AUCKLAND DISTRICT LAW SOCIETY INC
INDEPENDENT VOICE OF LAW

Land Transfer Bill 2016

28 April 2016

The Property Law Committee ("the Committee") of the Auckland District Law Society Inc. welcomes the opportunity to make submissions on the Land Transfer Bill.

The Committee previously submitted on the exposure draft in 2013. This submission is prepared in three parts. The first addresses the Committee's concerns in relation to the revised provisions on indefeasibility, the second part tackles the proposed compensation provisions, and thirdly this submission deals with unresolved issues of importance that we originally raised in our 2013 submission but not have not been satisfactorily addressed in the bill.

Indefeasibility

Conflict between 6(2) (b)(i) & 6(4) - clause 6 of the Bill now includes a definition of fraud which for the most part follows the original law commission recommendation. There is however a potential contradiction within the definition and we set that out as follows.

Section 6(2)(b)(1) provides that the fraud must be against the registered owner of an unregistered interest, if the registered owner or register owner's agent-

"In acquiring the estate or interest had actual knowledge of, or was wilfully blind to, the existence of the unregistered interest"

Section 6(4) however provides that-

"The equitable doctrine of constructive notice does not apply for the purposes of deciding whether the conduct is fraudulent."

On the one hand there is a component in the determination of whether a fraud has occurred that a party of an unregistered interest in acquiring the estate had either actual knowledge or was "wilfully blind to".

It is certainly arguable that "A party who is wilfully blind to" could also be deemed to have "constructive notice" of the unregistered interest. Given that Section 6(4) provides that the equitable doctrine of a constructive notice does not apply for the purposes of deciding

whether conduct is fraudulent there is a potential contradiction or conflict in relation to the Section 6(2)(b)(1) wilfully blind test. While no doubt some lawyers will argue that wilful blindness and constructive notice are distinguishable and no conflict arises other lawyers will disagree. Remedying the potential conflict between Section 6(2)(b)(i) and Section 6(4) is highly desirable.

Clause 52(1) (a) – cl. 52 of the Act "Exceptions or Limitations" deals with the various exceptions and limitations to Indefeasibility of title. Clause 52(1)(a) provides for an exception in the case:

"Where the title of the estate or interest of the registered owner is acquired through fraud on the part of the registered owner or the registered owner's agent."

In other words amongst other exceptions there is an exception to indefeasibility where a mortgage, being an interest of the registered mortgagee, is acquired through an unauthorised person executing a mortgage over the title.

To avoid this exception arising, Section 54(1) "Verification of Identity of Mortgagor by Mortgagee" requires:

"That the mortgagee must take reasonable steps, or ensure that reasonable steps are taken to verify the identity of the mortgagor and the identity and the authority of any person who executes the mortgage".

Clause 54(4) also provides that the person who verifies the identity of the mortgagor or the identity and authority of a person who executes the mortgage must ensure that a record is kept of the steps taken under this clause for not less than the prescribed period and that the documents or copies of documents and other evidence relied on to comply with section are kept for not less than the prescribed period.

In subsection 54(5) the legislation further provides that a person who fails to comply with subsection (4) commits an offence and is liable to summary conviction for a fine in the case of an individual of $5,000 or in the case of a body corporate a fine not exceeding $25,000.

The reality is that the party who will have the onus and obligation imposed on them to verify the identity of the mortgagor will be the solicitor appointed by the mortgagee. The Select Committee should appreciate that this will mean that it will need to be the lawyer who is the witness to the mortgagor's signature. This will mean that parties who are providing mortgages will need to attend the legal offices of solicitors to sign the documents.

The current situation is that the lawyer can delegate that responsibility to a person with whom they are confident is a sufficiently qualified witness. The new statutory obligation that mortgagees will undoubtedly impose on lawyers will mean greater legal costs are incurred and there could be considerable inconvenience where parties who wish to execute mortgages are outside of the lawyer's locality.

Manifest Injustice - the bill seeks to introduce a new concept which challenges the long established principle of indefeasibility and that is the ability of a party to apply to a court for the alteration of the register in the cases of "manifest injustice" pursuant to cl. 56 of the Bill.

