with, in order to justify him in issuing an ordinary certificate of title" are to be kept.<sup>790</sup> Those records are updated as limitations are removed and titles are included in the computer register.
- 20.39 Under section 194 of the LTA, the Minutes do not form part of the register for the purposes of section 46 (register open for search).<sup>791</sup> This prohibition on access was inserted in 1994,<sup>792</sup> and was based on the wish to avoid "slander of title".<sup>793</sup>
- 20.40 Limitations as to title expire 12 years after the land has been brought under the LTA.<sup>794</sup> However, limitations as to parcels do not expire. If the only remaining limitations are limitations as to parcels, which relate to survey deficiencies that can be overcome by a fresh survey, it is questionable whether the general prohibition on access should be retained, particularly because access can be obtained through the Official Information Act 1982.

789 Compare section 18(1) of the Land Transfer Amendment Act 1963, where cancellation is carried out under that section and not sections 80–81.

790 Land Transfer Act 1952, s 193(1).

791 Land Transfer Act 1952, s 194.

792 Prior to that, the provision allowed for automatic access to the Minutes by the registered proprietor only, although others had access by order of the High Court.

793 For a brief note on that subject see *Adams' Land Transfer Act 1952*, above n 775, para 494.

794 See Limitation Act 1950, s 7 and Land Transfer Act 1952, s 204. When paper titles were converted into computer registers any outstanding "limitations as to title" were removed so there should be few, if any, such limitations remaining.

20.41 The Minutes are not likely to be added to nor consulted very often. The primary existing function of the Minutes is as an historical record even if the possibility of new limited titles issued from “compulsory” applications remains. Therefore, it is likely that they need not be dealt with in the new legislation as an ongoing “live” record. In the event of fresh limited titles being issued under the new Act, a new process would be required for recording imperfections that required rectification before a full guarantee applied.

Q172 Should the new LTA remove the requirement for the Registrar to keep the Minutes as a live record?

Q173 Should the new LTA provide for public access to the Minutes, or is this adequately dealt with under the Official Information Act 1982?

### *Caveat provisions*

20.42 Section 205(1) of the LTA prohibits the lodgement of a caveat against a compulsory application under this Part.<sup>795</sup> However, it permits the lodgement of a caveat against bringing land under the Act by virtue of an application under Part 2 (voluntary application). Such a caveat is registered under the Deeds Registration Act 1908 but must be lodged prior to the issue of a certificate of title from such an application. Whilst the potential for compulsory applications remains, this provision needs to remain.

20.43 Section 205(4) of the LTA sets out another caveat process, which enables an occupier of land or an adjoining occupier or owner to lodge a caveat if the land was compulsorily brought under the Act and is comprised in a title that is limited as to parcels. Such a caveat may be lodged at any time after that limited title was issued. If limited as to parcels titles remain, this caveat procedure would continue to be relevant.

20.44 Section 205 of the LTA deals with many different issues and is difficult to interpret correctly. It might be advantageous to split the two caveat and associated provisions into separate sections.

Q174 Should the caveat options in section 205(1) and (4) of the LTA be dealt with in the same or different sections?

## DEEDS REGISTRATION ACT 1908

### Background

20.45 Because most privately owned land in New Zealand is under the LTA, very little registration is conducted under the Deeds Registration Act 1908 (DRA). However, because it is the only enactment that deals with the registration of remaining deeds system land, it needs to remain in force for the foreseeable future.

<sup>795</sup> Note that an “application under this Part” is defined in section 184 as meaning an application under section 186, that is, a compulsory application.

20.46 Since the time of its enactment, the DRA has changed little. Such changes as have occurred have been as a consequence of changes to other associated pieces of legislation.<sup>796</sup> The fact that the DRA otherwise remains virtually untouched is partly because of the increasing disuse of the Act. However, it is also because the basic principles and structures are essentially sound.

### Administrative changes

20.47 Prior to 1 June 2002, each registration district coincided with the former provincial districts and each district had a deeds register office, which was located in the same place as each land registry office under the LTA. Typically, both offices were housed in the same building and, from 1996, were administered by LINZ. Each district land registrar under the LTA also held the position of registrar of deeds because both deeds registration and land registration districts were physically identical.

20.48 After the abolition of the position of district land registrar, in 1999, some rationalisation of the position of registrar of deeds was undertaken. The Registrar-General of Land became the Registrar for every deeds register office.<sup>797</sup> Also, section 5 of the DRA was amended to enable a deeds register office to be the office for more than one district. This allowed the consolidation of the deeds records for those deeds registries/land registries that were closed, and the relocation of their records and functions to regional LINZ offices.

### The deeds registration regime

20.49 Under the LTA, deeds (called “instruments” in the DRA) are registered in the deeds register office by being copied into the deeds register. There are parallels with the land transfer system in that deeds are numbered and entered into primary entry books on arrival (similar to the land transfer journal). Then skeleton details are entered into index books according to parcel description (similar to the function of the land transfer register) and then copied into record books (similar to retention of land transfer instruments and other documents). The process is completely manual and labour intensive.

