

STATE GUARANTEE OF TITLE – AN UNGUIDED PATH?

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INTRODUCTION

A common feature of the Torrens system is an assurance fund to guarantee title against loss. The principles of “indefeasibility” and “guarantee” are complimentary: the former gives security against deprivation; the latter assumes the possibility of such deprivation and grants financial assistance if it occurs. Torrens commented on the theoretical basis for the inclusion of compensation provisions in the 1857 Act:¹

... as we cannot give the land to one and the improvements to another, there is no way of avoiding injustice other than that adopted in the South Australian Act, giving compensation in money to the rightful proprietor ... indefeasibility of title is a necessary corollary to the [abolition of the respective investigation of titles], and from this again follows the necessity of providing a fund whence compensation in money may be secured to the rightful heirs and others who through the operation of the law may be barred from recovering the land itself ...

In New Zealand, the Land Transfer Act 1952 provides compensation not only for deprivation of an estate or interest in land, but also for loss or damage caused by mistakes on the part of the Registrar or his or her officers. This expansion of Torrens’ original intention is currently the subject of judicial debate. The first part of this paper examines two recent New Zealand judgments which grapple with the undefined parameters of loss other than “land loss”. In the second part, questions are raised as to the lack of litigation in cases where an innocent party has suffered some form of land deprivation.

THE LAND TRANSFER ACT PROVISIONS

The fundamental provision for compensation in the Land Transfer Act 1952 is set out below:

172. Compensation for mistake or misfeasance of Registrar –

Any person –

- (a) Who sustains loss or damage through any omission, mistake, or misfeasance of any Registrar, or of any of his officers or clerks, in the execution of their respective duties; or
- (b) Who is deprived of any land, or of any estate or interest in land, through the bringing of the land under the Land Transfer Acts, or by the registration of any other person as proprietor of that land, or by any error, omission, or misdescription in any certificate of title, or in any entry or memorial in the register, or has sustained any loss or damage by the wrongful inclusion of land in any certificate as aforesaid, and who by this is barred from bringing an action for possession or other action for the recovery of land, estate or interest –

may bring an action against the Crown for recovery of damages.

¹ Torrens, *The South Australian System of Conveyancing by Registration of Title* (1859).

Procedural provisions in this Part of the Act comprise the measure of damages, the limitation of actions, notice before action, costs and the Crown's right of subrogation.² Exceptions to the Crown's liability to pay compensation are embodied in s. 178 of the Land Transfer Act 1952. In 1984, the introduction of s. 172A made available compensation for loss occurring after a search of a title but before registration. The guaranteed search scheme is now well established. Its protection is limited – it gives to any purchaser a guarantee against adverse entries in the Land Transfer journal, but does not provide a guarantee of priority over competing interests.

THE SUCCESSFUL CLAIMS: S. 172(a)

For many years, the parameters of s. 172 of the Land Transfer Act 1952 have remained uncontested.³

However, in 1995, two cases gave the Courts the opportunity to revisit some established principles. Both cases involved claims coming within s. 172(a), and both were successful. Each judgment raises important issues.

1: *Registrar-General of Land v Marshall*⁴

The Facts:

In 1915 Henare Maiho was gifted land in the Tuakau area. The land was the subject of a Maori Land Partition Order made in 1915. The order was registered in the Land Transfer Office in 1917 and later that year a title was issued in Mr Maiho's name. Part of the land was transferred in 1926 and in the same year a small amount was taken for road.

In 1938 Mr Maiho transferred the land he owned to his children. The transfer was recorded in the Maori Land Court Registry but not in the Land Transfer Office. Mr Maiho died intestate in 1948 but his estate was not administered until 1974. In the administration of the estate there was a failure to produce the transmission and subsequent transfer to the Maori Land Court. The result of several transactions was that the Land Transfer Office and the Maori Land Court had different people recorded as owners: the Land Transfer title showed a Mr Marshall (the purchaser from the estate) as the owner whereas the Maori Land Court showed the children as owners. In 1986 Marshall was refused a loan from the Department of Maori Affairs because the latter was unhappy with the title position.

Marshall took proceedings in the Maori Land Court and an order was made declaring him the owner of the land. Marshall then claimed the costs of those proceedings – \$10,064.71 – against the State on the ground they were a loss through an omission or mistake by the Registrar under s. 172(a) of the Land Transfer Act 1952.

² Sections 179, 180, 173, 174, 175-7 Land Transfer Act 1952.

³ Early twentieth century cases helped clarify both the breadth and the limitations of the section. See, for example, *Wells v Registrar-General of Lands* (1909) 29 NZLR 101; *Dempster v Richardson* (1930) 44 CLR 576; *Russell v Mueller* (1905) 25 NZLJ 256; *R v Registrar-General* (1905) 24 NZLR 946; *Lee Mong Kow v Registrar-General of Titles* (1923) 32 BCR 148; *Williams v Papworth* [1900] AC 563; *Tolley & Co Ltd v Byrne* (1902) 28 VLR 95; *Finucane v Registrar of Titles* [1902] QSR 75.

See also discussion in "The Compensation Provisions of the Act", *The New Zealand Torrens System Centennial Essays*, Hinde ed, p 143.

⁴ [1995] 2 NZLR 189.