With the introduction of the "wilful blindness" test the exclusion of the equitable "constructive notice" test and now the inclusion of "ought to know" test in relation to manifest injustice there is scope for significant uncertainty. The potential for lawyers to debate what these undefined tests mean is likely to be a legislative gift to the legal profession resulting in costly and unnecessary litigation.

With no definition of what "manifestly unjust" means in cl57, and just a list of factors in cl57(4) for a Judge to take into account when deciding whether to make an order, there is an undoubted amount of uncertainty as to how this section fits it into the hierarchy of the compensation legislation.

It is our understanding that it is the intention of the legislature that financial compensation for fraud will be the usual remedy, and cl 57 is intended to apply in more exceptional circumstances when financial compensation is not enough.

However, this hierarchy is not expressed clearly, with no definition of what is manifestly unjust, and there has already been commentary from academics taking a different view as to how and who might access the two remedies of either compensation or possibly getting the legal estate returned.

Rod Thomas, Associate Professor at Law School, Auckland University of Technology has commented on the new manifestly unjust cause of action saying -

"If you are trying to get you land back why bother with any allegation of "Land Transfer fraud" when you can go for "manifest injustice". Fraud will always be an example of a "manifest injustice" and the manifest injustice threshold will be lower "

Clarity on these issues is essential in the legislation, particularly given that it is a peeling back of the certainty of registration under the Torrens system. The drafters need to clarify the interplay between fraud and manifest injustice. Clause 57 is not limited to situations of fraud, and could include carelessness for example.

There is also a further issue arising when an innocent owner of a property ends up having to go to court to defend their registration when someone has claimed that for them to remain registered it would be manifestly unjust. If they are successful in defending their registration and retaining title, there should be a specific provision in the legislation allowing them to be compensated by the Crown for the full legal costs of defending their title.

Subpart 3 - Compensation

As the Law Commission stated in "A New Land Transfer Act"[1] - "*A state compensation system is an essential underpinning of the Torrens system in New Zealand … The system operates as one of first resort to compensate people for loss due to the operation of the Lands Transfer Act 1952. This means that claimants may bring claims against the Crown without having first to exhaust remedies against wrongdoers. This system must continue under the new Act. The policy is fundamental to maintaining public confidence in the registration system."*

This fundamental basis is expected to continue under the Land Transfer Bill, but without amendment, these rights of compensation are being significantly eroded.

Timing of assessment of compensation

Clarification was requested of the exposure draft of the Land Transfer Bill as to what "at the date of the claim made" meant as it was vague in meaning. Clause 65 of the current Bill has clarified this, but now reduced the value of the estate or interest in land to the value ***as at the date on which the claimant gained or ought to have reasonably gained knowledge that the loss had occurred***.

This is a serious erosion of the compensation provisions, particularly given the length of time compensation claims can take to be resolved in the courts. The *Burmeister*[2] case, being the most recent prominent case with a claim for compensation took nearly a decade to resolve. The difference in value of land over that period from discovery to award could make compensation almost meaningless, and gives the Crown no incentive to resolve matters quickly and fairly, and could place owners in a difficult position in terms of being pressured to accept an offer under cl 62 even if the offer is not adequate, due to the value erosion over time with the delays involved in litigation making it the better of two bad options, rather than adequate compensation. Interest at the judicature rate under clause 70 also does not often match the movement in value in the property market over a period of time. An owner might be compensated but would unlikely be able to repurchase an equivalent property. It will be essential that the prescribed amount in cl 62 is kept up to date with increasing property values.

We welcome the new approach to resolving claims that cl. 62 and 63 seeks to introduce. However, clarification is required as to what is the 'prescribed amount', and will this 'prescribed amount' be continually updated to keep track with the fast moving market?

To claim that any unfairness is dealt with by cl. 68 giving Courts the discretion to adjust compensation is not enough as courts are more likely to read compensation down than increase compensation, and the basic principles of compensation should be fair and just rather than putting claimants to the cost, uncertainty and delay of compensation of filing

[1] June 2010, Report 116, page 35 at 4.1
[2] *Burmeister v Registrar-General of Land* [2014] NZHC 631

and litigating proceedings in the hope that the Court will exercise its discretion in favour of the claimant with the attendant risk.

The wording of cl. 70 needs to be adjusted to be consistent with the changed wording in cl. 65 as date of the claim is no longer the date of value.

