Reconfiguring Land and Property: What is a Subdivision ?

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Introduction

Several cases brought to the courts recently have allowed for some interesting discussions about what is, and what is not, a subdivision. The word subdivision has a common language use and meaning that concerns division of a parcel of land for separate use, development or occupation. The Resource Management Act 1991 provides a 'precise transactional'[1] definition consisting of several types of subdivision which has been examined in the context of a variety of interests less than fee simple. The discussions and decisions have significance or surveyors.

This paper analyses three recent case decisions related to the various definitions of subdivision. The case decisions question statutory and common use definitions of the term. Their findings are important because they determine whether various types of land development will be subject to statutory regulation (RMA 1991 and district plan consent process). The cases also reference different, and special land tenure arrangements which might provide new opportunities for viewing a range interests in land and property in current contexts.

Subdivision Defined

The use of the terms 'allotment' and 'subdivision' is so central to the activities of a professional and cadastral surveyor that their meaning appears to go

without saying. So accepted and unquestioned is the word subdivision that legal property texts only explain it (if at all) by reference to its context—the regulation of the subdivision process. Even the few survey law texts that do mention subdivision (Kelly 1937, NZIS 1990, McKay 2009), only describe the regulation and processes of subdivision and not the meaning of the term. Furthermore, as observed in one of the cases discussed below,[2] the court even had difficulty finding parties interested in engaging with the question.

To some extent the lack of precise legal attention to the definition of subdivision is surprising since cross lease developments which are essentially a legal and administrative work-around to avoid the appellation of subdivision, were being used from the 1950s. The primary incentive for cross leases was that they were not subdivisions in the regulatory sense, even though separate interests in land were recorded and separate certificates of title were issued. There might have been plenty of opportunity then, since the 1950s to examine what was, and what was not a subdivision, but this has not been the case, and it has been left to posterity; now in fact, to raise these questions. Several recent court cases have explicitly focused on the definition of subdivision in various contexts.[3] These cases suggest that there are practical and non-trivial issues at stake, with significant consequences to land tenure arrangements.

Some earlier case decisions have also commented on what defines a subdivision. In Re An Application by Hamilton City Council [4] a subdivision to create an allotment is characterised such that: "It is separately defined, … and it is intended that it may be dealt with separately."[5] In the Court of Appeal in Waitemata County v Expans Holdings Ltd[6] the different judges stated, " … one has to fall back on the commonly accepted meaning of the word."[7] The judges furthermore noted "By reference to the plan they can be separately described and dealt with in law."[8] and " … it must be accorded common sense meaning which will conform to the context in which it is used."[9] The Court of Appeal, in re Transfer to Palmer,[10] stated:

> The phrase "subdivision into allotments" has no legal meaning, nor is it a term of art. The section refers to dealings with land, and the phrase must be understood in a way in which persons who are in the habit of dealing with land would understand it … . The ordinary meaning of the term "subdivision into allotments" is that there is either an actual demarcation of the allotments on the ground, or, at any rate, a plan of the land showing the allotments as subdivided – something, in short, to show clearly to a purchaser that he is purchasing an allotment of land which has been subdivided into allotments.[11]

The elements of a subdivision, therefore, seem to be: 1) the identification of a parcel of land, and 2) the ability to claim that parcel under a defined tenure arrangement in the name of identified interest holders.[12] The professional responsibilities for land subdivision are clear: surveyors identify and define land parcels and conveyancing solicitors apply for title recording the tenure in the land and the proprietor—these are the people, " … who are in the habit of dealing with land."

The Purpose of Subdivision

The purpose of subdivision is to provide land allotments of a size and location suitable for use and occupation. Any land development proposal firstly relies on the identification of a parcel of land (an allotment) upon which development can take place. To create appropriate allotments for occupation, use and development, land parcels are usually divided (subdivided) according to location, size, shape, access, etc., by the process of subdivision. A subdivision is a division of a parcel of land that has previously been divided. For example, in New Zealand we may consider an original Crown Grant to have arisen from a division of land that may (by various means) have been acquired from original customary Maori owners, to provide for separate ownership and new uses. Subsequent divisions are therefore subdivisions.