The Decision:

In the District Court, Twaddle J held that, although Marshall had an indefeasible title under the Act, he had nonetheless sustained loss or damage within s. 172(a). The children of the estate had caused disruption on the land and the uncertainty of title had prevented him making full use of his legal ownership. Negligence was attributed to both the Registrar and to the administrator of the estate: the former for not having been alerted to the fact that the transmission and the transfer related to Maori land; the latter for not checking the Maori Land Court records, and not examining the old titles. Judgment was granted against the Registrar for 40% of the costs.

The District Land Registrar appealed against the award. He contended that, as Marshall had an indefeasible title to the land, the title did not require confirmation by the Maori Land Court.

In his dismissal of the appeal, Hammond J identified two essential issues: did s. 172(a) cover losses of this kind, and was the loss occasioned by the omission, mistake or misfeasance of the Registrar?

Hammond J clearly identified the differing nature of the two subsections of s. 172, stating that, as s. 172(b) specifically dealt with the loss or deprivation of land, s. 172(a) must be regarded as applying to other kinds of loss as well. His Honour acknowledged the decision of Edwards J in *Wells v Registrar-General of Lands*⁵ and further pointed out that such an interpretation reflected the general philosophy of the statute. It was considered inappropriate to regard any claim under s. 172(a) a “negligence claim”; rather, it should be a statutory claim to compensation within the terms of the legislation itself. The lack of uniformity in decisions concerning the interpretation of the statutory words “omission, mistake or misfeasance”, suggested to His Honour the breadth of application of s. 172(a). The words “omission” and “mistake” were held to take their natural meaning. As the issue in point was clearly an “omission”, there was no necessity to deal with the somewhat murkier meaning of the word “misfeasance”. Attention was drawn to the word “through” which clearly indicated an element of causation.

Did then, the omission of the Registrar result in a loss? Counsel for the appellant, referring to the decision of McGechan J in *Housing Corporation of New Zealand v Maori Trustee*,⁶ argued that the indefeasibility of Marshall’s title made the application to the Maori Land Court “superfluous”. The “loss” therefore was not compensatable under the statute as it was not caused by the District Land Registrar. While confirming the superiority of the Land Transfer Act over Maori Affairs legislation, Hammond J, adopting a narrower perspective, sought only to decide whether the Registrar had omitted to do something he ought lawfully to have done. The obligations owed by the District Land Registrar and the administrator had not been met. Marshall’s loss had, in part at least, been caused by the Registrar’s failure to both note that the land was clearly Maori land and give due effect to Regulation 16 of the Land Transfer Regulations 1966 (SR 1966/25). Loss had also been caused by the administrator’s failure to

⁵ (1909) 29 NZLR 101.

⁶ [1988] 2 NZLR 662.

comply with s. 164 of the Act and Regulation 17 of the Regulations. His Honour emphasized his views with the following comment:⁷

It is well-known to Registrars that Maori people, and the Maori Affairs Department make extensive use of the Maori Land Court records in considering loans, and other matters in relation to Maori. Both public and private reliance is an obvious and known factor in this particular situation. There is no policy reason I can discern ... to cause the Court to restrict liability.

In short, it was held that s. 172(a) did cover loss of this kind, and that the loss was partially caused by an omission of the Registrar. Hammond J's well-reasoned judgment and careful observations identify important contemporary issues in this area of law. This paper analyses and comments on three: the problem of two systems of registration in New Zealand, the significance of contributory negligence in a claim for compensation, and the concept of insurance.

Two Systems of Registration

To any keen observer, New Zealand accommodates two systems of registration of interests in land – one embodied in the Land Transfer Act 1952; the other in the Te Ture Whenua Maori Act 1993. Hammond J confirmed that when the two systems conflict, the Land Transfer Act must take priority.⁸

In short, on this sort of question of primacy, the Land Transfer Act trumps Maori Affairs legislation. At the end of the day, as a matter of high principle, that must be so: if there is any area of the law in which the absolute security is required – without any equivocation – it must be in the area of security of title to real property ... The Maori Land Court is an important institution in New Zealand. It is an institution to which many Maori in fact look before turning their attention to the Land Transfer Office. Maori rightly regard the Court as an important guardian of their interests. But ... there can be no equivocation on a matter of such importance as where paramountcy of title lies. To say that non-compliance with other reporting requirements can or might somehow affect indefeasibility of title is simply untenable ...

While the important Maori Appellate Court decision (*Re Pakiri R Block and Rahui Te Kuri Incorporation* 23/3/93, MAC Case Stated 1/93) was acknowledged, Hammond J refused to allow the comments of that court to undermine the strength of an indefeasible title.⁹ There are now suggestions that the Te Ture Whenua Maori Act 1993 may have changed the view that provisions for notification in the Maori Land Court exist for adminis-

⁷ [1995] 2 NZLR 189, 200-1.

⁸ [1995] 2 NZLR 189 at 198-199. Hammond J confirmed McGechan J's decision in *Housing Corporation of New Zealand v Maori Trustee* [1988] 2 NZLR 662. It was held in this case that, on its registration at the Land Transfer Office, a Housing Corporation mortgage became valid and enforceable against all parties, notwithstanding the provisions of s. 233 of the Maori Affairs Act 1953. Section 233(1) of the 1953 Act provided:

No alienation of Maori freehold land which is not by this Part of this Act required to be confirmed by the Court shall have any force or effect unless and until the instrument by which the alienation is effected has endorsed thereon a memorial that it has been produced to the Registrar and has been noted in the records of the Court.

While confirming that Marshall did indeed have a water-tight indefeasible title, Hammond J considered the essential issue in the case to be narrower.

