

PROPERTY LAW AMENDMENT BILL

EXPLANATORY NOTE

THIS Bill amends the Property Law Act 1952.

Clause 1 relates to the Short Title to the Bill.

Section 75 of the principal Act provides for restricted covenants to be implied in conveyances by trustees and persons acting in a fiduciary capacity, including the Public Trustee when he is appointed or acting as committee of a mentally defective person's estate. *Clause 2* extends the provision to cases where the Public Trustee is acting as manager of any property under Part V of the *Public Trust Office Bill*. The clause also transfers to section 75 the provision now contained in section 93 of the Public Trust Office Amendment Act 1921-22, which provides that every conveyance of property by the Public Trustee, except when acting as agent or attorney, shall, in the absence of evidence to the contrary, be deemed to have been made by him in a fiduciary capacity within the meaning of section 75. The clause is to come into force on the same day as the *Public Trust Office Bill*, namely, 1 April 1958.

Clause 3 transfers to section 87 of the principal Act the provision now contained in section 60 of the Public Trust Office Amendment Act 1921-22 which protects the Public Trustee where he acts reasonably and in good faith in executing a discharge of mortgage under section 87, which section authorises the Public Trustee to accept payment of money owing under a mortgage, and sign a discharge of the mortgage, in cases where the mortgagee cannot be found.

Clause 4 redrafts section 129 of the principal Act, which relates to the power of the Court to grant special relief in cases of encroachment. The main changes are in subclauses (1) and (5) which have been expanded so as to allow any person concerned to apply to the Court for relief, whether or not any action or proceeding relating to the land is pending. It is made clear that all such cases can be taken in a Magistrate's Court by consent. The proviso to subclause (6) has been consequentially amended so as to require that, except where a Magistrate's Court is acting under its consent jurisdiction, the party invoking the remedies given by the clause shall give notice of his intention to all other parties to the proceedings; and so as to allow any party as of right to have the proceedings transferred to the Supreme Court. The other changes are of a minor consequential nature.

Hon. Mr Marshall

PROPERTY LAW AMENDMENT

ANALYSIS

Title

1. Short Title

2. Covenants implied in conveyances

3. Protection of Public Trustee when
executing discharge of mortgage

4. Power of Court to grant special
relief in cases of encroachment

A BILL INTITULED

An Act to amend the Property Law Act 1952

BE IT ENACTED by the General Assembly of New Zealand
in Parliament assembled, and by the authority of the same,
5 as follows:

1. Short Title—This Act may be cited as the Property Law Amendment Act 1957, and shall be read together with and deemed part of the Property Law Act 1952 (hereinafter referred to as the principal Act).

10 **2. Covenants implied in conveyances**—(1) Subsection one of section seventy-five of the principal Act is hereby amended by inserting, after the words “mentally defective person’s estate”, the words “or as manager of any property under Part V of the Public Trust Office Act 1957”.

(2) Section seventy-five of the principal Act is hereby further amended by adding the following subsection:

“(3) Every conveyance of property by the Public Trustee, except when acting as agent or attorney, shall, in the absence of evidence to the contrary, be deemed to have been made by him in a fiduciary capacity within the meaning of this section.” 5

(3) Section ninety-three of the Public Trust Office Amendment Act 1921-22 is hereby consequentially repealed.

(4) This section shall come into force on the first day of April nineteen hundred and fifty-eight. 10

3. Protection of Public Trustee when executing discharge of mortgage—(1) Section eighty-seven of the principal Act is hereby amended by adding the following subsection:

“(9) In any case where the Public Trustee discharges a mortgage under the powers conferred on him by this section, he shall incur no liability in respect of any loss incurred in respect of his so doing so long as he acts reasonably and in good faith. The onus of proving that the Public Trustee has not acted reasonably and in good faith shall be upon any person alleging it.” 15 20

(2) Section sixty of the Public Trust Office Amendment Act 1921-22 is hereby consequentially repealed.

4. Power of Court to grant special relief in cases of encroachment—The principal Act is hereby amended by repealing section one hundred and twenty-nine, and substituting the following section: 25

“129. (1) Where any building on any land encroaches on any part of any adjoining land (that part being referred to in this section as the piece of land encroached upon), whether the building was erected by the owner of the first-mentioned land (in this section referred to as the encroaching owner) or by any of his predecessors in title, either the encroaching owner or the owner of the piece of land encroached upon may apply to the Supreme Court, whether in any action or proceeding then pending or in progress and relating to the piece of land encroached upon or by an originating application, to make an order in accordance with this section in respect of that piece of land. 30 35

“ (2) If it is proved to the satisfaction of the Court that the encroachment was not intentional and did not arise from gross negligence, or, where the building was not erected by the encroaching owner, if in the opinion of the Court it is
5 just and equitable in the circumstances that relief should be granted to the encroaching owner or any other person, the Court, without ordering the encroaching owner or any other person to give up possession of the piece of land encroached upon or to pay damages, and without granting an injunction,
10 may in its discretion make an order—

“(a) Vesting in the encroaching owner or any other person any estate or interest in the piece of land encroached upon; or

15 “(b) Creating in favour of the encroaching owner or any other person any easement over the piece of land encroached upon; or

“(c) Giving the encroaching owner or any other person the right to retain possession of the piece of land encroached upon.

20 “(3) Where the Court makes any order under this section, the Court may, in the order, declare any estate or interest so vested to be free from any mortgage or other encumbrance affecting the piece of land encroached upon, or vary, to such extent as it considers necessary in the circumstances, any
25 mortgage, lease, or contract affecting or relating to that piece of land.

“(4) Any order under this section, or any provision of any such order, may be made upon and subject to such terms and conditions as the Court thinks fit, whether as to the payment
30 by the encroaching owner or any other person of any sum or sums of money, or the execution by the encroaching owner or any other person of any mortgage, lease, easement, contract, or other instrument, or otherwise.

“(5) Every person having any estate or interest in the piece
35 of land encroached upon or in the adjoining land of the encroaching owner, or claiming to be a party to or to be entitled to any benefit under any mortgage, lease, contract, or easement affecting or relating to any such land, shall be entitled to apply for an order in accordance with this section, or
40 to be heard in relation to any application for or proposal to make any order under this section. For the purposes of this subsection the Court may, if in its opinion notice of the application or proposal should be given to any such person as aforesaid, direct that such notice as it thinks fit shall be given to
45 that person by the encroaching owner or any other person.

“(6) Any Magistrate’s Court shall have jurisdiction to exercise the powers conferred upon the Supreme Court by this section, and application may be made to a Magistrate’s Court accordingly, in any case where the value of the piece of land encroached upon (without the buildings thereon) does not exceed the amount to which the jurisdiction of the Magistrate’s Court is limited in civil cases, and in any case where a Magistrate’s Court would have jurisdiction in accordance with section thirty-seven of the Magistrates’ Courts Act 1947: 5 10

“Provided that a party intending to invoke the powers given to a Magistrate’s Court by this subsection shall, except in any case where the Court derives its jurisdiction under that section, give notice of his intention to all other parties before the hearing, and in all cases any party shall be entitled as of right to have the action or proceeding or application transferred to the Supreme Court, or to appeal to the Supreme Court against any order purporting to be made by the Magistrate’s Court under this section. 15

“(7) Every order vesting any estate or interest in any person under this section shall for the purposes of the Stamp Duties Act 1954 be deemed to be a conveyance, and shall be liable to stamp duty accordingly. 20

“(8) Any order under this section may be registered as an instrument under the Land Transfer Act 1952 or, as the case may require, the Deeds Registration Act 1908.” 25