The division of land by the surveying of discrete parcels, and having them granted by the Crown as estates in fee simple to registered proprietors, provided the basis for the encouragement of settlement in New Zealand and the development of a property market. Subdivision (and the consequential issue of a title) feeds the property market and supports the security of subsequent investments in land. Furthermore, because of the powerful influence of the property market on national and personal wealth, there is a very strong reliance on property law in New Zealand. Equivocation in the application of legal terms in our property law requires resolution through clear judicial decisions providing guidance on the application of terms used in the vocabulary of property-rights.

Control of Subdivision

The regulation of subdivision of land has generally been within the jurisdiction of local authorities, initially to ensure adequate access and services but more recently to manage the extended effects of the intensification of land use resulting from subdivision.[13] Planning legislation, as developed throughout the 20th Century, has provided local government with the means to regulate the use, occupation, development and subdivision of land. For example, the Town and Country Planning Act 1977 states that, 'control of subdivision' is a

matter to be dealt with in District Schemes.[14] However, by 1991, with the enactment of the Resource Management Act, it was apparent that land development was becoming more varied, and that the definition of subdivision and allotment needed to reflect alternative rights in property. Primarily, a subdivision required the identification of a parcel of land over which a Certificate of Title could be issued, and this could allow for either fee simple tenure or various lease arrangements. Cross leases, Unit titles and other leases which "…could be for 20 years or longer …"[15] were incorporated as separate definitions of subdivision.

Statutory Definitions - subdivision

There have been some definitions of the term subdivision in earlier legislation. The Land Subdivision in Counties Act 1946 s 2 (2) stated: "For the purposes of this Act any division of land, whether into two or more allotments, shall be deemed to be a subdivision of that land for the purposes of sale if at least one of those allotments is intended for sale." The Municipal Corporations Act 1954 s 350 s (2) stated: "For the purposes of this Part of this Act any land in a district shall be deemed to be subdivided if,

> (a) Being land subject to the Land Transfer Act 1952, and comprised in one certificate of title, the owner thereof, by way of sale or lease, or otherwise howsoever, disposes of any specified part thereof less than the whole, or advertises or offers for disposition any such part, or makes application to a District Land Registrar for the issue of a certificate of title for any part thereof … ."

In the Land Transfer Act 1952 subdivision is not given a specific definition, although the context suggests that a subdivision is used to describe the separation of one or more parcels of land.[16]

There are, moreover, different contexts and uses of the word subdivision, such that the Local Government Act 1974 refers to a subdivision in this sense: "… **ward** means a subdivision, for electoral purposes, of the district of a territorial authority." Clearly this use of subdivision does not refer to a separate allotment, nor to a parcel under defined ownership.

The Property Law Act 2007 uses subdivision in the slightly different sense of a development of land that has created separate uses likely to be held under separate tenure arrangements, with a separate Record of Title and different uses. For example, roads, accessways, reserves, and fee simple estates.[17] It is the Resource Management Act 1991 which provides for the explicit meaning of subdivision, and therefore, this Act has the clearest definition of subdivision.

Resource Management Act 1991 s 218 Meaning of subdivision of land

> *(1) In this Act, the term* ***subdivision of land*** *means -*
> *(a) the division of an allotment -*
> *(i) by an application to the Registrar-General of Land for the issue of a separate certificate of title for any part of the allotment; or*
> *(ii) by the disposition by way of sale or offer for sale of the fee simple to part of the allotment; or*
> *(iii) by a lease of part of the allotment which, including renewals, is or could be for a term of more than 35 years; or*
> *(iv) by the grant of a company lease or cross lease in respect of any part of the allotment; or*
> *(v) by the deposit of a unit plan, or an application to the Registrar-General of Land for the issue of a separate certificate of title for any part of a unit on a unit plan; or*
> *(b) an application to the Registrar-General of Land for the issue of a separate certificate of title in circumstances where the issue of that certificate of title is prohibited by section 226, -*
> *and the term* ***subdivide land*** *has a corresponding meaning.*