⁹ The Maori Appellate Court stated at p 2, para 3 that:

... since the decision in *Housing Corporation of New Zealand v Maori Trustee* [1988] 2 NZLR 662, a feeling has arisen among some Judges that the Land Transfer Office has adopted a somewhat cavalier attitude towards Maori land and the protective mechanisms of the Maori Affairs Act 1953.

trative convenience but in no way affect indefeasibility of title.¹⁰ Section 126 is a new provision in the 1993 Act. It provides:

126. No registration without prior confirmation – The District Land Registrar shall not register any instrument affecting Maori land (other than an instrument not required to be confirmed or an order of the Court or of the Registrar) unless the instrument has been confirmed by the Court, or the Registrar of the Court has issued a certificate of confirmation in respect of the instrument, in accordance with the relevant provisions of Part VIII of this Act.

The apparently indestructible indefeasible title may well be undermined. If the District Land Registrar registers a transfer without confirmation, s. 81 of the Land Transfer Act 1952 could be used to correct the title. The mechanisms of the Te Ture Whenua Maori Act 1993 seem to stretch well beyond the suggestion that “every reasonable effort, in the interests of Maori should be made to ensure that the quality of information in the Maori Land Court Registry is supported.”¹¹

Contributory Negligence

Marshall’s case has confirmed the availability of the defence of contributory negligence in compensation claims. Former relevant decisions occurred before negligence became apportionable under the Contributory Negligence Act 1947.¹² While nothing in the Contributory Negligence Act 1947 appears to preclude its application to the compensation provisions of the Land Transfer Act 1952, judicial affirmation is reassuring.

The availability of this defence is not uniform in Torrens jurisdictions. In New South Wales full compensation for the loss must be given. This is confirmed in the two decisions: *Registrar-General v Behm*¹³ and *Northside Development Pty Ltd v Registrar-General*.¹⁴ In Victoria, no compensation is payable if the claimant, or his or her solicitor or agent, causes or substantially contributes to the loss by fraud, neglect or wilful default. For a claimant to be successful in a bid for compensation under s. 110 of the Transfer of Land Act 1958, he or she must prove that the loss was not caused by this type of fraud. Comment has been made on the consequent difficulties.¹⁵

The Queensland courts have, for many years, struggled with the issue of contributory negligence for compensation claims. In the new Land Title Act 1994, s. 174(1)(b) provides that a person is not entitled to compensation for deprivation, loss or damage if that person, his or her agent, or an indemnified solicitor caused or substantially contributed to the deprivation, loss or damage by fraud, neglect or wilful default.¹⁶

The defence is available in New Zealand – it should therefore be used.

10 Obiter comment in *Re Pakiri R Block and Rahui Te Kuri Incorporation* 23/3/93, MLC, 1/93; and Brooker’s *Land Law*, para 14.4.03 and 14.7.03/2.

11 Comment by Hammond J: [1995] 2 NZLR 189 at 201.

12 See, for example, *Miller v Davy* (1889) 7 NZLR 515; *Re Jackson’s Claim* (1890) 10 NZLR 148; and obiter in *Russell v Registrar-General of Land* (1906) 26 NZLR 1223.

13 [1980] 1 NSWLR 589.

14 [1987] ACLR 513; (1987) 5 ACLC 642.

15 Robin Edwards “Immediate Indefeasibility and Forgery: Is it what we really want?” *Law Institute Journal*, vol 67, No 8, August 1993.

16 For prior research, see Queensland Law Reform Commission, *Consolidation of Real Property Acts*, Report No 40, March 1991. See also P Butt “A new era in Torrens title in Queensland — the Land Title Act 1994” (1994) ALJ 675.

The Concept of Insurance

Prior to *Marshall v Registrar-General of Land*, the administration of our Land Transfer system has escaped accountability. Claims by the Registrar-General that “public confidence in the land titles system depends on the standards achieved in keeping the record” and that the officials who administer the Land Transfer Act have been “meticulous”¹⁷ indicate stringent control. Do they, however, reflect current business trends? One of the public policy reasons for the compensation provision is the concept of insurance; the other, efficiency in public administration. The correlation of both concepts is important and can be achieved through an effective risk management policy. Hammond J cites Mapp’s simple theory:¹⁸

If the Registrar knows that an insurance fund is available and will be utilized on sound insurance principles, he can tailor protective requirements to meet only risks of sufficient frequency to justify them.

Statistical analyses in various Torrens jurisdictions suggest that Land Registry offices return substantial profits.¹⁹

In its 1989 Report,²⁰ the New South Wales Law Reform Commission addressed the issue. It referred to the findings of a management consultant who reviewed the operations of the assurance fund in Victoria:²¹

He regarded it as paradoxical that while most of the work in the Titles Office was directed towards maintaining the integrity of the Register Book and minimising claims against the assurance fund, recent statistics showed that the overwhelming proportion of successful claims resulted from errors in the processing system itself, and not from deficiencies in registered titles. The Office subjects documents to intense scrutiny at a high cost both to the office itself and to the users of the system. It was doubtful ... that these costs resulting from a system designed to protect the fund were greatly outweighed by the costs of meeting claims caused by deficiencies in the Register ... Mr Tauber made the general observation that in striving for “administrative perfection” the Office was allocating resources to one aspiration when the resources could have been allocated to a more realistic, achievable objective, such as containing losses resulting from lost documents.