20.50 Registration is voluntary. No title passes and no interest is acquired merely through the act of registration of a deed. However, registration is significant if there are competing deeds. The registered deed can prevail over the unregistered deed, even if the former was executed subsequently to the execution of the latter.<sup>798</sup>

### What changes may be required

20.51 As stated earlier, the fundamental framework and processes are basically sound. Despite the conversion of LTA records and processes from manual/paper to automated/electronic, there are no plans to go through a similar exercise for the deeds records and processes.

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796 For example, the most recent significant amendments were made by the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002.

797 Deeds Registration Act 1908, s 6 (as amended).

798 Deeds Registration Act 1908, s 35.

- 20.52 However, because LINZ is reducing the number of offices from five to two, the future location of the deeds records is currently under consideration. As the legislation stands, at least one active deeds registry is necessary for the receipt, registration and processing of instruments under the DRA.
- 20.53 The manual registration process and paper-based system require the records either to be onsite in the surviving office or offices or, at least, to be readily accessible. There is no express requirement to keep the deeds records within the deeds register office premises. Instead, the Registrar is obliged to control custody of the registers and instruments and to supply copies of, or extracts from, indexes and other records.
- 20.54 In 2002, the requirement to keep deposited instruments lodged for safekeeping with the Registrar in the register office was removed.<sup>799</sup> The obligations are now designed to ensure such instruments are reasonably available for reference or copying within the custody of the Registrar. The subtle change was made to allow more flexibility in future storage and access arrangements.
- 20.55 Any changes that may need to be made to the DRA would appear to fall into two distinct categories:
- (a) changes to provide for storage of records outside the deeds register office (should LINZ decide to embark on that course), while still allowing the public to access those records; and
  - (b) changes that modernise existing processes that will otherwise remain the same in substance.<sup>800</sup>
- 20.56 Access to the records is essential because the Registrar is required to supply copies of, or extracts from, the records. The person entitled to those copies “shall have liberty to examine the index, recorded copy, instrument, or memorial for the purpose of satisfying himself of the correctness of the copy or extract so supplied”.<sup>801</sup>
- 20.57 Although some of the changes that may be required for the relocation of deeds records outside LINZ premises have been substantially carried out, the provisions may warrant further consideration to ensure all future contingencies are catered for.
- 20.58 Generally, the Act would benefit from modernisation and rationalisation.<sup>802</sup> Some provisions are now obsolete.<sup>803</sup>

799 Deeds Registration Act 1908, s 45.

800 For example, the copying of instruments could be simplified.

801 Deeds Registration Act 1908, s 50.

802 For example, the office defined in section 5 as being the “Deeds Register Office” is called the “Register Office” in some places (see ss 16 and 22 as examples) or the “Deeds Registry Office” (see s 29). Also, the fees chargeable for activities and functions carried out by the Registrar need to be updated because they have not been changed except to convert the imperial currencies into their decimal equivalents.

803 For example, Deeds Registration Act 1908, s 34, which relates to the appointment of district agents by the Governor-General.

## Conclusion

- 20.59 To enable the legislation to respond effectively to future needs more flexibility around storage and access options would be desirable. One thing that can be said with some confidence is that there must continue to be a deeds registration system for the foreseeable future, and therefore there must be an enactment that supports that system.

# Chapter 21

## Flat and office owning companies and share titles

### FLAT AND OFFICE OWNING COMPANIES

- 21.1 Part 7A of the LTA provides a procedure for the registration under the LTA of licences to occupy flats or offices granted by a flat or office owning company to its shareholders. The company, specifically created for this purpose, retains ownership of the land on which the building is erected whilst the shareholders hold the licences to occupy the flats. Registration of the licence gives it no “greater operation or effect than it would have without registration”, but it is an interest within the meaning of section 62 of the LTA.<sup>804</sup>
- 21.2 Part 7A was enacted as Part 1 of the Companies Amendment Act 1964 and was later inserted in the LTA in 1994 as part of the reform of company law and the enactment of a new Companies Act in 1993.<sup>805</sup> This scheme preceded the cross-lease device and the Unit Titles Act 1972. However, it has not been popular and only small numbers of licences to occupy have been registered.<sup>806</sup> The Unit Titles Act 1972 contains provisions that enable a company licence scheme under Part 7A to be converted into stratum estate.<sup>807</sup> There are no signs of wholesale conversion.
- 21.3 There is little evidence of new company licence developments. However, if licensees acquire their shares and obtain their licences without needing a mortgage there is limited incentive to register those licences. Therefore, there may be developments with unregistered occupation licences, which are not a matter of public record.

804 See Land Transfer Act 1952, s 121F(1).

805 By Land Transfer Amendment Act 1993, s 2.

806 For a brief discussion of Part 7A developments see Hinde McMorland & Sim *Land Law in New Zealand* (loose leaf, LexisNexis, Wellington, 2005) paras 14.006–14.007.

807 Unit Titles Act 1972, Part 4.



## The future of flat and office owning companies

- 21.4 The main question relating to these types of developments is whether they should be allowed to continue.<sup>808</sup> There are three options:
- retain the status quo and allow new developments to be created; or
  - place a moratorium on the creation of new developments but allow the existing developments to continue and retain the existing provisions for this purpose; or
  - abolish flat and office owning companies and convert the existing developments into a different form, for example, unit titles.

