

Answer Guide for 2015 Cadastral Law Exam Research Assignment

Question 1: Report for Penny Tracy

1. Limited as to parcels
 - Notation on certificate of title issued under sec 190(3) Land Transfer Act 1952 [formerly sec 8 Land Transfer (Compulsory Registration) Act 1924]
 - the title is limited as to description of parcels (s191 LTA 1952, formerly s9 LTA 1924)
 - the extent of the land owned by the registered proprietor may differ from that recorded on the title, because another person who was in adverse possession of part of the land at the time the first limited title was issued for the land, and continued in possession for 12 years (used to be 20 years), may have possessory title that extinguishes the title of the registered proprietor to that part of the land being adversely occupied (ss197, 199, 200, 207 LTA 1952; s21 Limitation Act 2010)
 - no survey or investigation was carried out prior to the issue of the first limited title to determine whether or not anyone was in adverse possession of part of the land
 - limitation as to parcels can be removed by survey and issue of ordinary title(s207 LTA 1952)

2. Diagram on Transfer
 - Up until about 1966, simple subdivisions and boundary adjustments could be effected by a diagram drawn by a registered surveyor on the land transfer document (Land Title Surveys in NZ – Chap 3, Sec 4, ‘Further subdivision or boundary adjustment’)
 - When defining boundaries originating from a diagram on transfer, the documentary dimensions of the first parcel transferred out of the title have priority and must be respected, whether the title is ordinary or limited (Land Title Surveys in NZ – Chap 5, Sec 2, ‘Some specific situations’)

3. Coastal water margins (sourced from LTS in NZ, Chap 2 Sec 2 & Chap 4, unless otherwise shown)
 - A water boundary is a boundary set at the landward margin of: a river bed or stream bed; a lake bed; or the common marine and coastal area or other tidal area, and includes a natural boundary where this term is used in enactments to refer to a boundary at a water margin (rule 2 ‘Terms & Definitions’, Rules for Cadastral Survey 2010)
 - The usual boundary of a parcel adjoining tidal water is either the line of MHW or MHWS. Generally the seaward boundary of a Crown Grant was high water at ordinary tides, i.e. MHW, and the majority of older parcels reflect this (s35 Crown Grants Act 1908)

- With the enactment of new legislation, principally the RMA 1991 and the Marine and Coastal Area (Takutai Moana) Act 2011, the Crown in many circumstances now requires marine and coastal area to be transferred out of private ownership and be vested in the Crown. This results in the seaward boundary being MHWS.
- Accretion relating to natural and movable, tidal or flowing water boundaries is the natural, gradual, imperceptible and permanent build-up of additional land (or recession of the water) alongside that boundary. If these four elements are present and can be proved, the dry land (alluvion in the case of build-up and dereliction for water recession) may be claimed by the adjoining owner (at their option) and added to their title.
- Erosion is the natural eroding or eating away of land along tidal or flowing water boundaries. It is the reverse of accretion but all four elements must be present.
- Where the title is held under the Land Transfer Act 1952, any change as a result of accretion or erosion is considered to be a correction to the title pursuant to s 80 of the Land Transfer Act 1952. Erosion is deemed to have been lost from the title and must be excluded from the new title. It is not obligatory to update a parcel to include areas of accretion, but the property owner is entitled to have the title corrected to reflect the current position of the water boundary, by application to the Registrar-General of Land. (part from <http://www.linz.govt.nz/regulatory/20711>)
- Avulsion is the sudden and visible change to the position of a water margin. Avulsion does not constitute accretion or erosion and is distinguished by the time element. In the case of avulsion and artificial diversion, the extent of rightful ownership does not change and the boundaries remain in the position they were in before the event.

4. Boundary Definition of Parcel A – no subdivision

- Penny appears to be entitled to the full documentary extent of title, because:
 - (i) the OP's Deeds Plan 537 and DP 358930 define the documentary southern roadside boundary
 - (ii) the southern roadside fence wasn't established until 23 years after issue of the first limited title to the original Lot 12 Deeds Plan 537 (in 1930), so the land between the fence and the road boundary has not been lost by adverse possession
 - (iii) the OP Deeds Plan 537 and the definition of the eastern boundary of Lot 12 on Deeds Plan 537 determine the documentary eastern boundary and there is no adverse occupation inside (west of) that boundary.
 - (iv) Penny's occupation extends beyond the eastern boundary of Parcel A into the unalienated Crown Land, but her limited title boundary cannot be defined to include this land because it was never part of Lot 12 Deeds Plan 537 .
 - (v) the definition of the western boundary should respect the dimensions of the diagram of transfer (measured from eastern documentary boundary of Parcel A) with the shortage being taken by Parcel B

- (vi) the occupation by Charlie Windsor over the western portion of Parcel A is not likely to constitute 'rightful entitlement' to that land by adverse possession, considering the circumstances of the establishment of the occupation (priority of diagram of transfer; uncertainty if occupation established before Parcel A title was issued; erected by father & son, so likely a fence of convenience; toetoe hedge on boundary restricts practical use of land)
- (vii) the water boundary remains at MHWMM as defined on Deeds Plan 537 because the change in the position of the bank was a result of avulsion, not accretion or erosion.
- (viii) it is arguable whether rule 6.7(a) [RCS 2010] should require the water boundary to be right-lined, thus removing the ambulatory nature of the boundary, or rule 6.7(b) should be used to justify adopting the water boundary in its original position. Both options have merits and are acceptable for the purposes of this exam.
- (ix) there is potential for MHWMM to be defined further out to sea on the basis of a more accurate fix of true MHWMM than was made in 1916, or on the basis of accretion between 1916 and the 1982 storm. Both could be difficult to prove and define, and the latter would require a substantial accretion application to try and achieve it. However, both options are acceptable for the purposes of this exam.