Although the Register of Titles in Victoria disagreed with many of the consultant’s observations, the Land Titles Office has progressively moved towards a risk management policy. It has abandoned many checking processes: for example, requisitions on withdrawal of lapsed caveats and checks on signatures and registrations of companies have been eliminated. Appropriate staff reductions have been made. The Law Commission suggested that many more administrative processes could be eliminated.

17 “Forgery, Fraud and Frailty”, B E Hayes (1988) 4 BCB 270.

18 [1995] 2 NZLR 189 at 194, referring to Mapp, *Torrens Elusive Title* (1978) (Alberta Law Review Book Series) at p 70.

19 Various Torrens jurisdictions have produced analytical evidence of claims made against the Assurance Fund. See, for example, New South Wales Law Reform Commission in Issues Paper 6 (December 1989) “Torrens Title : Compensation for Loss” at p 5 for analysis of claims in New South Wales between 1977-1988, and p 6 for like analysis in Victoria between 1981 and 1987. A similar study was made in New Zealand for claims between 1981 and 1988 (1988) 4 BCB 270. Hammond J, at p 196 of his judgment, suggests that the lack of case law for compensation claims indicates a pattern of settled claims. While this assumption appears to have been confirmed by counsel for the appellant, the writer queries it.

20 New South Wales Law Reform Commission “Torrens Title: Compensation for Loss” Issues Paper, December 1989, 1PC.

21 *Ibid*, 35.

Hammond J commented that this “risk management” policy is practised “to a greater or lesser degree”²² in all Torrens jurisdictions. To what extent is it practised in New Zealand? Adherence to administrative perfection in this area is outdated. The introduction, in April 1995, of single-page Land Transfer forms for the facilitation of a computerized Land Transfer system, and indeed the computerization itself, should result in a considerable reduction in administrative checking procedures. The Land Transfer Office has recently become part of the Department of Survey and Land Information. This transition period should provide an opportunity for a careful appraisal of present systems and staff numbers.

2: *McNicholl v Attorney General*²³

*The Facts:*²⁴

A parcel of land was brought under the Land Transfer Act in 1935 pursuant to the Land Transfer (Compulsory Registration of Titles) Act 1924 and a title issued expressed to be “limited as to title and parcels”. In 1958 a new title was issued for part of that land for which the limitation as to title had been removed though the limitation as to parcels remained. In 1965 that land was subdivided into eight separate lots with a residue remaining.

In 1987 the residue was transferred to Mr McNicholl and new “balance title”, CT 64A/444, issued on request without the deposit of any new survey plan for that land. Through an error in the Land Transfer Office, the limitation as to parcels was not recorded on this title. The area on the title was expressed to be 1.3812 hectares despite the fact that the memorandum of transfer into Mr McNicholl’s name and the order to create a new CT both showed the area as 4550 m². The difference was accounted for by the presence of a road. The actual road ran across the land shown in the title, though the former paper road ran where shown on the title to the west of the land. Clearly the issue of the “balance title” was done simply on the basis of the earlier part cancelled title and failed to take account of the then known position of the actual road.

Between 1977 and 1990 Mr and Mrs McNicholl lived on a large property, on which was the matrimonial home, immediately to the west of the land shown on CT 64A/444. In 1990 the couple separated and proceedings for the division of the matrimonial assets followed. It was proposed that as part of the settlement Mrs McNicholl, the plaintiff, should take the land with the matrimonial home and also the land in CT 64A/444, the latter being needed for sale to produce the cash to reduce the mortgage on the former land.

In January 1991 Mrs McNicholl employed a valuer, Mr Brock, to value the land in CT 64A/444. He did so on the area on the certificate of title, 1.3812 hectares, despite the government valuation being on the area of 4550 m². His valuation was \$120,000 and the government valuation \$12,000. He did carry out a physical inspection of the land before making the valuation. Realising the discrepancy in area, Mr Brock pointed out in his report that the District Valuer was intending to revalue the land to reflect the “correct”, ie greater, area. On 13 September 1991 a consent order

²² [1995] 2 NZLR 189 at 194.

²³ Unreported, Tompkins J, 31 July 1995, HC, Auckland, M1295/94.

²⁴ The facts and a full comment on this case are detailed in a case note by the writer in (1995) 7 BCB 119.

for the division of the matrimonial property, based in part on this information, was made in the Family Court.

Later in 1991 the land in CT 64A/444 was surveyed and, according to the judgment,²⁵ “it was then [Mrs McNicholl] discovered that the area was only 4550 m².” As such, the local authority would not consent to the erection of a house on the site. When the problem was pointed out to the Land Registry Office, an officer acknowledged that an omission had been made in not noting the title as “limited to parcels” and hence this claim for compensation.

Subsequent negotiations with the local authority resulted in that body acquiring the land over which the road actually ran in exchange for the land covered by the paper road.

A 1994 valuation of the land as at 1991 based on the two differing areas showed a discrepancy of \$100,000 for which this claim was then brought.

The Decision:

Tompkins J stated without discussion that the claim came within s. 172(a). The Crown argued that the quantum of the claim was limited by s. 179 of the Act, but Tompkins J held that a comparison of the wording of the section shows that s. 179 applies only to claims under s. 172(b) and that therefore the claim was to be assessed in accordance with ordinary common law principles. Taking all of the factors into account, His Honour made an award of \$75,000 together with interest at 11 per cent from 13 September 1991 and costs.

The success of Mrs McNicholl’s claim raises a number of issues.