Q175 Which option do you favour?

## Specific problems with Part 7A

- 21.5 Part 7A of the LTA has significant compliance requirements. These requirements may be disproportionate to the benefits obtained from registration.
- 21.6 The provisions in Part 7A of the LTA require modernisation and amendments to bring them in line with current practices in LINZ.<sup>809</sup> Also, despite the fact that many sections in Part 7A were amended as recently as 2002, the process is still partly paper-based. Some sections provide for the electronic registration of licences.<sup>810</sup> However, other requirements are impractical in an electronic environment, for example, sections 121G(1) and (2) that require the production and physical noting of share certificates.<sup>811</sup>
- 21.7 There are other possible minor changes. Section 121K(3) of the LTA directs the Registrar to register a termination of licence without fee. However, there is no discernible reason why this action should be without cost when other comparable registration actions are not.
- 21.8 Also, Part 7A of the LTA does not expressly provide for variation of licences. Section 121C(2), which provides that all the lease provisions of the LTA apply to licences, appears to be sufficient to deal with the possibility of variation. However, Part 7A could expressly provide for variation of licences.

Q176 If Part 7A of the LTA is retained, what changes can be made to Part 7A to align it with electronic lodgement and other modern needs?

Q177 What other changes would improve Part 7A of the LTA?

808 In 1999, the Law Commission recommended that no further flat or office owning companies should be permitted: New Zealand Law Commission *Shared Ownership of Land* (NZLC R 59, Wellington, 1999) 33.

809 See, for example, the methods for service of notice in section 121P; the out-of-date plan requirements contained in section 121D; and the requirements contained in section 121G regarding notification to the company of mortgages and discharges by the Registrar.

810 See Land Transfer Act 1952, s 121C.

811 See also section 121L, which requires the licensee, when applying for the registration of the termination of the old licence or registration of its replacement, to request the Registrar in writing to bring the mortgage down on to the new licence.

21.9 This provision was put in place to enable separate computer registers to be issued for shares in land when land was owned under tenancy in common. Because such shares are capable of being separately dealt with (for example, transferred or mortgaged) it is convenient for recording purposes to replace the single title with separate share titles.

21.10 Section 72 of the LTA provides:

When two or more persons are entitled as tenants in common to undivided shares in any land, each such person shall be entitled to receive a separate certificate for his undivided share:

Provided that tenants in common shall not be bound to take separate certificates unless and until they require to make separate dealings with their respective interest and the Registrar, in his discretion, requires them to take separate certificates for those interests.

21.11 This provision requires the Registrar to issue separate titles where they have been requested by tenants in common and there is no discretion on the part of the Registrar. The clear implication of the section is that the shares must be owned by different people.

### Cross leases

21.12 Section 72 of the LTA was enacted prior to the invention of the cross lease and was not designed with such a device in mind. Nevertheless, its existence is vital to cross leases, because it is authority for issuing a title for the fee simple component of such leases.

21.13 The fact that section 72 does not acknowledge cross leases is problematic because often a cross-lease development will be undertaken by a developer who will initially be the sole owner and both lessor and lessee of each flat. Although this appears to be contrary to section 72, in practice, composite fee simple share/leasehold titles are issued where the shares are owned by the same person.

21.14 Although section 66A of the Property Law Act 1952 (see now section 278 Property Law Act 2007), which clarified that a proprietor can create a lease to himself or herself, was inserted in 1968 to support the concept of the cross lease,<sup>812</sup> section 72 of the LTA was not modified.

### Computer registers instead of certificates of title

21.15 Computer registers have replaced certificates of title. Section 7 of the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 (the 2002 Act) allows computer freehold registers for freehold interests and section 9 of the 2002 Act allows a computer interest register for interests less than freehold, including leasehold estates. Section 13 provides that if the Registrar considers it appropriate he or she may create a composite computer

<sup>812</sup> See *Robert Bryce & Co Ltd v Stowehill Investments Ltd* [2000] 3 NZLR 535, para 40 (CA) Blanchard J for the Court.

register for a combination of those estates. No criteria for exercising that judgement are prescribed. The Registrar may be guided by sections 66<sup>813</sup> and 72 of the LTA.

- 21.16 Another potential issue surrounding section 72 of the LTA, is whether it can be repealed given that some land may continue to be contained in certificates of title on account of temporary conversion difficulties. Also, there is an issue relating to all titles that under the 2002 Act the Registrar can declare that land is no longer electronic transactions land<sup>814</sup> and issue certificates of title in place of computer registers (see chapter 13).<sup>815</sup>

Q178 What provisions are needed to support share titles in the new legislation?

Q179 Should the legislation offer increased guidance as to when a composite register should be issued? What criteria should be applied in this situation?

813 Section 66(1) specifies that the Registrar may issue a certificate of title for a leasehold interest if “the number or nature of entries thereon or in the register book renders it expedient”.

814 Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, s 25(2).

815 Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, ss 15 and 16.

