

PROPERTY LAW AND EQUITY REFORM COMMITTEE

REFORM OF THE LAND TRANSFER ACT 1952

WORKING PAPER NO. 3

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/ NZLR 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 1972, and we set out our conclusions, in Working Paper No. 2. In that paper we also set out our tentative views on the question of compensation, and it is largely with this question that we are again concerned in this paper.

II. SUMMARY OF OUR VIEWS ON INDEFEASIBILITY

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, and we invited comments on this basis.

We received 13 submissions, and after giving them all careful consideration we came to the conclusion that no compelling case had been established for changing the law relating to indefeasibility of title. It remains our intention to recommend accordingly.

III. SUMMARY OF WORKING PAPER NO. 2

In Working Paper No. 2 the Committee set out as its basic premise the view that the present provisions relating to compensation are in need of reconsideration, and we suggested that in deciding what amendments are desirable the following matters should be studied:

- (a) the date at which the property should be valued;
- (b) the quantum of compensation to be awarded;
- (c) whether interest on that amount should be payable;
- (d) whether compensation should be reduced where contributory negligence is established;
- (e) whether the Crown should have a right of recoupment against the person causing the loss.

In Working Paper No. 2 we set out our tentative views on these matters and invited comments. We now propose to discuss them in more detail.

IV. PAYMENT OF COMPENSATION

Before discussing these detailed matters, however, we should record our view that it is generally undesirable for the assessment of compensation to be determined by the Court in every case. In our view

it would be preferable wherever possible to provide for payment of compensation to be made by the Registrar-General of Land without recourse to the Court. However, unless the Registrar-General is to forsake his administrative role for a judicial one, which we do not recommend, such an approach would require a clear and simple method of calculating the amount of compensation to be paid in any particular case. There must, in short, be no room for argument.

We are of opinion that such a scheme is feasible and we summarise what we have in mind in paragraph X infra.

V. AN ALTERNATIVE APPROACH

An alternative approach was advocated in a number of submissions. It was suggested that instead of laying down a specific formula in the Act, the Court should be given a general discretion to award such compensation as it sees fit in any particular case.

The Public Trustee, who supported this approach, suggested that in determining what compensation should be paid the Court should be required to have regard to the following matters:

- (a) The date at which deprivation occurred;
- (b) The circumstances in which deprivation occurred;
- (c) The date on which the dispossessed owner became, or ought reasonably to have become, aware of the deprivation;
- (d) The value, at each of the dates in (a) and (c) of the land, and of all buildings and other improvements effected thereon by the dispossessed owner, his predecessors in title, and their respective servants, agents, lessees and licensees;
- (e) The conduct of the dispossessed owner and in particular any delay, failure, neglect or omission on his part in the

exercise of his rights or remedies after the date of deprivation;

- (f) Such other facts or circumstances as may appear to the Court to be relevant.

We think this approach has much to recommend it if all questions of compensation are to be determined by the Court. It would, however, be undesirable if awards of compensation are to be assessed, at least in the first instance, by the Registrar-General.

VI. DATE AT WHICH PROPERTY SHOULD BE VALUED

In Working Paper No. 2 the Committee set out 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.

We rejected the second possibility 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. We expressed the view that it would be contrary to the principles of equity to allow an owner to gain some advantage merely by biding his time. We recognised that this objection would be met by the third possibility, but we finally rejected this approach because of the difficult questions of fact inherent in it.

In some of the submissions made to us the point was made - and we concede its validity - that "difficult questions of fact" should not prevent justice being done, and that the Courts are daily concerned with the solution of such questions with the end of achieving justice in view. We agree that if the quantum of compensation is to be determined by the Court our objection to the third possibility falls to the ground, but as we have already stated we do not consider that an application to the Court is generally desirable.

The Committee, therefore, reaffirms its original view that the relevant date should be the date of deprivation.

