

**THE DECISION IN BRADLEY v. ATTORNEY-GENERAL OF NEW ZEALAND
AND OTHERS [1978] 1 NZLR 36**

**Report of the Property Law
and Equity Reform Committee**

**Presented to the Minister of Justice
September 1980**

PROPERTY LAW AND EQUITY REFORM COMMITTEE

REPORT ON THE DECISION BRADLEY V. ATTORNEY-GENERAL OF NEW ZEALAND AND OTHERS
[1978] 1 N.Z.L.R. 36

TO: The Minister of Justice

PRELIMINARY

1. FOLLOWING the decision Bradley v. Attorney-General of New Zealand and Others now reported at [1978] 1 N.Z.L.R. 36 you requested the Committee to review the law and practice as highlighted in that case and to recommend any change in law thought desirable. The Committee then prepared and issued a working paper to which it received 58 submissions and replies.

FACTS

2. IN Bradley's case a firm of solicitors was held to be negligent and liable to make good to its client the loss he sustained because the firm had failed to discover when searching the certificate of title to the land in the Land Registry Office prior to settlement that a mortgage had been lodged in the Land Registry Office for registration and did not take the mortgage into account when settling the purchase of the property on behalf of the client which had, by that time, become subject to the registered mortgage. The risk of such an occurrence is always present because of the time which elapses between the receipt of a document in a Land Registry Office and an appropriate memorial being entered upon the certificate of title to the land affected. At the time of the events which gave rise to Bradley's case such delays could in some Land Registry Offices amount to a period of weeks but this period has since been reduced to a matter of days by the adoption of more efficient procedures for registration and a less burdensome volume of transactions being registered.

3. IN addition to the risk of loss in such cases, there is the further risk of loss during the subsequent period which elapses between settlement and registration.

4. TRANSACTIONS such as transfers and mortgages can usually only be registered if the registered proprietor's copy of the certificate of title is

produced to the Land Registry Office. In this type of transaction the registered proprietor or other person e.g. mortgagee holding his copy of the title can control the registration and there is comparatively little risk of loss. Other instruments, however, such as caveats, liens, notices under the Matrimonial Property Act 1976 and statutory land charges can be registered without production of the registered proprietor's copy of the certificate of title. It is in this area that there is a greater risk of loss occurring by reason of such an instrument being entered on the certificate of title in the Land Registry Office before the person acting in reliance on his holding the proprietor's copy of the title and/or his knowledge of the condition of the title resulting from a search made at the Land Registry Office can have the instrument giving effect to his transaction registered in the Land Registry Office.

ALTERNATIVE SOLUTIONS INITIALLY PROPOSED

5. IN its working paper the Committee proposed four alternative plans which might be adopted to protect an innocent purchaser mortgagee or lessee from loss and sought submissions in respect thereof. (Hereafter a reference to a purchaser is intended to refer also to a mortgagee, lessee or other person seeking to obtain a legal estate or interest in the land.) Briefly, the four plans were as follows:

(a) Plan A

This plan proposed the adoption in New Zealand of a system of priority notices similar to that used in a number of countries overseas. The solicitor for a purchaser desiring protection against possible registration of adverse documents would apply for a Priority Order from the Registrar that would give the purchaser absolute priority of registration for, say, 30 days.

(b) Plan B

This plan requires the State to take the responsibility for the "gaps" in the land registration system and to give an automatic insurance indemnity to every purchaser who suffers loss from an adverse dealing that was not disclosed by the purchaser's search of the title if made within 7 days before settlement. The period of protection would run

from the date of the search through to registration. The Plan would give the state a right of indemnity or contribution by subrogation if other persons e.g. the purchaser's solicitor were negligent and had caused or contributed to the loss.

(c) Plan C

This plan is based on the premise that the main risk of loss to an innocent purchaser comes from caveats etc. which can be entered on the certificate of title without the production of the proprietor's duplicate copy. The plan proposes that a purchaser's search would give automatic priority over any such hostile instruments not shown in the search provided that the settlement takes place within 7 days of the search.

(d) Plan D

This plan was proposed by the New Zealand Law Society and envisaged that a check search would be made immediately before settlement and registration would have to be effected within a limited number of days after settlement. If subsequent registration of the instrument giving effect to the transaction settled in reliance on the search were prevented by some hostile instrument having been lodged after the check search, the transaction for which the check search was obtained would take precedence over the hostile instrument. The party claiming under the hostile instrument could pursue other remedies available to him and to the extent that these might fail would be entitled to be compensated under the existing compensation provisions of the Land Transfer Act.