# Chapter 22

## Title to access strips

- BACKGROUND**
- 22.1 Current statutory requirements oblige persons subdividing land to provide legal frontage or access to a public road for each allotment in a subdivision. Prior to such requirements, subdividers could complete their subdivisions without either dedicating as “road” land set aside for that purpose, or providing for access to public roads for all the allotments created by those subdivisions.
- 22.2 As a consequence, many access allotments, which were intended to be transferred to allotment owners for the purpose of providing access to public roads, were left in the name of the original subdivider. Many such allotments still remain in that state today. Part 4A of the LTA was designed to enable owners of allotments to make application for title to other allotments (created by subdivision) that were laid off for the sole purpose of providing access to an existing road.<sup>816</sup>

**SECTION 89A – APPLICATION FOR TITLE: ISSUES**

### What is an access strip? The criteria for application

- 22.3 There is confusion over when Part 4A of the LTA applies, that is, what exactly is an applicable “access strip”. Applications have been received for parcels of land that are similar to access ways within the meaning of section 315 of the Local Government Act 1974 (laid out for public access to public places).
- 22.4 Section 4 of the Property Law Act 2007 defines an “access lot” as a separate allotment in a subdivision “that was created to provide access from all or any of the other allotments of the subdivision; and to an existing road or street”. It may be helpful to have a similar wide definition for Part 4A of the LTA.
- 22.5 The criteria for application for title to an access strip are that:<sup>817</sup>
- (a) the access strip is a separate piece of land created by a subdivision;
  - (b) in the opinion of the Registrar, the access strip was laid off for the sole purpose of providing access from any of the allotments in that subdivision to an existing road or street; and
  - (c) each applicant is the registered proprietor of an estate in fee simple in allotments that are contiguous to the access strip.

<sup>816</sup> See discussion in Struan Scott and others *Adams’ Land Transfer* (loose leaf, LexisNexis, Wellington, 2007) para Part 4A INTRO1. Part 4A of the LTA was inserted by section 2 of the Land Transfer Amendment Act 1966 on 7 October 1966.

<sup>817</sup> Land Transfer Act 1952, s 89A.

- 22.6 The access strip need not be under the LTA. Section 89A(4) of the LTA envisages the strip being either subject to the Act or deeds land. Section 89A(1) is not as clear about this point as it might be.
- 22.7 The application must be made by all the registered proprietors of the allotments that are contiguous to the access strip. They must apply to have the access strip brought under the LTA, or for the issue of a computer register as tenants in common in shares proportionate to the number of contiguous allotments they own: section 89A(1) of the LTA.
- 22.8 However, subsection (3) makes it clear that subsection (1) only applies if there is a failure to find the proprietors of the access strip, or if every proprietor located consents to the application. Thus, if a proprietor of the access strip is located and refuses to consent to the application, it cannot proceed under section 89A of the LTA.<sup>818</sup>

### Multiple owners

- 22.9 If an allotment in the original subdivision that created the access strip has been further subdivided, each of the two or more new allotments so created, and that are contiguous to the access strip, are treated as allotments of the original subdivision. Thus, it is possible for many allotments created through different and later subdivisions to qualify for entitlement.<sup>819</sup>
- 22.10 Finally, no application can be made where an access strip is acknowledged, accepted or declared to be “a road or street or service lane or an access way in accordance with law by any local or controlling authority having jurisdiction”.<sup>820</sup>

### Land “contiguous” to the access strip

- 22.11 More than one application has failed in the past because the land of the applicant was not contiguous to the access way. In some cases, a subdivider has demonstrated a clear intention to distribute shares in the access way to allotment owners in the vicinity of the access way, or to all allotment owners in the subdivision, by transferring shares accordingly, without completing that exercise before disappearing from the scene. It might lead to fairer results if entitlement was not strictly limited to contiguity of allotment and access strip – if it can be demonstrated that the subdivider had a wider intention.

### Problem where person already owns a share in access strip

- 22.12 If a person already owns a share in the access strip and does not want to lose that share, but is supportive of someone else acquiring a share under section 89A of the LTA, it is unclear what they should do to preserve that share and allow others to obtain a share or shares.

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818 The term “proprietor” in subsection (3) is defined in subsection (4) and includes not only registered proprietors or documentary owners, but also persons entitled to the access strip through or under such registered proprietors or documentary owners.

819 Land Transfer Act 1952, s 89A(2).

820 Land Transfer Act 1952, s 89A(5).

- 22.13 Such a person must consent to the application under section 89A(3)(b) of the LTA if the application is to progress. However, consent does not amount to preservation of an existing interest. This subsection only seems to contemplate the applicant obtaining title to the entire estate in the access strip. Section 89E(d) confirms this.
- 22.14 In order to retain that share, the proprietor would be forced to join in the application if the access strip was still deeds land and thus bring it under the LTA. However, it would make no sense for the proprietor to do that if he or she already has an LTA title for the share. If that person did join in the application, it would mean applying for something he or she already owned and his or her title would be merely cancelled and replaced.

Q180 Is the current definition in the LTA of “access strip” satisfactory? Is the Property Law Act 2007 definition of “access lot” useful (see para 22.4)?

Q181 How could the legislation unambiguously describe the circumstances in which an application can be made (access strip under the LTA or still in the deeds system or mixture of both)?

Q182 Should applications be limited to instances where the access strip and the applicant’s land are contiguous? If not, what criteria should be used?