5. Boundary Marking versus Removal of Limitations

- If Penny is entitled to the full extent of her documentary title, a boundary marking survey could be carried out and a CSD lodged, but it would have to be a 'Boundary Marking – Full CSD (Conflict)' because some of the boundary points have not been previously defined in an approved CSD [see rule 2 definition of boundary reinstatement survey and rule 6.2(a)(vii)]. Consequently, all of the boundary points of Parcel A could be ground marked and line pegs placed on existing boundaries
- A boundary marking survey would not remove the limitations as to parcels from her title or prevent claims for title by adverse possession against her title
- A survey to remove limitations would require a full land transfer survey on a 'Limited Title' or 'LT Subdivision' CSD.
- A boundary marking survey would require the same amount of work to carry out the survey as a full LT survey, but would require less work to prepare a CSD, because a title plan is not necessary. There would also be no subsequent work by surveyor or lawyer to deposit the CSD or issue a new title. Therefore, the cost of a boundary marking survey would be less than a survey to remove limitations.
- A survey to remove limitations would provide certainty as to boundaries and area, facilitating subsequent development or subdivision of the land
- A survey to remove limitations could be done in conjunction with a survey to claim the occupied portion of the adjoining unalienated Crown Land

6. Impact of MACAA 2011 on subdivision of Parcel A

- Sec 128 MACAA 2011 repealed and substituted sec 237A(1)(b) RMA 1991 resulting in the requirement that: Where a survey plan is submitted to a territorial authority in accordance with section 223 RMA 1991, and any part of the allotment being subdivided is within the coastal marine area, the survey plan shall show any part of the allotment that is in the coastal marine area as part of the common marine and coastal area (CMACA).
- Therefore, if Parcel A is subdivided, the portion of land between MHWL and current MHWS would have to be shown as a separate lot (primary parcel), with its own appellation, and labelled as 'common marine and coastal area'. Note that this land does not vest in anyone, but simply 'becomes' CMACA upon deposit of the subdivision plan.

7. Feasibility of subdividing Parcel A

- Documentary area of Parcel A is 0.1770ha.
- 0.0100ha will become CMACA on subdivision.
- 0.0100ha (approx.) will vest as esplanade reserve
- The area available for saleable allotments will be 0.1570ha, which is less than the 0.1600ha required to subdivide into 2 complying allotments as a controlled activity.
- S230(1) RMA does not exempt the esplanade reserve area from being considered when determining the net area of the allotments. This section is used to determine whether or not the 4ha threshold under the RMA applies.
- Sufficient area to subdivide 2 allotments as a controlled activity could be obtained by gaining ownership of the adjoining Crown Land occupied by the owner of Parcel A, or by acquiring land from Parcel B via a boundary adjustment subdivision
- The subdivision process involves:
 - (i) Site survey and preparation of proposed plan of proposed subdivision
 - (ii) Liaise with client's lawyer through process
 - (iii) Prepare and submit applications for subdivision consent and any other associated resource consents to local authorities
 - (iv) Once consents obtained, carry out subdivision survey & prepare CSD
 - (v) Obtain adjoining owner consents for removal of limitations
 - (vi) Design & supervise any site works required
 - (vii) Prepare as-built plans
 - (viii) Obtain sec 223 and 224(c) RMA approvals
 - (ix) Submit CSD to LINZ for approval
 - (x) Client's lawyer prepares & submits legal dealing for deposit of plan and issue of new titles