SUBMISSIONS RECEIVED

6. MANY of the submissions received were lengthy and did not state a clear preference for a particular solution to the acknowledged problem, so that it is difficult to give an exact summary but the following gives the general effect of the submissions.

Substantially in favour of one of the four plans:

Plan A	5
Plan B	21
Plan C	3
Plan D	7
No preference or not in favour of any change	6
Alternative suggestions in complete or partial individual proposals	16

—
58
—

The most favoured solution is Plan B (with modifications). For convenience the essence of Plan B is repeated as follows:

ALTERNATIVE SOLUTION PREFERRED

7. PLAN B requires the State to take responsibility for the "gaps" in the Registry System and to give an automatic indemnity to every purchaser for value (including mortgagee, lessee, etc.) who suffers loss from an adverse claim not registered on the title and which was not disclosed by the purchaser's search of the title if made within a limited period before settlement. The period of protection would run from the date of the search through to registration. The Plan would give the State a right of indemnity or contribution by subrogation against any person whose negligence caused or contributed to the loss e.g. the purchaser's solicitor where he was negligent in making the search or in conducting the settlement and registration.

UNSATISFACTORY FEATURES OF ALTERNATIVE SOLUTIONS

8. THE main reasons for rejecting Plans A, C and D were as follows:

Plan A Priority Notices - This system would be effective but would involve a disproportionate increase in the volume of work in the Land Registry Offices as well as for solicitors. The additional cost involved in operating the priority notices system (both within the Land Registry offices and within legal offices - at the expense of the citizen purchaser) would be excessive for the rare case when loss in fact occurred.

Plan C Deferring Caveats, Liens Etc. - This is a more complicated system which could provoke difficulties in practice and would necessitate interference with Land Transfer principles and with the rights of caveators and lienholders which would not always be justifiable.

Plan D Preferential Registration - This system would, in practice carry the disadvantages of Plans A and C.

OTHER SUGGESTED SOLUTIONS NOT FAVOURED

9. IN the submissions and replies received by the Committee there were also many other suggestions which are now analysed briefly, with the reasons for rejecting them:

- (a) A Computerised Searching and Registration System - This would involve considerable initial expense to install and far reaching changes in practice. Such a system may come in future and would be capable of speeding the processes within the Registries. However, no computerised system within the Registries would solve the unavoidable delays outside the Registry offices i.e. between initial search and actual settlement and between settlement and presentation of the instruments for registration. These inevitable periods of delay are the vulnerable periods against which protection for innocent citizens dealing with land under a compulsory state-guaranteed system of title must be given.
- (b) Speeding Up or Elimination of Inland Revenue Stamping Processes - These changes would be desirable and the possibility of implementing them can be kept under review. However their implementation would involve major practical changes and possible Inland Revenue Department opposition. At best these changes would merely reduce but never eliminate the "gaps" (potentially no less dangerous even if smaller than at present) between settlement and registration.
- (c) Altered Registration Procedure for Caveats etc. - The intention is to have caveats etc. noted on the title more quickly. This change would be desirable as a means of improving efficiency of searching but would provide no remedy to protect against losses occurring by lodging of hostile instruments during the vital gap after settlement.

- (d) Hamilton District Law Society - The Hamilton District Law Society suggested a plan involving a guaranteed search note being sought from the District Land Registrar by an intending purchaser and its issue would be entered on the title and "freeze" it against caveats etc, for 28 days to safeguard registration of purchaser's transfer. This is really a modification of Plan A (priority notices) and other plans and is open to similar objections. In addition, the physical noting of every guaranteed search note issued would be a major burden to Land Registry Office staff and add greatly to the number of memorials entered on the certificate of title itself.
- (e) Another New Zealand Law Society Plan - Was suggested. This involved coloured bags for registration of caveats etc. to speed entry on titles, also proposed postponement in priority of matrimonial property notices, and streamlining of Inland Revenue Department stamping procedures. The Committee accepts these as being important suggestions but believes that their adoption would in practice involve considerable additional work complication and difficulty and would never be completely effective as a solution to the problem. On balance this "package" of suggestions is considered inferior to the much simpler Plan B.