Q183 What process should be put in place to allow a current owner of a share in the access strip to both retain that interest and allow someone else to acquire the balance?

SECTION 89B  
– EFFECT OF  
CONTIGUOUS  
OWNER  
NOT BEING  
PARTY TO  
APPLICATION  
– CONSENT  
ISSUE

- 22.15 This section covers applications where not all contiguous registered proprietors are parties to the application. An application can still be made if one or more of the registered proprietors of contiguous allotments are not parties as long as their consent is given in writing. By not being a party to the application but consenting to it, the registered proprietor of contiguous land is waiving entitlement to a share in the access strip.
- 22.16 Consent is not necessary if a contiguous registered proprietor cannot be found after reasonable efforts have been made to locate that person. In this case: “no rights, express or implied, over the access strip or any part thereof in favour of his allotment shall be prejudiced by the granting of the application”.<sup>821</sup>
- 22.17 It is not clear what those words mean. Possibly they preserve registered rights of way over a strip in favour of the “missing” proprietor, or the implied rights of way created by some other means. Or, the words may mean that the ability

<sup>821</sup> Land Transfer Act 1952, s 89B.

of the “missing” registered proprietor to later claim a share in the access strip is not prejudiced by a successful application. However, such a limited application is not supported by the rest of the legislative framework.

Q184 Is the consequence of consent or the absence of consent by a registered proprietor of land contiguous to the access strip adequately dealt with?

Q185 Is it appropriate to attempt to preserve the rights (if any) of a non-located proprietor?

#### SECTION 89C – HOW THE APPLICATION IS DEALT WITH

22.18 Section 89C(1) of the LTA provides that:

Every application under section 89A of this Act shall, except as otherwise expressly provided in this Part of this Act, be dealt with, as to notices, plans, caveats, fees, and all other matters, in accordance with the provisions of this Act *relating to applications to bring land under this Act*, as far as those provisions are applicable and with all necessary modifications. (Emphasis added.)

22.19 Other provisions in Part 4A of the LTA do provide otherwise and do make necessary modifications in various ways. A strong case can be made for a stand-alone code for access strips rather than several confusing links to other provisions in the LTA where it is difficult to ascertain what is applicable. The application needs to cater for variable circumstances, none of which are like the circumstances covered by sections 19 to 32 or by the Land Transfer Amendment Act 1963.

Q186 If the access strip can be either under the LTA or under the deeds system (or a mixture of both) is it preferable for there to be a set of stand-alone provisions that deal with the mechanical aspects of applications, or is it sufficient to cross-reference the relevant provisions in other parts of the LTA that are to apply?

#### SECTION 89D – ISSUING TITLES TO ACCESS STRIPS

22.20 Under this section, the Registrar can issue title for an application when:

- there is compliance with Part 4A; and
- all required notices have been given; and
- all times required to expire have expired; and
- every caveat lodged has lapsed or been withdrawn; and
- no sufficient reason to the contrary otherwise appears.

22.21 This follows a similar pattern to the equivalent sections in other Parts of the LTA that govern other types of application, although the wording differs.<sup>822</sup> For the sake of uniformity and ease of use, it would be helpful if the wording in all sections that deal with the issue of title from applications could be standardised as far as possible.

<sup>822</sup> See Land Transfer Act 1952, s 27 and Land Transfer Amendment Act 1963, s 15.

22.22 The fee simple estate in the access strip vests in the applicants as tenants in common if there is more than one applicant, and the fee simple estate of the previous owner or proprietor ceases.<sup>823</sup> But title must be subject to any outstanding interests and these interests are brought down on to the new title.<sup>824</sup> It is debatable whether this is a fair and reasonable outcome as far as outstanding interests are concerned.

22.23 Section 89D(2) of the LTA confers a discretion on the Registrar that allows him or her to refuse an application under section 89A if the access strip is not being used solely for the purpose of access to a road from the allotments of the subdivision in respect of which the application is made. The discretion appears to contemplate another permissible use as well as use as access to a road. This is left open for the judgement of the Registrar.

Q187 How should outstanding interests to which the access strip was subject at the time the application is lodged be dealt with?

Q188 Should the discretion to register an access strip, even though it may be used for purposes other than solely to provide access from the applicant's allotment to an existing road, be left open?

SECTION 89E  
– CONDITIONS  
APPLYING  
WHEN TITLE  
ISSUED FOR  
ACCESS STRIPS

22.24 The new title for the access strip is locked into the titles for the contiguous land of the successful applicant(s) by section 89E of the LTA.

**Joint Family Homes Act 1964 and mortgages of part of an allotment**

22.25 A disposition of, or a charge over, the contiguous allotment to which title to the access strip attaches is deemed to extend to the access strip. But the settlement of any such contiguous allotment under the Joint Family Homes Act 1964 is deemed not to be a disposition of the allotment.<sup>825</sup> If both the contiguous land and the share in the access strip are viewed as parts of a whole, this conclusion seems strange.

22.26 Section 89E(e) of the LTA aligns any joint ownership of contiguous allotments with the ownership of the commensurate share in the access strip. But this does not apply if the contiguous allotment is settled under the Joint Family Homes Act 1964.