The parameters of the two sub-sections:

Hammond J, in Marshall’s case, analysed the differences between s. 172(a) and s. 172(b) of the Land Transfer Act 1952. If s. 172(b) covered “land loss”, s. 172(a) “must apply to other kinds of loss as well”.²⁶ His Honour’s main concern was to ensure the breadth of the section – it should not apply only to deprivation of an estate or interest in land. As Marshall had clearly not been so deprived, s. 172(a) was plainly (and exclusively) applicable. There was no necessity to further consider the alternate nature of the two sub-sections. Mrs McNicholl’s situation is more complex. She was claiming for loss resulting from the omission of the words “limited as to parcels” on Certificate of Title 64A/444. Expressed differently, she was claiming for loss resulting from the incorrect belief that she had a guaranteed title with an area of 1.3812 hectares. Clearly, this could also constitute a claim under s. 172(b): she had been deprived of an estate or interest in land through “an error, omission or misdescription in [her] certificate of title”. A new problem thus arises – are the subsections pure alternates?²⁷

The occurrence of a compensation claim falling under two heads is not unknown. In New South Wales, Section 126(1) of the Real Property Act 1900 is not dissimilar to our s. 172(b). Section 127 provides a separate cause of action for loss through departmental error or when no remedy is

²⁵ *McNicholl v Attorney General*, above note 23, at p5.

²⁶ [1995] 2 NZLR 189, 195.

²⁷ It could be argued that the word “or” between the two subsections suggests this – but see later comments.

available under s. 126. The New South Wales Law Reform Commission in its Issues Paper²⁸ made the following comment:

Section 127 duplicates some of the bases of claim in s 126, but in other respects is quite different. Unlike s 126, which requires plaintiffs to prove that they have been deprived of an estate or interest in land, s 127 requires only that plaintiffs have suffered loss or damage. In practice, however, the differences between ss 126 and 127 are not regarded as critical, and plaintiffs normally bring proceedings under both sections ... Due to ungainly drafting it is sometimes difficult to discern the separate functions of ss 126 and 127 ...

The wording of s. 172 of the Land Transfer Act might easily be dubbed “ungainly”. Strict adherence to one of two alternatives is limiting. Only the removal of the exclusivity of both parts of s. 172 will truly preserve “the wide scope for compensation advocated by Hammond J”.²⁹

The narrowing of Mrs McNicholl’s claim to s. 172(a) had a significant effect on the eventual financial outcome. In the judgment, it was held, quite correctly, that s. 179 should only apply to claims made under s. 172(b). In this case therefore the limitations imposed by s. 179 did not apply.³⁰

Tompkins J proceeded to assess the claim “on the normal basis for the assessment of damages”.³¹ Citing Griffiths J in *Registrar of Titles v Spencer*,³² His Honour endeavoured to put Mrs McNicholl “in the same position, so far as money can do it, as if the wrongful act complained of had not been done”.³³ The claim was assessed at the time of the matrimonial settlement. Mrs McNicholl’s part of the settlement included land supposedly worth \$120,000 but, in reality, worth only \$20,000; and the award of compensation was \$75,000 plus interest. There is no discussion in the judgment of the New South Wales decision *Registrar-General v Behn*,³⁴ in which Mahoney J specifically commented on the decision in *Spencer*:³⁵

I ... do not think that what was said in Spencer’s case ... should be seen as limiting damages in all cases to the value of the land at the date when the plaintiff was deprived of it. I do not mean by this that, in every case, damages under the statutory count are to be assessed by reference to the value of the land of which the plaintiff was deprived at the time of the judgment. Each case must be considered according to its own facts ...

Mahoney J’s comments seem particularly pertinent in Mrs McNicholl’s situation. At the time of the hearing, as a result of her subsequent agreement with the local authority, she was in the position she originally anticipated. The value of the land reflected the basis of the matrimonial settlement. If this discretionary approach had been adopted by Tompkins J, the outcome may have been very different.³⁶

28 IP 6, December 1989, 18-19.

29 [1995] 2 NZLR 189, 195.

30 Section 179 of the Land Transfer Act 1952 provides:

Measure of Damages — No person shall, as against the Crown, be entitled to recover any greater amount for compensation in respect of the loss or deprivation of any land, or of any estate or interest in land therein, than the value of that land, estate or interest at the time of that deprivation, together with the value of the messuages and tenements erected thereon and improvements made thereto (if any) prior to the time of that deprivation, with interest at the rate of 5 per cent per annum to the date of judgment recovered.

31 *McNicholl v Attorney General*, above note 23, at p 7.

32 (1909) 9 CLR 641.

33 *Ibid*, p 645.

34 [1980] 1 NSWLR 589.

35 *Ibid*, p 597.

36 As indicated in (1995) 7 BCB 120, similar recommendations for a discretionary approach to the measure of compensation have been made by the New South Wales Law Reform Commission in

Contributory Negligence

This case occurred within months of Hammond J's decision in *Registrar-General of Land v Marshall*.³⁷ Although Hammond J clearly endorsed the application of contributory negligence principles to compensation claims, counsel for the Crown in this latter case did not raise the defence. Mrs McNicholl appears to be at least partially responsible for the problems relating to the value of the land in CT 64A/444. For some years, she had lived close to that land, on which the existence of a road would have been unmistakable. One might also have expected her to have questioned the government valuation, which was based on an area of 4550 m². Moreover, it is clear from her discussion with the valuer months before the matrimonial settlement that she was well aware of the problem. She decided nonetheless to proceed with the settlement. Should she have been held accountable?