8. Possible solutions to occupation conflicts between Parcels A & B
- The owner of Parcel B is occupying approx. 2m of Parcel A along its entire western boundary
 - The owner of Parcel B could try to claim this strip of land by adverse possession under the Land Transfer Amendment Act 1963, but the owner of Parcel A could defeat this by asserting their ownership through the lodgement of a caveat whereby the RGL would have to refuse the application (ss 8 & 9 LT Amendment Act 1963)
 - The owner of Parcel B could try to claim this strip of land by adverse possession under s200 Land Transfer Act 1952, but would have to prove that the adverse occupation commenced before the issue of CT 1848/76 and that the legally established criteria for adverse possession were met. The owner of Parcel A could lodge a caveat under s137 LTA 1952 to contest such a claim.
 - The owners of Parcels A & B could agree to carry out a boundary adjustment subdivision. This could benefit both owners as it would enable Parcel B to legalise some of their encroachment onto Parcel A, and enable Parcel A to be subdivided as a controlled activity.
 - The owner of Parcel B could acquire some land from Parcel A in a separate ordinary fee simple title by subdivision and hold it with his existing limited title as provided for by s220(2) RMA 1991. This would require the removal of limitations from Parcel A, but not Parcel B.
 - The owner of Parcel A could grant the owner of Parcel B a right of way over that part of Parcel B's driveway that encroaches onto Parcel A.
 - The owner of Parcel A could grant the owner of Parcel B a lease or license over part of Parcel A.
 - The encroachments could be removed/relocated by agreement between the owners
 - Either owner could seek relief under s322 Property Law Act 2007
9. Adverse possession claim to Crown Land (sourced from NZIS Limited Title Masterclass at http://www.surveyors.org.nz/Attachment?Action=Download&Attachment_id=1143 unless otherwise shown)
- Public land can generally not be claimed by adverse possession – sec 172(2) Land Act 1948 and sec 51(1) Public Works Act 1981
 - However, title may be claimed by adverse possession if the land is unalienated land of the Crown with no title
 - There must have been continuous adverse possession for at least 60 years (s21 Limitation Act 2010)
 - Application can be made under s19 LTA 1952 to bring the land under the LT Act
 - The application must be approved by the Surveyor-General and assented to by the Governor General (s19 LTA 1952), then processed in accordance with ss20-32 LTA 1952

- An application would need to show that the claimant had continuous and exclusive occupation for at least 60 years and that there had been no acknowledgement of Crown ownership
- In support of the claim, the application could include evidence such as rates payments, land use (e.g. part of the adjoining property), improvements to indicate intention to possess, occupation monuments (e.g. fences to exclude others)
- It appears that the owner of Parcel A would have a valid claim to title of the portion of adjoining Crown Land currently being occupied because that occupation has been continuous and exclusive for over 60 years, and the land has not been alienated by the Crown and it has no title
- The land that could be claimed would be the land within the existing fences and out to MHWS
- No marginal strip would be reserved under s24(1) Conservation Act 1987 because the Crown is not disposing of the land.

10. CSD Requirements

- 'Boundary Marking – Full CSD (Conflict)' for boundary marking survey
- 'Limited Title' or 'LT Subdivision' CSD for survey to remove limitations
- 'LT Subdivision' CSD for any subdivision option
- LT 'Easement' CSD for an easement only plan
- LT 'Lease' CSD for a lease
- LT 'Application' CSD for adverse possession claim over Crown Land, if separate title sought
- 'LT Subdivision' CSD if adverse possession claim over Crown Land included in subdivision of Parcel A
- 'Limited Title' CSD if adverse possession claim over Crown Land included with survey to remove limitations from Parcel A

Question 2: Letter to Charlie Windsor

1. Ownership of strip adjoining Lot 3 DP 358930

- The owner of Lot 3 could claim title to the strip of land by adverse possession under s200 LTA 1952 because it appears that they and their predecessors in title have occupied the land since before the first limited title to Lot 12 was issued [s199(1)(d) & (3)]. They have not foregone that right just because the adverse possession wasn't claimed at the time Lot 11 Deeds Plan 537 was subdivided.
- Note that Lot 11 Deeds Plan 537 that was subdivided by DP 358930, never had a limited title, because its first land transfer title was issued in 1920 before limited titles came into existence under the LT (Compulsory Registration) Act 1924.

- The owner of Parcel B's title to the strip of land may have been extinguished as a result of the adverse possession by the adjoining owner(s27 Limitation Act 2010), but the owner of Parcel B is still the registered proprietor of this land until a successful application is made for title to it by the owner of Lot 3 DP 358930, or the owner of Parcel B excludes it from his title by removal of limitations,

2. Recommended action

- For the above reasons, it would be inadvisable for Charlie Windsor to relocate his western fence or to demolish that part of the old boat sheds over the boundary of Lot 3 DP 358930.
- He could get a survey done to remove limitations from his title and seek his neighbour's consent to defining on the documentary boundary. If the neighbor was willing to give consent, then they would effectively be relinquishing any right to title by adverse possession.
- You would need to advise Charlie that you would be obliged to explain the situation fully to his neighbor if he engaged you to do this work.

3. Concurrent work for neighbours

- Inform Charlie that in order to advise him on his query about his western boundary, you will have to carry out investigations that you will charge him for at your quoted rates or lump sum.
- Ideally this should be done in writing before the commencement of any work for him
- Advise Charlie that if any dispute arises between Charlie and Penny, then you may have to stop work for Charlie
- Any further work that you carry out for Charlie in conjunction with the work you are doing for Penny would be charged according to a fair apportionment of costs, not on the basis of Charlie only paying for the costs that are over and above what Penny would be charged if you were only doing work for her.
- The surveyor's role is to impartially determine the correct positions of boundaries taking all relevant evidence, legislation and rules of law into consideration
- Refer to NZIS Council Policy: Conduct of Members http://www.surveyors.org.nz/Attachment?Action=Download&Attachment_id=1115 and Schedule 2 Cadastral Survey Act 2002