VII. INTEREST ON COMPENSATION

Those who wrote to us were in general agreement that the dispossessed owner should be entitled to a reasonable rate of interest down to the date of actual payment.

The Committee sees this interest as compensation for loss of enjoyment of the property, and it should therefore be payable from the date of deprivation. Looked at in this light it is axiomatic that moneys actually received in respect of the property after the date of the deprivation should be brought into account and set against the amount of interest to be paid.

We also consider that interest should be taxable in the year of receipt: this will discourage a person who discovers the deprivation from sitting on his remedies and allowing interest to accrue at the Crown's expense.

VIII. THE EFFECT OF NEGLIGENCE

Our original view, set out in paragraph IX of Working Paper No. 2, was that the principle of contributory negligence should be retained, and this found support in the submissions we received. However, after reconsideration we have changed our opinion. It is, after all, the

operation of the Act that causes the dispossessed owner to lose his property, and but for the doctrine of indefeasibility no degree of negligence would result in this loss. Moreover, to allow the Crown to advance a claim of contributory negligence would be to require recourse to the Court, with the resulting uncertainty which we are endeavouring to remove.

We have therefore concluded that contributory negligence should not operate to reduce a claim for compensation.

IX. RIGHT OF RECOUPMENT BY THE CROWN

The Committee affirms its tentative view that the Crown should have the right to recoup the whole or part of the compensation actually paid from a person (other than the dispossessed owner) who was wholly or partially responsible for the loss.

X. THE COMMITTEE'S PROPOSAL

As stated above, the Committee considers that as a general rule compensation should be payable by the Registrar-General of Lands without recourse to the Courts. Nevertheless, we recognise that a fixed formula for calculating compensation could cause injustice in a particular case.

We therefore propose a two-tiered approach:

- (1) In any case where the Registrar-General is satisfied that a deprivation within the scope of the Act has occurred, he should be required to offer compensation as follows:
 - (a) a sum equal to the value of the property at the time of the deprivation; and
 - (b) interest at the rate of 5% on that sum from the date of deprivation to the date of actual payment, less any sums received by the dispossessed owner in respect of the property after the date of deprivation.

NOTE: The sole question to be determined by the Registrar-General would be whether a deprivation had occurred. He would not be concerned with considerations of fault, or other matters. The compensation payable would be determined in accordance with (a) and (b) and would not be negotiable.

- (2) In any case where the dispossessed owner considers that, by reason of some special circumstances, compensation in accordance with (1) above would be inadequate to fully compensate him for the loss he has suffered, he should have the right to apply to the Court for a greater award. But where such a claim is made the Crown should have the right to appear and be heard.

NOTE: In cases before the Court it would seem to be desirable to give the Court a wide discretion, but the guidelines set out in paragraph V, supra, would be helpful. To discourage "gold-digging" applications to the Court the Court should be expressly empowered to award less than the applicant would have received had he accepted the Registrar-General's offer.

It seems to the Committee that this dual approach would provide for certainty, cheapness, and administrative simplicity in the majority of cases, while at the same time providing for the genuine hard case.

XI. THE REGISTRAR'S POWERS OF CORRECTION

The relevant sections of the Land Transfer Act 1952 dealing with the Registrar's powers of correction are ss. 80, 81 and 85. Section 80 provides as follows:

"80. Errors in register may be corrected - 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.

As the Privy Council said in Frazer v. Walker (at p.1076) "Section 80 is little more than a 'slip' section and not of substantive importance ..." Its effect appears to be merely to enable the Registrar

to correct clerical errors and the like occurring in the Registry Office. It does not appear to give rise to any difficulty and no change in this section is recommended.

Section 85 provides as follows:

"85. Court may order former certificate of title to be cancelled - Upon the recovery of any land, estate, or interest by any proceeding in any Court from the person registered as proprietor thereof, the Court may, in any case in which such a proceeding is not expressly barred, direct the Registrar to cancel any certificate of title or other instrument, or any entry or memorial in the register relating to the land, and to substitute such certificate of title or entry as the circumstances of the case require, and the Registrar shall give effect to the order accordingly."