823 Land Transfer Act 1952, s 89E(d).

824 Land Transfer Act 1952, s 89D(1).

825 That exception is seemingly because the access strip share would not qualify as land capable of being settled in terms of the criteria laid down by that Act.



- 22.27 Under section 89E(f) of the LTA, if the contiguous allotment, or part of it, is subject to a mortgage<sup>826</sup> and power of sale is exercised by the mortgagee, the power of sale is deemed to extend to the commensurate share of the mortgagor in the access strip as if the estate or interest in the latter were included in the mortgage as part of the security.<sup>827</sup>
- 22.28 This is complicated if only part of that allotment is mortgaged. In such case, the power of sale extends across a proportionate part of the access strip. Although this is an unlikely situation, it is unclear how the correct proportion in the access strip could be assessed. In fact, a subdivision of the access strip (as to the share) would have to take place. It is such an improbable situation that the question as to whether this should be covered at all has to be asked especially in light of the way in which the legislation tries to cope with it. There is no obvious answer to this potential dilemma but the statutory remedy seems to be worse than the problem itself.
- 22.29 Section 89E(g) of the LTA extends (f) to situations where the contiguous allotment is settled under the Joint Family Homes Act 1964 irrespective of whether the access strip is owned by the husband and wife, or either of them. It might be simpler if the settlement was deemed to extend to the access strip

### The separate titles issue

- 22.30 Section 89E(i) of the LTA prevents actions against the Crown or the Registrar by anyone whose estate in fee simple in the access strip has ceased or been determined under section 89E(d) except where that registered proprietor:
- has been deprived by fraud on the part of the applicant(s) or by the error, omission or misfeasance of the Registrar or LINZ officers dealing with the application; and
  - is barred by this Act from bringing an action for recovery of the land.
- 22.31 This section is based on the notion of a separate title for the access strip or for each share in the access strip. Since 1966 (when sections 89A to E of the LTA were included) there has been a trend away from having separate titles for allotments (or shares in them) that serve other allotments, if they are owned by the same proprietor. It is normal now to have those allotments (or the shares in them) amalgamated into single titles where there is common ownership.
- 22.32 This has the following advantages:
- (a) only one title issues instead of two, thus reducing the workload for those involved;
  - (b) the chance of one allotment being separately disposed of or charged inadvertently (and unlawfully in terms of the restrictions in section 89E of the LTA) is minimised; and
  - (c) any dealings affecting the amalgamated title only have to be recorded once.

826 For the purposes of section 89E(f) the term “mortgage” is defined in section 89E(h) although it is not an exhaustive definition.

827 Land Transfer Act 1952, s 89E(f).

22.33 There could be instances where amalgamation was not practicable, for example, where the contiguous allotment is settled as a joint family home but the share in the access strip could not be so settled (although that is questioned above). So it may still be necessary to issue a separate title for all or some of the shares.

Q189 Should settlement under the Joint Family Homes Act 1964 include proportionate shares in an access strip?

Q190 Are mortgages dealt with adequately in section 89E of the LTA, and, if not, how could the provisions be improved?

Q191 Are any other changes to sections 89A to 89E of the LTA needed?

# Chapter 23

## Statutory land charges

### WHAT ARE STATUTORY LAND CHARGES AND HOW ARE THEY REGISTERED?

- 23.1 Statutory land charges are charges against land that are created by statute and give notice of monies owing. Whilst they may be registered under the LTA, the authority for their existence will be the Act that creates them. Authorisation for registration will come from the Act that created them or the Statutory Land Charges Registration Act 1928 (SLCRA).

#### Statutory Land Charges Registration Act 1928

- 23.2 This Act provides for a “default” mechanism enabling charges to be registered if the creating Act does not provide for registration, and it provides forms to be used for registration purposes if the creating Act fails to so provide.
- 23.3 The Act prescribes a form called a notice of statutory land charge (Form 1 in the Schedule) and another form for release of registered statutory land charge (Form 2 in the Schedule). The Act is administered by the Ministry of Justice.

### THE ISSUE

- 23.4 Following a review of about 40 different statutory land charges administered by a number of government agencies, LINZ concluded that the most notable feature about these charges is the lack of uniformity regarding their registration and the consequences of registration (what form they should take, their effect on other documents subsequently lodged for registration, and their priority in relation to other registered documents or charges).
- 23.5 Some examples of these variations are:
- priority in accordance with date and time of registration or automatic fixed priority;
  - no effect on subsequent registration, or stop on subsequent registration without consent of the charge-holder; and
  - forms prescribed by the creating Act, or directive to use SLCRA forms by default.
- 23.6 About 75 percent of the charges rely on the SLCRA for prescribed forms of charge and discharge. This occurs by either express direction or default (that is, the Act creating the charge is silent as to form). Registration is difficult for LINZ to administer because of the widely varying consequences once registration occurs.

## AN OPTION

- 23.7 Provisions that deal exclusively with the registration of notices of charge could be incorporated within the core registration enactment (the LTA) of the agency responsible for registration. Such a regime might confer more control to the Registrar over the whole regime of statutory land charges, improve consistency and simplify administration.
- 23.8 The issue then is whether the SLCRA should be incorporated into the new LTA.<sup>828</sup>

### Comments

- 23.9 A number of agencies administering statutory land charges have been consulted about the above option and there is general agreement that it would be a sensible solution.
- 23.10 The SLCRA has been modified over the years but would require further amendment if it was to be incorporated into the new LTA, even if most of the changes were modernisation of the current wording.