CLAIMS UNDER S. 172(b) – A FORGOTTEN PROVISION?

The two recent judgments on s. 172(a) of the Land Transfer Act 1952 highlight uncertainties with respect to compensation for errors or omissions by the Registrar. However, the effect of s. 172(b) – claims for deprivation of an estate or interest in land – has, in New Zealand, long remained undebated.³⁸ The lack of litigation may suggest prior settlement of claims. It may also suggest a failure to recognise this essential provision.

A study of the Torrens jurisdictions shows that many registered owners have lost their titles as a result of indefeasibility, but few associated compensatory claims have ever succeeded. The access of such claims has been likened to the process of “getting blood out of a stone”.³⁹ Some of the difficulties and injustices are uniform; others are unique.

In New South Wales, the combined effect of ss 126 and 127 of the Real Property Act 1900 (NSW) forces a claimant against the fund to pursue the wrongdoer first before bringing an action against the Registrar General. The latter action may also be brought if the claimant cannot fully recover the amount of the loss from the wrongdoer. The Registrar General can only exercise a right of subrogation with respect to moneys recovered under s. 126; ie when the person liable cannot be found or is insolvent or bankrupt.⁴⁰ As in New Zealand, a claimant may obtain compensation for deprivation resulting from fraud, including the fraud of a solicitor or agent.⁴¹

its paper “Torrens Title: Compensation for Loss” (IP 6, December 1989) and by the Alberta Law Reform Commission in Report No 69 “Proposals for a Land Recording and Registration Act for Alberta”. In the former paper, it was clearly stated that by placing limitations on indemnity, the whole principle of insurance is wrongly excluded.

³⁷ [1995] 2 NZLR 189.

³⁸ For a discussion on the ambit of this subsection, see Hinde, McMorland & Sim *Land Law* (vol i, 1978; vol ii, 1979) Butterworths, paras 2.113 — 2.127; Sim “The Compensation Provisions of the Act” (1971) *The New Zealand Torrens System Centennial Essays* pp 138-157; Brookers *Land Law* 1-501.

³⁹ “Forgeries – Indefeasibility of Title” Solicitors’ Liability Committee, *Law Institute Journal* 1990, 535.

⁴⁰ See s. 131 Real Property Act 1900; *Northside Developments Pty Ltd v Registrar-General* (1987) ACLR 513; (1987) 5 ACLC 642.

⁴¹ This provision has in recent years been the subject of considerable debate. The phrase “in consequence of fraud” was given an extremely narrow interpretation in the case *Armour v Penrith Projects Pty Ltd* [1979] 1 NSWLR 98. In the *Northside* case, it was held that fraud need not be confined to the mechanics of registration. Support for this view was gained from *Parker v Registrar-General* [1977] 1 NSWLR 22 and *Behn v Registrar-General* [1979] 2 NSWLR 46;

In Victoria, s. 110 of the *Transfer of Land Act 1958* allows compensation payments to any person who has suffered loss or damage, within eight specified categories. Section 111 of that Act provides for direct application to the Registrar who may admit the claim and make the appropriate payment. If the application is refused, it is still possible to commence an action. If an action is commenced, s. 110 then enables the plaintiff to name the Registrar General as nominal defendant without first having to take proceedings against the wrongdoer. The Registrar is entitled to join in any other person as a co-defendant.⁴²

The category of fraud as a means for recovery from the assurance fund is not specifically provided for in s. 110. It seems clear that some of the grounds for lodging a claim should allow for compensation, but expressly excluded from compensation are any cases in which the claimants or their solicitors or agents have substantially contributed to the loss by fraud. For a claimant to be successful in a bid for compensation, he or she must prove that the loss was not caused by this type of fraud. The cases *Eade v Vogiazopoulos & Ors*⁴³ and *Vassos & Anor v State Bank of South Australia & Anor*⁴⁴ provide recent judicial comment. In *Chasild Pty Ltd v Taranto*,⁴⁵ Gray J's decision in favour of deferred indefeasibility casts an uncertain light on the Victorian compensation provisions. Under the principle of deferred indefeasibility a loss, apparently caused to a mortgagee by having a forged mortgage removed from the Register, may not be capable of supporting a successful claim.

In Queensland, the Court's interpretation of fraud in the context of ss 126-129 and s. 135 of the now out-dated *Real Property Act 1861-1990* has until recently been so narrow that any right of recovery turned "on the quixotic nature of the type of fraud perpetrated, rather than on any discernible rational principle".⁴⁶ In *Beardsley v Registrar of Titles*⁴⁷ the very narrow interpretation of the words "a person who derived benefit by such fraud" seemed unduly harsh. However, in *The Registrar of Titles v Igarashi & Ors*⁴⁸ the Court of Appeal of the Supreme Court of Queensland has ruled that, in s. 126, the phrase "the person who derived benefit by such fraud" must not be limited in its operation to a person who becomes registered by such fraud. To so limit would be inconsistent with the evident purpose of both ss 126 and 127.

While some Australian states struggle against "compensation schemes [which] are so guarded by statutory procedural hurdles which a claimant must surmount, and are so closely defended by the state that their very

[1980] 1 NSWLR 589; (1981) 35 ALR 633. In the High Court decision *Saade v Registrar-General* (1993) 118 ALR 219, a liberal interpretation was adopted in order to find in favour of the person deprived. For a discussion on this decision, see P Mendelow "Fraudulent Deprivation and the Torrens Assurance Fund: *Saade v Registrar-General* (1993) 118 ALR 219, (1994) 2 APLJ 279.