CRITICISMS OF PLAN B

10. PLAN B was subjected to various criticisms:

- (a) This solution is not a real cure and is only shutting the door after the horse has bolted. The Committee accepts this criticism but points out that the only "real cure" in these terms is to abolish all registration or noting of instruments except on production of the registered proprietor's copy of the Certificate of Title. This would abolish all caveats, liens, statutory land charges, matrimonial property notices, charging orders etc. The Committee believes that this price is far too high and remains convinced that Plan B is the best solution to the problems created by the conflicting interests.
- (b) Monetary compensation is not proper recompense to a disappointed purchaser. This criticism reflects a widespread misunderstanding of Plan B. The purchaser would be able to apply the money received under the indemnity to satisfy claimants under charges such as caveats or

liens and have the title freed from such claims. It is only where the adverse claim is to the land itself that the disappointed purchaser may have to be satisfied with monetary compensation e.g. where the hostile instrument is a notice under the Matrimonial Property Act 1976.

- (c) There is a problem in fixing satisfactory time limits for the indemnity to be available particularly with country farms and farming settlements.
- (d) There is a problem in fixing the upper limit (if any) of the amount of the indemnity

These last two criticisms will be dealt with more fully as an improved version of Plan B incorporating the many helpful and constructive suggestions contained in the replies which the Committee received, is set out.

IMPROVED PLAN B

11. THE solution to the problem highlighted in Bradley's case must be simple, not making excessive work for the Land Registry Officers or the legal profession (else the added cost to the public would be disproportionate for the benefit received) and should not necessitate major changes to existing conveyancing procedures. It is designed to cover a risk of perhaps one or two cases in a million.

12. AS already mentioned, Plan B does not freeze the title or prevent registration of adverse claims but merely requires the State to give protection against the rare risks which under the present state of the law and of conveyancing procedures it is almost impossible for a reasonably careful solicitor to avoid. This raises the difficult question of what is reasonable care. Without wishing to decide that question the Committee has decided that for the purposes of this Plan the parameters should be defined in the following two respects.

- (a) The guarantee is based on the purchaser searching the title to confirm it is clear of adverse interests not more than 7 days before settlement. The pre-settlement search (or check search) is a vital step in careful conveyancing at present and reveals adverse interests then entered on the title. If the solicitor for the purchaser neglects to check-search

the title he runs the risk of his client being unprotected against such interests. The guaranteed search note will protect the client only against those adverse interests that could not be discovered, despite the exercise of reasonable care, namely those adverse interests entered on the title after the date when it would be reasonable to expect the purchaser to have checked the title prior to settlement.

In strictness a search should be made within a day or two of the settlement, but to cover unavoidable delays, especially in the case of country solicitors, it was considered fair to extend the period to 7 days before settlement. If settlement is delayed, successive check searches can be made in the knowledge that if any adverse interest arises between the date of the last search and settlement the State will guarantee the condition of the title, provided the last search is made within 7 days of settlement.

- (b) The solicitor, after settlement must attend efficiently to stamping and other steps necessary before registration. The State protection is to continue until registration is complete but in any case shall not continue for more than two months from the date of settlement unless there are special reasons that justify a longer period being allowed. Again a time limit is suggested which is longer than often required in simple transactions, but less than required in cases where there is difficulty or unavoidable delay in stamping or other incidental steps. This is especially so with country settlements.

EXTENSION OF TWO MONTHS TIME LIMIT

13. IT is also important to note that these are prima facie statutory parameters within which the indemnity system will operate to protect the client. It is not a statutory definition of reasonable diligence for a solicitor. A solicitor may comply with the 7-day and 2-month time periods for the check-search and registration of the instruments but he may still be negligent in taking so long. The result will be that the client will receive automatically the benefit of the indemnity based upon the pre-settlement check search note but the state would be entitled to claim by subrogation in the client's shoes against the solicitor for indemnity or contribution on the ground of the solicitor's negligence in failing to exercise all proper professional skill and care and that this negligence had led or contributed to the loss. In this way the State is

able to recover so far as the loss is wholly or partially the fault of a negligent solicitor and must itself bear the loss only when or so far as there has been no negligence by a solicitor so that the loss is caused by "the system". As the State provides the Land Registration system and compels all citizens to use it, the Committee considers that the State should indemnify innocent citizens who suffer loss as a result of the workings of the system where there has been no negligence.