Q192 Is the problem of lack of uniformity caused by the SLCRA or by other enactments that create statutory land charges?

Q193 If it is the latter, what impact on those problems would the repeal of the SLCRA and the incorporation of the equivalent provisions in the new LTA have?

<sup>828</sup> Such a move is not without precedent: see discussion regarding Part 7A of the LTA in chapter 21 above.



# Appendices



# Appendix A

## Summary of questions in Part 1

### CHAPTER 2 – INDEFEASIBILITY

- Q1 Assuming indefeasibility of title is a cardinal principle of the LTA, should this concept be defined in the Act? If so, is either the Tasmanian Act or the Queensland Land Title Act (listing exceptions) a useful model?
- Q2 Or is the term “indefeasibility of title” misleading? If so, what might be a better term? Or is it unnecessary to refer to the concept in the Act?
- Q3 Should the indefeasibility sections be re-worded to reflect their current interpretation or an interpretation more consistent with the objectives of the LTA? If so, how could they be re-written?
- Q4 Should a volunteer be entitled to the same protection as a purchaser for value?
- Q5 Which of the suggested options discussed in chapter 2 do you consider would be most in line with modern Torrens principles and practice?

### CHAPTER 3 – LAND TRANSFER FRAUD

- Q6 Should a court be able to declare an act to defeat an unregistered interest, by a proprietor who had already registered with no apparent intent to defeat that interest, “fraudulent” for the purposes of the LTA?
- Q7 Or should the holder of the unregistered interest rely on an in personam claim where possible?
- Q8 What is the appropriate scope of fraud under a Torrens system? Should it be the equitable approach of New Zealand judges such as Turner P, or the stricter more pro-purchaser stance of the Australian courts, or somewhere in between?
- Q9 Should there be a statutory definition of land transfer fraud?
- Q10 If so, should the elements of land transfer fraud as developed by the case law be incorporated into the legislation?
- Q11 Or, should an interpretation based on the Nova Scotia definition be adopted?
- Q12 Or, should a definition be left to be developed further by the case law?

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CHAPTER 4 –  
IN PERSONAM  
CLAIMS

- Q13 Is an in personam claim an exception to indefeasibility, or a parallel jurisdiction? If the latter is conceptually more accurate, is there nonetheless a risk to Torrens title that should be controlled?
- Q14 If so, should the boundaries of the in personam jurisdiction be left to judicial development, or created through legislative reform?
- Q15 Would the three requirements for a valid in personam claim set out above have the effect of preventing significant inroads into Torrens principles? If so, should those three requirements be included in the new LTA?

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CHAPTER 5 –  
REGISTRAR'S  
POWERS OF  
CORRECTION

- Q16 Has the electronic system changed the circumstances in which there is need for the Registrar to exercise his or her powers?
- Q17 Should the extent of the Registrar's powers in relation to the word "wrongfully" be clarified, and if so, how?
- Q18 Are there situations where it would be appropriate for the Registrar to correct a title that has been obtained "wrongfully"?
- Q19 Should the Registrar be able to make substantive findings as to legal rights or should his or her power be limited to an administrative power?
- Q20 In what situations might it be appropriate for the Registrar to have a broader power to correct the register?
- Q21 Which of the options suggested in chapter 5 should be adopted?

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CHAPTER 6 –  
UNREGISTERED  
INTERESTS

- Q22 To what extent are there any truly unregistrable interests under the LTA? If so, what are they?
- Q23 How should unregistrable interests be treated in relation to the new LTA?
- Q24 Are there any unregistrable interests that should be able to be registered?
- Q25 Should the extension of the s 182 protection to non-registered purchasers be reaffirmed, or should the legislation be changed to reflect the orthodox application of the section?
- Q26 Should the register accurately reflect or "mirror" the interests that relate to a particular piece of land? That is, should unregistered interests that affect land be able to be included on the computer register?
- Q27 Should there be greater protection for unregistered interests?
- Q28 How should priority of interests be determined?
- Q29 Should New Zealand adopt some form of interest recording system to protect unregistered interests?



- Q30 If so, what form should this system take and what interests should it cover?
- Q31 Are there any other issues to be considered surrounding unregistered interests

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CHAPTER 7 –  
CAVEATABILITY  
OF INTERESTS

- Q32 What interests should be caveatable?
- Q33 Should a registered proprietor be able to caveat his or her own title?

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CHAPTER 8 –  
TRUSTS ON  
OR OFF THE  
REGISTER

- Q34 Is there a problem with the present situation provisions for trusts?
- Q35 If so, should the new Act provide that trustees can be described as such on the register?
- Q36 If so, should they be obliged to deposit the trust deed with the Registrar (with a reference on the register) so that it may be searched?
- Q37 Or, should the new LTA provide for a system of noting restrictions on the register, similar to that in the English legislation?
- Q38 What would be the practical consequences of a system similar to that in Queensland: (a) for the registry and (b) for the purchaser?
- Q39 What would be the benefits of registering trusts for beneficiaries? For purchasers? For conveyancers?
- Q40 What might be the disadvantages of registration for purchasers?
- Q41 Would the benefits of registration outweigh the disadvantages?
- Q42 What would be the practical consequences of a system similar to that in England: (a) for the registry and (b) for the purchaser?
- Q43 What would be the disadvantages and benefits of a system of noting restrictions?