42 D J Whalan considers this approach superior to the approach in some other Torrens jurisdictions (for example, New South Wales and Queensland) where action must be first brought against the wrongdoer. It not only accords more with the principle of insurance, but also lessens the duty of care needed to ensure that the correct defendant is sued. See D J Whalan, *The Torrens System in Australia*, Law Book Company, Sydney, 1982.

43 (1993) V ConvR 54-458; (1993) ANZ ConvR 129.

44 (1992) V ConvR 54-443; (1993) ANZ ConvR 39.

45 (1991) 1 V.R. 225.

46 "Fraudulent Deprivation and the Assurance Fund", C McKelvey (1993) Queensland Law Society Journal, 133, 138.

47 (1993) 1 QdR 117.

48 (1995) ANZ ConvR 636.

existence is something of a mockery”,⁴⁹ our comparative legislation suffers fewer handicaps. Innocent New Zealand victims should find the fund reasonably accessible. The essential question is – do they?

Within the past five years, there have been several reported cases in New Zealand on s. 62, s. 182 and s. 183 of the Land Transfer Act 1952.⁵⁰ In all, the principle of immediate indefeasibility has been reviewed and, without exception, confirmed.⁵¹ This paper raises the possibility that some of these victims, unaware of their rights, have been left to “lick their wounds” and ponder the justice of our system. It is not known if deprived parties have followed up decisions by claiming payments from the compensation fund. Information on possible settlements cannot be obtained, on the basis that its provision may breach the Privacy Act. If, however, settlements have not been made, our practice of pure Torrens law is flawed. A comparative analysis of two recent cases, one in Victoria and one in New Zealand, illustrates the problem. The two cases are undeniably similar in fact. Compensation was awarded in the former. Was it awarded in the latter?

Victoria: *Eade v Vogiazopoulos & Ors*⁵²

In June 1988, Mr Vogiazopoulos negotiated the purchase of a butcher’s business. A solicitor (Mr Stergiou) was employed to act for him and purportedly for his wife. A finance broker (Mr Shearer) was also engaged. Preliminary negotiations failed and the transaction faltered. But by mid-July 1988 it was revived and proceeded quickly. Mr Shearer arranged a loan of \$180,000 from a Mr Eade, to be secured by a first mortgage over the Vogiazopoulos home. Shortly after, the contract for the purchase of the business was completed. Mr Vogiazopoulos did not operate the business successfully; Mrs Vogiazopoulos took no part in it. The mortgage fell into arrears, and, after one variation Mr Eade eventually commenced proceedings.

In the first proceeding, Eade sought orders for possession of the family home. Judgment was entered against Mr Vogiazopoulos, but Mrs Vogiazopoulos defended the proceedings claiming that she did not sign the mortgage or the variation. She thus submitted that by reasons of the forgery the forged mortgage (which had been registered) was null and void. Alternatively, she claimed that she was entitled to an in personam claim. She alleged breach of duty of care against her solicitor owed to her as a result of his purporting to act for her as a solicitor in relation to the mortgage and the purchase. She had signed a statutory declaration as to non-sale prior to the loan transaction. She also sought compensation from the Registrar

⁴⁹ *Registrar-General of Land v Marshall* [1995] 2 NZLR 189, 195. Hammond J made reference to the following criticisms on the topic – Simpson, *Land Law and Registration* (1976), pp 179-183; Mapp, at p 69; Sim “The Compensation Provisions of the Act” in Hinde, *The New Zealand Torrens System Centennial Essays* (1971), pp 138-157; McGillivray “Compensation Provisions in Torrens Statutes: The Existing Structure and Proposals for Change” (1993) 67 ALJ 904.

⁵⁰ See, for example, *Morrison v Bank of New Zealand* [1991] 3 NZLR 291; *Cricklewood Holdings Ltd v C V Quigley & Sons Nominees Ltd* [1992] 1 NZLR 463; *Jessett Properties Ltd v UDC Finance Ltd* [1992] 1 NZLR 138; *Dungey v McCallum* [1993] 3 NZLR 551; *Disher v Farnworth* [1993] 3 NZLR 390 (CA).

⁵¹ The recent upheavals in Australia concerning immediate and deferred indefeasibility have not been mirrored in New Zealand. For a full discussion of these cases, see E Toomey: “Fraud and Forgery in the 1990s: Can our Adherence to Frazer and Walker Survive the Strain?” (1995) 5 *Canta. L.R.* No 3.

⁵² (1993) V ConvR 54-458; ANZ ConvR 129.

of Titles. Eade contended that if the signature was not that of Mrs Vogiazopoulos, it was placed on the documents by her husband as agent. The question of estoppel was also raised. With respect to the compensation claim, the Registrar argued that neglect had substantially contributed to her loss.

The allegation of forgery led to further proceedings.

It was held, *inter alia*, that Mr Eade was entitled to enforce the mortgage against Mrs Vogiazopoulos. Evidence concluded that the signature of Mrs Vogiazopoulos had been forged. The validity of the mortgage could only be challenged if there was proof of fraud on the part of Mr Eade or his agent. No evidence suggested this; thus, the mortgage could stand.

Mrs Vogiazopoulos claimed indemnity from the Registrar of Titles under s. 110 of the Transfer of Land Act 1958.