14. THE purpose of the plan is to protect the individual purchaser etc., i.e. the client and not the solicitor. Therefore the proposed time limit of two months may be too strict in certain exceptional cases where delays are due to the requirements of the Stamp and Cheque Duties Act or the Land Transfer Act or to special difficulties in completing a settlement. The Committee therefore proposes that in deciding any disputed claim under the guarantee the Court may extend this time limit if it thinks it fair and reasonable to do so in order to give the purchaser the protection which he should be able to expect from a thoroughly efficient registration system. Instead of leaving the purchaser with the perhaps difficult task of persuading the Court to grant an extension of time in advance, we think that protection should be automatic against any adverse dealing that appears on the title within two months after the date of settlement. If registration cannot be completed by that date the purchaser need not do anything further except continue to registration and if in the interim an adverse interest has arisen he should lodge a claim. It will be for the Court to decide whether or not the facts of the particular case justify the extension of the protection of the scheme to include it. This would, it is considered, give added protection in those few exceptional cases of unavoidable delay. It is expected that adverse claims will crop up within a very short period after settlement when an estranged spouse or creditors or others with adverse claims learn that the property has been sold and that they must act promptly to enforce their claims.

15. ONE difficulty that arises is with the new registration practice of rejecting documents for the slightest error instead of the earlier practice of issuing a requisition and leaving the document (retaining its priority) in the Registry Office. An alteration of the Registry practice is not suggested but it is considered that if a purchaser presents his document for registration and if it is rejected by the Registrar for some comparatively slight error, the State guarantee should still apply and the purchaser should be entitled to his compensation if the Court on inspecting the document holds that it is substantially in

registrable form and that the error, although requiring it to be rejected by Registry regulations, does not really affect the equitable effect of the document. We stress again that this procedure is not to obtain a concession from the State but to provide a protection to compensate for the admitted gaps and weaknesses inherent in the State-operated compulsory registration system.

STATE'S RIGHT OF SUBROGATION

16. IN addition to the State protection under the search note guarantee, the purchaser will still have redress against the solicitor if the latter has been negligent in the transaction (either in respect of time limits or otherwise). Alternatively if the State pays out under the guarantee it is subrogated against the solicitor in respect of the money paid to the client. (This is precisely the same principle as already applies to payments made out of the Consolidated Revenue account under Part XI of the Land Transfer Act where the loss for which compensation is paid was caused by the fraud of any person bringing land under the Act. Section 175 of the Land Transfer Act gives the Crown a right of recovery as against any such fraudulent person.)

17. THE RESULT will be that every solicitor in a conveyancing transaction would know that if he did a search within 7 days of settlement, to satisfy himself that there are no adverse interests, and proceeds to registration within two months after settlement his client would be reimbursed by the State for any loss the client suffered by the appearance of an adverse or hostile document not shown on the guaranteed search note and that prima facie the State would not have a right of subrogation against the solicitor unless it could positively prove negligence by him. Normally, adverse claims of this type are money claims, and the guarantee payment would discharge the claim and leave the purchaser with the property he intended to buy so that in most cases the result would be more than a cash guarantee but would really be a guarantee of title. It would be very unusual for the adverse claim to be for an ownership interest in the property, but in such cases the purchaser would get compensation for his loss if he did not get the property itself and had not recovered the money he had paid.

SETTLEMENT

18. IT is clear that, if Plan B be adopted, it will become necessary in any claim to ascertain the exact date of settlement and the Committee has been

pressed in some of the replies to furnish a definition of "settlement". Normally with a transaction completed by payment between two legal firms, settlement is the process of paying the price and receiving the title deeds and no problem would arise. But it may be more difficult to fix an exact time in the case of settlements made within one office and even more so with many farm sales settled by telegraphic transfer of funds between different towns and with delayed handing over of documents upon solicitors' undertakings, when discharges of encumbrances are received from Rural Bank etc. Although it will depend on the circumstances in every case, settlement may, for the purposes of this Report, be said to be that point when the money finally passes beyond the purchaser's control. Frequently in a protracted settlement the moneys will be held on undertakings given by the vendor's solicitor, in which case the Committee is of the opinion that the vendor's solicitor should notify the purchaser before the final disbursements so that the purchaser may check the title. However, it will be for the Court to decide according to the circumstances of any case that comes up for decision. A safeguard will be the right of the Court to extend the two month period if any doubt as to the exact date of settlement brought the case beyond the allowed period.

NO UPPER LIMIT TO INDEMNITY

19. THE Committee considered whether or not there should be an upper limit to the amount which could be claimed under the scheme and decided against such a limit. Although the Committee accepted that in large settlements precautions can be taken to safeguard against the "gaps" such as registering a caveat or pre-stamping the documents, it would be wrong in principle to make a distinction between different transactions on this ground. Any imposed limit would also lead to practical problems during inflationary periods.