Clause 60 is however a matter of serious concern to the Committee as the Bill has shortened both the first and second periods significantly. We have previously submitted on this issue as have others. At the very least the second period, if it is to be shortened should not be shortened to less than one month, as while the current section 172A may only have seen infrequent use it is a vital element of the compensation regime, and the proposed reduction from 2 months to 10 working days, is too great a reduction and the proposed tight timeframe risks defeating the purpose of the regime.

It would be very helpful if there were an indication as to how the prescribed amount in s62 and interest under s70 will be set or calculated. This could easily be expressed in the legislation as the rate set under s87 of the Judicature Act plus 5%.

Market value versus compensation

The basis for compensation for land lost under the Bill is "market value" (cl 65(1)). We agree with the submission from the New Zealand Institute of Valuers (NZIV) that the basis is both inadequate and unjust in foreseeable situations of loss of title. Instead, the basis for compensation should be as if the land were taken under the Public Works Act 1981 ('PWA'). That is, compensation is the monetary equivalent of what has been lost, from the perspective of the person to be compensated.

While market value has a clear and established definition within the legal and valuation context, it would be inadequate in many situations to compensate a party who has lost their interest in land. The term 'compensation' in the land context, has a well-established set of principles both in terms of valuation and case law and in particular under the framework of the public works compensation legislation. Crown compensation is, after, all one of the fundamental issues being dealt with under this legislation, to give people confidence in our titles system.

While in some cases market value is adequate and appropriate compensation for loss of land, there are many circumstances where market value would not equate to compensation. Compensation is the monetary equivalent of what has been lost. Compensation must represent the loss from the perspective of the party who has lost the land. The focus of compensation is the value of the land to the party who has lost the land, not the value of the land on the open market and not the value of the land to the acquirer. Compensation must be 'full' and 'fair'.

We agree with the NZIV's examples where market value would be inadequate and thus fall short of compensation which include without limitation:

a. Where two adjoining lots provide greater value if held together such that the loss of one lot reduces the value of the owner's interests at an amount greater than the market value of the individual lot loss. This could be where a small lot gives access to a large adjoining block of land and each is on a separate title. Where the two are held by the same owner, the large block of land may be subdivided and has a value accordingly. The loss of the access lot may mean that the large block would no longer be subdivisible on its own. Thus, compensation based on the market value of the access block would be inadequate and unjust. It would not allow for the synergy value to the owner.

b. Where the value of improvements are of much greater value to the owner who lost the land than to the market. For example, where the property has been put to a particular use or purpose. This could be as with a church, or a unique processing plant, for which market value would not be adequate compensation to put the former land owner in the equivalent position by monetary compensation.

PWA compensation can exceed market value in appropriate circumstances. Logically, the public interest in taking the land for roading projects, and the like, should not provide different compensation from taking title to protect the integrity of the Torrens land register system.

The PWA provides reasonable limits to ensure that there is not over compensation and also provides some practical protection to requiring authorities which could also protect the Crown in the Land Transfer legislation compensation context. The PWA compensation system has established and balanced principles which would provide adequate compensation and also has mechanisms to avoid excessive compensation which would be of assistance to courts in determining compensation under the LTA. This would also provide greater certainty as to likelihood of potential compensation due to the current case law which would be more likely lead to settlements under cl 62 as lawyers will be able to more adequately advise their clients as to likely outcomes if they went to court, to enable them to adequately assess an offer of settlement made.

The Local Government Act 2002 refers to PWA for compensation and similarly the Bill could refer to this legislation.

There does not appear to be a principled reason to provide compensation that is less than full and fair in the circumstances where market value is not the applicable measure, when Crown compensation is a fundamental underpinning of our Torrens system legislation.

Regulations to prescribe movements in land values

The Bill proposes creating regulations under cl 68 and cl 226(1)(q) "prescribing the manner in which movements in land value are to be calculated…". We agree with the submissions from the NZIV that his is an impractical proposal in that regulations cannot provide a workable prescription for the calculation of land value movements over time, in different regions in New Zealand. Rather, valuation evidence from a Registered Valuer should be

called to assess the compensation value of the relevant estate or interest at the relevant date (consistent with other legislation).