Smith J held that though the registration of the mortgage could not be challenged, it did however cause her loss and damage. The Act prevented her having the mortgage set aside and the register rectified even though the mortgage was forged. Her fee simple in the land was thus encumbered. It was further held that, if she had been negligent in her failure to read the statutory declaration, this act was not the sole cause or the substantial cause of her loss.

Mrs Vogiazopoulos was thus entitled to compensation for the loss suffered as a result of the registration of the mortgage to Mr Eade.

New Zealand: *Morrison v Bank of New Zealand*⁵³

Mr and Mrs Morrison were joint owners of a property in Browns Bay. Mr Morrison is described in the evidence as “a businessman with a number of different interests; such things as thoroughbred horse racing and breeding, goat farming and kiwifruit ... [and had] a substantial portfolio of shares and a number of different properties”.⁵⁴

The Bank of New Zealand, with whom Mr Morrison had a number of different transactions relating to his various business activities, granted a mortgage over the Browns Bay property, apparently signed by both husband and wife and securing their joint and several liability. Mrs Morrison denied ever signing this, and the inference was drawn that her husband forged her signature. While it is not as clear as in Eade that the monies were intended to be used for purposes beyond the financing of the home, such further use can be deduced from the evidence. Significance can also be given to the remark by the solicitor who “witnessed” the signatures “that he was very conscious of the problems that could be created, particularly between a husband and wife when a mortgage of this nature which could be drawn on by the husband was entered into in relation to a family home”.⁵⁵

The marriage subsequently came to an end. Part of the settlement of matrimonial property included the sale of the Browns Bay property. Mrs Morrison claimed that it was only then that she became aware of the mortgage to the Bank of New Zealand. The property was sold, a first mortgage to a nominee company was paid off, and other expenses were

⁵³ [1991] 3 NZLR 291.

⁵⁴ *Ibid*, 292.

⁵⁵ *Ibid*, 293.

met. The bank made claim to the remaining \$220,000. Mrs Morrison made the following claims: that the mortgage was void or otherwise invalid on the grounds that her signatures to the mortgage and the overdraft facilities were forgeries; alternatively that she was entitled to half of the balance under the joint ownership of the property; or alternatively that the defendant bank was in breach of a duty of care owed to her.

The defendant, relying on s. 62 and s. 183 of the Land Transfer Act 1952 and the decision in *Frazer v Walker*⁵⁶ submitted that the bank was entitled to complete protection because the mortgage, although forged, had been registered. Counsel for the plaintiff conceded the validity of the mortgage on this ground, but further argued, unsuccessfully, that the words of the mortgage should be construed having in mind the course of dealings between the parties, and that the bank was in breach of a duty of care. Hillyer J's decision clearly confirmed the principle of immediate indefeasibility.

Mrs Morrison's position bears undeniable similarity to that of Mrs Eade. Mrs Eade received monetary compensation for her deprivation. The question remains: did Mrs Morrison receive similar compensation through a settled claim, or did she remain unaware of her rights?

Further Potential Claims Forgotten?

The Renshaw Edwards Debacle and Others

The rising incidence of fraud and forgery in mortgage transactions is undeniable.⁵⁷ The illegal activities of a few practitioners in the country have seriously undermined public confidence in the legal profession. Not least among these were schemes devised by Lower Hutt partners Renshaw and Edwards. Innocent clients were left feeling angered and cheated. The Law Society was immediately targeted, and, in turn, the gross inadequacy of the fidelity fund resulted in obligatory "contributions" from all practising principals in the country. While the debate concerning payment of the individual contributions of \$10,000 by instalment continues, some of the victims still await full reparation. The Law Society's unquestioned assumption of liability is debatable. In the "scramble" to find an amount exceeding \$30 million, no suggestion appears to have ever been made that the State may be liable for some of the deficit. One of the first basic investigations which should have been undertaken was to discover whether any of the many forgeries had culminated in registration. If any had, the answer is simple – under the Torrens guarantee of title, the State must be accountable. Instead, clients of the Lower Hutt firm have been trapped in arguments among solicitors as to whether the banks or the Law Society should shoulder the responsibility. No one appears to have targeted the State. The supposed simplicity of our Torrens system of registration may well have failed these people. Heed should thus be taken.

⁵⁶ [1967] 1 All ER 649.

⁵⁷ Practitioners are today being encouraged to exercise all necessary precautions. See "Practice Pointer – Avoiding Forgery in Mortgage Transactions" (1995) ANZ ConvR 147.

CONCLUSION

Compensation provisions in any Torrens statute must adequately reflect a genuine “insurance” objective. If this objective cannot be met, reform committees have suggested radical alternatives: the complete abolition of the scheme, the use by the State of the services of private insurance companies, or the introduction of private title insurance, be it optional or compulsory.⁵⁸ Such sweeping reforms are unnecessary; more moderate ones would, however, enhance the system.

In New Zealand, the Land Transfer Act 1952 provides reasonably accessible and, in most cases, adequate State compensation. It is imperative that the empowering provisions are both recognized and used fairly. In any claims for loss other than land loss, the Courts must now carefully redefine the limits of s. 172(a). Greater discretion may provide necessary flexibility. The possible disregard – or oblivion – of s. 172(b) is critical. Torrens’ intention was clear: the principle of indefeasibility of title must be accompanied by the availability of compensation for those who, through the operation of the Act, are barred from recovering their land. Partial use only of the system results in unacceptable injustices.

⁵⁸ See, for example, New South Wales Law Reform Commission “Torrens Title: Compensation for Loss” Issues Paper, December 1989, 1 PC.