

15 December 1971

PROPERTY LAW & EQUITY REFORM COMMITTEE

REFORM OF THE LAND TRANSFER ACT 1952

WORKING PAPER NO. 2

COMPENSATION

I. INTRODUCTION

The Committee has been directed by the Minister of Justice to consider the implications of the advice of the Privy Council in Frazer v. Walker [1967] 1 A.C. 569; [1967] N.Z.L.R. 1069. In the Committee's view this study involves the consideration of three basic questions:

- (1) Is the law in relation to the registration of forged and other void instruments satisfactory as it now stands?
- (2) Are the compensation provisions of the Land Transfer Act 1952 (referred to in this paper as "the Act") adequate?
- (3) Are the Registrar's powers of correction defined in the Act with sufficient clarity?

The Committee considered the first question in Working Paper No. 1 published on 1 March 1971. This present paper is concerned with the second question, and the Committee may issue a third paper in due course dealing with the Registrar's powers of correction and other related matters.

II. SUMMARY OF FIRST WORKING PAPER

In Working Paper No. 1 the Committee was primarily concerned to set out and examine critically the competing principles of immediate indefeasibility and deferred indefeasibility with a view to recommending either the retention of the former or the

adoption of the latter. The Committee stated that it was divided on the intrinsic merit of the two alternatives, but that, in accordance with the principle of law reform that there must be a compelling reason for changing an established rule of law, it had reached the tentative conclusion that the present law as expounded in Frazer v. Walker did not call for any alteration. Comments and suggestions were invited on this basis.

III. SUMMARY OF SUBMISSIONS RECEIVED ON WORKING PAPER NO. 1

The Committee has received 13 submissions on its first working paper, and is grateful to all those persons who made them.

Most of the submissions favoured the retention of the principle of immediate indefeasibility, and those who prefer the principle of deferred indefeasibility recognise that no great hardship would arise from the retention of immediate indefeasibility, provided adequate provision is made for proper compensation of dispossessed owners.

IV. THE COMMITTEE'S CONCLUSION

After a careful consideration of all the comments sent to it, the Committee is of the opinion that no compelling case has been established for changing the law relating to indefeasibility of title as stated in Frazer v. Walker. It proposes to recommend accordingly.

V. COMPENSATION GENERALLY

The Committee has considered the provisions in the Act relating to compensation on the assumption that the principle of immediate indefeasibility should be retained.

The Committee is unanimously of the opinion that the present provisions relating to compensation need reconsideration. In deciding what amendments are desirable it has considered the matters referred to in the following paragraphs.

VI. DATE AT WHICH THE PROPERTY SHOULD BE VALUED

The Committee considered three possibilities:

- (1) the date at which the deprivation occurred, i.e. the date on which the instrument which deprived the dispossessed owner of his estate or interest was registered;
- (2) the date on which the dispossessed owner became aware of the deprivation; or
- (3) the date on which the dispossessed owner ought reasonably to have become aware of the deprivation.

The second possibility was rejected by the Committee because it does not provide for the case where the dispossessed owner ought reasonably to have become aware of the deprivation at an earlier date. It would be contrary to the principles of equity to allow an owner to gain some advantage merely by biding his time.

The third possibility has considerable appeal in that it would meet the case of the owner who delayed in bringing his claim. However, in the Committee's opinion the difficult questions of fact inherent in this approach outweigh any advantage it may have.

Accordingly, as at present advised, the Committee favours the first possibility, although it recognises that this may lead to hard cases where there has been a subsequent substantial increase in value, for example, as a result of rezoning. While accepting that such cases may arise, the Committee nevertheless feels that this approach is the simplest and most logical, and will allow, in the vast majority of cases, an adequate award of compensation.

VII. THE QUANTUM OF COMPENSATION

On the basis that the property is to be valued at the date of the deprivation the Committee suggests that the amount of compensation payable should be a lump sum calculated by adding to the value of the property at the date of the deprivation interest thereon at the rate of 5 per centum from that date to the date of the award.

VIII. INTEREST ON COMPENSATION

The Committee considers that the dispossessed owner should be entitled to a reasonable rate of interest from the date of the award to the date of actual payment.

IX. THE EFFECT OF NEGLIGENCE

The Committee notes that at present an award of compensation under the Act may be reduced if the person entitled to it contributed to his loss by his own negligence. The Committee's tentative view is that this principle of contributory negligence should be retained.

X. RIGHTS OF RECOURPMENT BY THE CROWN

Allied to the question of contributory negligence is the suggestion that where the loss complained of is due wholly or partly to any act or omission by any person (for example, a solicitor) the Crown should have the right to recoup the whole or any part of the compensation paid from that person. The Committee's present view is that the Crown should be so entitled.

XI. SUMMARY

1. The Committee proposes to recommend the retention of the principle of immediate indefeasibility.
2. The Committee considers that the compensation provisions of the Act should be amended to provide adequate compensation for a dispossessed owner along the lines set out in paragraphs VI and VII of this paper.

3. The Committee suggests that the principle of contributory negligence should be retained, and that the Crown should have a right of recoupment against any person whose act or default contributed to the loss complained of.

XII. A FURTHER SUGGESTION

In paragraph 5 of Working Paper No. 1 the Committee put forward the suggestion that the Supreme Court could be given a discretion, in cases where any void instrument has been registered, either to order that the former registered proprietor's name should be restored to the register, or to declare that the title of the person who registered the void instrument is indefeasible. It was contemplated that such a discretion would only be exercisable where no further transaction had taken place, that is, where the protection afforded by s.183 of the Act had not been obtained.

It was suggested that detailed statutory guidelines could be enacted setting out the matters which should be taken into account by the Court, e.g. whether either of the parties had been negligent; whether the land was vacant, or had a house on it; the length of time that the party who registered the void instrument had been in possession; relative hardship, and so on.

The Committee recognises that, if implemented, this proposal would introduce a degree of uncertainty into the question of title which may not be desirable. Nevertheless, it would provide a measure of flexibility which might assist in a more equitable solution of the sort of hard case of which Frazer v. Walker itself is an example.

The Committee particularly invites comments on this idea.

XIII. ACKNOWLEDGMENT

The Committee wishes to record its thanks to Professor D.J. Whalan of the University of Queensland who kindly attended its meeting at which the matters referred to in this paper were first discussed. However, it points out that the views expressed in this paper are those of the Committee and do not necessarily coincide with Professor Whalan's.

XIV. SUBMISSIONS

The views put forward in this working paper are tentative only, and the Committee would be grateful for any suggestions or constructive criticisms. It requests that submissions be sent to:

The Secretary,
Property Law & Equity Reform Committee,
Private Bag 1,
Government Buildings,
Wellington,

on or before 31 March 1972.