RESTATEMENT OF PLAN B INCORPORATING MODIFICATIONS

20. THE foregoing elaboration of Plan B may seem complicated and it appears from the replies the Committee received that some respondents had difficulty in envisaging the working of the Plan. Therefore the revised Plan B is restated in different words to show its rationale and practical effect.

21. A registration system such as ours, which promises a State guarantee of title, should as an incident thereto ensure that a citizen using the system (or a solicitor acting on his behalf) acting with reasonable care and competence can

with complete certainty undertake a transfer or mortgage or other dealing with a property so that the citizen from the moment of payment obtains the promised State guarantee, and that no gaps are left during the vital stages of the transaction due either to the procedures within the Registry Office, or to other compulsory Government procedures such as assessment and payment of stamp duty.

22. IF despite reasonable care, a loss occurs within the area of the "gaps" (as has happened on rare occasions - Bradley's case being one), the State should bear the loss, and this is primarily what Plan B proposes. If the loss is due to negligence either within or outside the area of the gaps, the solicitor should be responsible to his client, but the process of proving negligence can be a long and difficult one, and therefore if the loss occurs within the area of the gaps, even due to negligence, by the solicitor, the Plan goes one stage further and makes the State act as absolute guarantor, so that the client gets prompt and undisputed compensation for his loss. Then the State, if it claims that there was negligence by the solicitor, can in due course seek reimbursement from the solicitor. Finally if the loss occurs beyond the area or extended area of the "gaps" in the system the client has his normal remedy against his solicitor on proof of negligence, but no redress against the State. That is why the Committee wishes to define the seven day search period and the two months registration period as the undisputed limits (from the citizen's point of view) of the area of the State's guarantee.

PRACTICAL OPERATION OF PLAN B AS A SOLUTION

23. IN practice, once Plan B was in operation, both solicitors and Land Registry officials would perform their responsibilities just as at present (except for the making of check searches by those solicitors who have in the past failed to do this). No forms or documents need be prepared, and the State-guaranteed title search itself is a normal photostat one date-stamped by the Land Registry Office with no special formalities. If the two months registration period is overstepped, nothing need be done except wait for actual registration to discover if this is one of the extremely rare occasions which has coincided with intervening registration of a hostile instrument. If a clash with a hostile instrument does occur, the solicitor or client will approach the Registry in the first instance for compensation, and, if not made voluntarily, a Court application would be commenced to determine whether or not in this case the protection was available just as now applies to claims for compensation under Part XI of the Act.

RECOMMENDATION

24. THE Committee recommends that the Land Transfer Act 1952 be amended by incorporation of provisions which would provide an absolute indemnity by the State (to be met out of the consolidated revenue account in exactly the same way as under Part XI of the Act) for all persons dealing in good faith and for valuable consideration on the basis of search note copies of certificates of title to land issued by a Land Registry Office within 7 days next before settlement of the resultant transaction or within 2 months after the settlement with a right for the State to recover by subrogation against any solicitor or other person whose negligence caused or contributed to the loss.

25. IF you accept this recommendation in principle, the Committee will be pleased to submit draft legislation to give effect to it.


V.R.W. Gray
Chairman

Members

R.G.F. Barker
S.F. Drummond
G.W. Hinde
C.P. Hutchinson Q.C.
Warrington Taylor

APPENDIX

P.J.H. Jenkin

New Zealand Life Offices Association of New Zealand Incorporated

J.E. Lowe

C.B. Boock

New Zealand Law Society

D.A. Levett

Ministry of Works and Development

C.C. Kennelly

Hamilton District Law Society

Metropolitan Real Estate Ltd

Auckland District Law Society (incorporating 20 separate submissions from
practitioners within its area.)

Wellington District Law Society (incorporating 10 separate submissions from
practitioners within its area.)

Hawkes Bay District Law Society

R.B. Whale

S.C. Pavett

L. Florentine

Department of Lands and Survey

W.B. Greig

Hamilton District Law Society

K.O. Baines

Department of Maori Affairs

Gisborne District Law Society

Canterbury District Law Society

N.L. Manning

A. Jenkinson

Housing Corporation of New Zealand

The Perpetual Trustees Estate and Agency Company of New Zealand Limited

M.J. Miller

R.J. Mouat