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CHAPTER 9 –  
OVERRIDING  
STATUTES

- Q44 What sort of interests created under other statutes should be effective against a registered proprietor under the LTA? Should registration affect their validity and be required in order to perfect these interests or should they be able to exist in an unregistered form with a lesser status?
- Q45 Are you aware of other examples of statutory provisions that are inconsistent with the LTA?
- Q46 Should the LTA be amended to more clearly signal to people that other statutory interests may override their registered interest?
- Q47 Would an administrative response involving a Cabinet Office process or the Legislation Advisory Committee assist?
- Q48 Should the matter of ascertaining legislative intention for the purpose of reconciling statutory conflicts be left to the court? Would a clearer guide in the statutory provisions of the particular overriding statute, to legislative intention be helpful?

CHAPTER 10 –  
REGISTRATION  
OF MĀORI  
LAND

- Q49 Should it be made clear how the LTA relates to TTWMA? How might this be done?
- Q50 How could the practical problems of interface between the LTA and TTWMA be resolved?

CHAPTER 11 –  
THE  
COMPENSATION  
PROVISIONS

- Q51 Has the risk of mistakes and errors in the registration process increased or decreased with the automation of the register?
- Q52 Is it satisfactory that section 172(a) claims are limited to claims for Registrar's errors?
- Q53 Does section 172 provide adequate grounds for a claim of compensation?
- Q54 Do the grounds for compensation need to be more clearly stated?
- Q55 Does section 172A provide adequate protection for those suffering loss caused by the gap between lodgement and registration?
- Q56 With automation of the register, could section 172A be repealed in the future?
- Q57 Is the procedure in section 173 efficient and fair for the parties involved?
- Q58 Does cost effectiveness justify giving the Registrar-General the power to decide the merits of small claims and pay them without reference to Crown Law? Is this a necessary safeguard on the Registrar's discretion?
- Q59 If small claims are to be treated differently to large claims, what should be the ceiling for a "small claims"? Should this be stated in regulations?
- Q60 Is it appropriate to retain the above exceptions to the right to compensation, or can/should some of these exceptions be repealed?
- Q61 Is it appropriate to retain the above exceptions to the right to compensation, or should some of these exceptions be repealed?
- Q62 Should the land transfer legislation codify the exceptions to the right to compensation with an exclusive list?
- Q63 What is the most appropriate method of measuring damages for a compensation claim under the LTA?
- Q64 Should the measure of damages applicable under section 172(a) be left to the common law, or should guidance be given in the statute?
- Q65 Does section 179 provide an appropriate method of calculating damages for section 172(b)? In particular, should damages be measured as at the date when the claimant was deprived of land?
- Q66 Should the limitation period in section 180 be reconsidered?
- Q67 Should the Contributory Negligence Act 1947 apply to compensation claims under the LTA? If so, should it be listed in the land transfer legislation as qualification on the right to compensation?

- Q68 If contributory negligence should apply to the compensation regime, should there be any limits to its application?
- Q69 Is the policy of immediate indefeasibility consistent with a policy of contributory negligence, particularly in cases of third party fraud?
- Q70 Does the existence of private title insurance indicate problems with the state compensation system?
- Q71 Should the scope of the compensation scheme be altered in any way?

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CHAPTER 12  
– REVISING  
THE LAND  
TRANSFER ACT

- Q72 What do you think would be an appropriate structure for the new LTA?
- Q73 Are any of the models discussed in this chapter a useful basis for the new Act? That is: model 1, essentially the current LTA reorganised differently and incorporating the 1963 and 2002 stand-alone amendments; or, model 2, a structure based on modern Torrens legislation, the example set out being the Queensland Land Title Act 1994; or, model 3, a structure based on the proposed Canadian Model Land Recording and Registration Act.
- Q74 What provisions of the current LTA might be more appropriately placed in regulations?

The questions in Part 2 are not summarised as they are very extensive and relate very specifically to the text above them.

# Appendix B

## Terms of reference

The Law Commission will conduct a review of the Land Transfer Act 1952 with a view to modernising it and recommending such changes as may be appropriate. The review will reflect the fundamental soundness of the principles underlining the Torrens system of land registration that have been part of New Zealand law since 1870.

In particular, the review will:

- ensure the integrity of the land transfer system and make recommendations to improve it;
- ensure that the provisions of the Act take into account other developments in property law, both statutory and by judicial decisions;
- ensure that the law is certain and clearly expressed, and supply any omissions in it;
- examine the adequacy of the provisions concerning state guaranteed title;
- examine electronic developments and how the law should deal with them.

This review will be led by the Law Commission and will involve active co-operation with the Ministry of Justice and Land Information New Zealand. The Commission is asked to produce a draft Bill. The final report should be ready by mid-2009.

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