This section enables the Court, on the determination of proceedings affecting an estate or interest in land, to give the Registrar appropriate directions to amend the register and directs the Registrar to make the amendments accordingly. As the Privy Council pointed out in Frazer v. Walker (at p.1076), "... the power of the court is circumscribed in such a way that the effect of the section is that the power of the court to cancel or correct does not extend beyond those cases in which adverse claims against the registered proprietor are admitted by the Act". The power that is, arises when the court makes a finding in favour of a party against the registered proprietor in one or other of the cases in which exceptions to indefeasibility are admitted. This section does not, in the Committee's view, create any particular difficulty or uncertainty and no change in its terms is recommended.

Section 81 provides as follows:

"81. Surrender of instrument obtained through fraud, etc.. - 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."

On the face of it this section gives what the Privy Council described as "significant and extensive" powers to the Registrar, these powers not being limited to exceptions to indefeasibility provided for in ss. 62 and 63 of the Act. This has made it possible for a commentator to suggest that the powers of the Registrar appear to be more extensive than those of the court (see McMorland 1968 NZLJ 140) though it seems very unlikely that this was the intention of the Act. The section moreover, appears to give the Registrar the power to determine not merely cases of misdescription of land or boundaries or errors in entries in the register, but also cases involving fraud. The Registrar however, is not equipped to determine alleged or disputed cases of fraud and in practice would not undertake to make determinations of fact or law in such cases.

On the basis that questions involving fraud or other exceptions to indefeasibility would, and should, be dealt with by the court, the apparent vesting in the Registrar by s.81 of power to correct on the basis of fraud should, in the Committee's view, be removed. The two main reasons are that (1) the Registrar is not equipped to determine issues involving fraud or wrong doing, and (2) in practice no Registrar would attempt to act in such a situation without the facts having been determined by the court. Such determination by the court would be within its powers as expressed in s.85. Under that section, as has been pointed out above, the court may give the Registrar appropriate directions as to correcting the register and the only additional power which appears to be necessary to give effect to an order of the court is the power for the Registrar to call in certificates of title or other documents to enable them to be amended. It may well be, indeed, that the original intention of s.81 was no more than to give the Registrar appropriate powers to carry an order of the court into effect. Whether or not that was the original intention, the Committee considers that s.81 should be amended to make it clear that this is its sole effect. This could be done by amending the section as follows:

"81. Surrender of instrument obtained through fraud, etc. - The Registrar may require any person to whom any grant, certificate, or other instrument has been issued, or by whom it has been retained, to deliver up the same for the purpose of being cancelled or corrected, as the case may require, in any case where -

- (a) It appears to his satisfaction that the grant, certificate of title, or instrument has been issued in error, or contains any misdescription of land or boundaries, or that any entry or endorsement thereon has been made in error; or
- (b) The Court has determined that the grant, certificate, instrument, entry, or endorsement has been fraudulently or wrongfully obtained, or is fraudulently or wrongfully retained.

The effect of such a change would be: (1) that the Registrar would have the power to correct clerical errors under s.80 and, (2) there would be appropriate machinery to give effect to any judgment of the court involving a modification of the register or entries in it. The proposed amendment would, in the Committee's view, clarify the present doubts concerning the Registrar's powers while at the same time endorsing what is the present practice of Registrars throughout New Zealand in refusing to exercise the apparently wide powers under s.81 in any doubtful case.

XII.. SUBMISSIONS

The Committee would be grateful for any comments on the proposal put forward in paragraph X of this paper. It requests that these be sent to:

The Secretary,
Property Law & Equity Reform Committee,
Wellington District Land Registry,
Private Bag,
Lambton Quay,
Wellington

on or before 28 November 1975.