Clause 68 generally fulfils a useful purpose in allowing the court to determine compensation with regard to values at different dates. However, practically we agree with the submissions of the NZIV that the mechanism under cls 68(1)(b) and 226(q) is unworkable. The sheer cost and complexity of endeavouring to prescribe market movement by regulation would serve no useful purpose and, in any event, would be ineffective, and would be hard to keep current and up to date with fluctuations of the market.

As with other legislation such as the PWA, Unit Titles Act 2010 and Property Law Act 2007, a Registered Valuer would be best placed to provide such valuation evidence. As land values move differently in different locations and for different real estate types, and with different speeds. The highest and best use of a site might also change over time with changed zoning and possibilities under the unitary plan for example. Such analysis is best conducted by an independent Registered Valuer.

Recommendations

Clause 65 should refer to value as at the date of compensation being awarded or agreed. cl.70 will also need to be amended to mirror the time for assessment of the claim.

Clause 65(1) should be changed to omit "market value" and substitute in "compensation assessed as if the land were taken under the Public Works Act 1981" (or similar wording). This has the effect of changing the surrounding provisions and is efficient in adjustment.

Clause 68(1)(a) appears reasonable and appropriate in setting a different date of valuation and should be retained. However, cl 68 (1)(b) should be substituted to remove reference to section 226(q). Clause 68(1)(b) should provide that evidence from a Registered Valuer or Registered Valuers may be called to assess the compensation value at the relevant date. Please note that the term "registered valuation" is inappropriate and should not be adopted as the valuations are not registered, the valuers are.

Section 226(q) should be removed.

Unresolved Concerns

Paper Instruments – cl. 32-35

The Committee previously recommended that there should be clarification as to whether the Bill provides for paper instruments to be available and to be treated as equivalent to electronic instruments in all circumstances. There is no provision in the Bill that mandates

the abovementioned equivalent treatment, and the Committee repeats its recommendation.

Correspondingly, the Committee wishes for clarification as to whether the Bill intends that paper instruments are to be available and able to be used in all circumstances where electronic instruments are available.

While the Bill provides extensive clarification regarding mechanisms by which paper and instruments may be certified, executed, witness, lodged, and the priority systems that apply to them, that degree of clarification is not yet made clear regarding similar mechanisms for electronic instruments.

The Committee recommends additional provisions similar to those contained in s34-36 for paper instruments are replicated with the appropriate changes to make them relevant to electronic instruments.

Leases – cl. 91-97

Clause 92 provides that a lease variation instrument must be used to extend the term of the lease or vary the covenants and conditions contained in it. The instrument must be registered before the expiry of the current term of the lease, and it must be executed by the lessor and the lessee. This provision is proposed to replace s116 of the 1952 Act.

Given that a variation of one lease could impact on the value or usability of another lease, as would be the case in a cross lease scenario. The Committee is concerned about the specific omission of the requirement to obtain the mortgagee's consent of the other leases. The Committee submits that other stakeholders such as the New Zealand Bankers Association, if consulted, may also object to this provision.

Extinguishment of easements – cl. 112-114

Clauses 112, 113, and 114 all describe different processes by which easements may be extinguished. Consequently, each clause contains a different definition of “extinguished” which is specific to that clause only.

The Committee submits that the abovementioned clause-specific definitions of “extinguished” will lead to confusion. The Committee recommends that cl. 112-114 be reworded to avoid clause-specific definitions, and that perhaps a separate provision defining the term “extinguished” in relation to easements more generally may be appropriate for clarity.

Adverse possession – cl. 154-169

The Committee's concern is that cl. 154, which grants a person the right to make an application for the creation of a record of title in the name of the applicant based on "adverse possession" of land, lacks clarity. Clause 154 does not define the requirements of "adverse possession".

The Committee recognises that information pertaining to the "prescribed form" and "prescribed information" that is requirement for the process described in s154 has been made available in the Regulations. The Committee recommends that such information should be included in the Act directly to avoid confusion. The recommendation being that the requirements of "adverse possession" are defined in a new accompanying provision.

These comments have been prepared by the Property Law Committee of the Auckland District Law Society Incorporated. The Committee records that it will want to be heard at the Select Committee hearing. Please contact the Secretary to the Committee, Ben Thomson (ben.thomson@adls.org.nz) if you have any questions.

Yours faithfully,

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