The further part of s 218 defines the term 'allotment' which is relevant to the definition of subdivision of land, but not specifically part of the judicial decisions nor of this analysis. Legislative interpretations are usually statute specific, and one of the lessons of the cases examined in this paper is that judicial interpretations may look beyond this statutory definition to other contexts and extrinsic evidence. It is the applicability of the above RMA definitions of the types of subdivision of land which becomes the focus of this case law analysis. Let us now examine some relevant case law to illustrate how the courts have decided the question of interpretation and application of the term, 'subdivision of land'.

Covenants - Congreve v Big River Paradise

In 2005 a dispute arose about the interpretation and enforcement of a covenant which limited the extent to which a parcel of land could be subdivided.[18] In this case a covenant was registered on the servient title to restrict the development potential of a lot to enable a maximum of 3 allotments with one dwelling on each allotment.[19] The covenant was writte

> No subdivision of the servient lot shall permit the creation of more than three separate allotments nor permit more than one dwelling to be erected on each such lot.

Big River Paradise Ltd was the servient/burdened tenement on the north bank of Te Mata-au (Clutha River). The Congreve Family Trust was the owner of the dominant/benefited tenement on the south bank of the river. Implicit in the purpose of the covenant was the protection of a semi-rural outlook across the river.

Big River Paradise had obtained a land use consent for earthworks, infrastructure and design controls for the establishment of 52 dwellings on land parcels to be leased for a period of less than thirty years. Because of the leasehold tenure proposed, this development did not constitute a subdivision (as defined by s 218 RMA 1991), so needed no subdivision consent. The leases were explicitly a device of this development to get around the RMA definition of subdivision thereby avoiding the regulatory intervention of the territorial authority, the Queenstown Lakes District Council.[20]

Congreve objected to the land use consent approval and the case was extensively examined in the Environment Court; three hearings at the High Court; an appeal to the Court of Appeal, and a further Congreve objected to the land use consent approval and the case was extensively examined in the Environment Court; three hearings at the High Court; an appeal to the Court of Appeal, and a further appeal to the Supreme Court of New Zealand.[21] At least ten judges at different levels of the court hierarchy passed judgement on this case. The Environment Court case questioned the identity and names of the parties involved - the application for consent was made in the name of a non-existent entity - and the condition that the houses would have to be removed after 30 years. The Environment Court is focused on resource management, land use and the sustainable management of natural and physical resources. It is, of course, beyond the jurisdiction of the Environment Court therefore, to consider private property law.[22] The higher courts questioned the interpretation and application of the covenant.

After reviewing multiple precedent cases, and observing that statutory definitions may change,[23] Williams J. would not thereby allow that the application of a covenant should also change. In the High Court (Williams J.) concluded " … that the construction of the covenant is not limited by the definitions of 'subdivision of land' and 'allotment' in the RMA s 218."[24] The term 'subdivision' in the covenant, therefore, was to be " … accorded a common sense meaning which will conform to the context in which it is used …",[25] or as the commonly accepted everyday meaning. The proposal for 52 leasehold sites therefore, " … went well beyond what the covenant allowed and amounted to a subdivision of that land, even though not a 'subdivision of land' for the purposes of s 218 of the RMA … ."[26]

Big River Paradise appealed to the Court of Appeal whichsupported the High Court's conclusion that the proposal was a subdivision in the ordinary sense of the word:

> The Resource Management Act defines 'subdivision of and' for the specific purpose of identifying the types of subdivision which are subject to control under that Act. There is no obvious logic in applying that definition to 'subdivision' when used in the restrictive covenant given the very different context.[27]

A further appeal to the Supreme Court of New Zealand [28] was also unsuccessful. It is relevant here to quote another precedent case, as it has relevance to the discussion about the Clearspan and Cross lease decisions below. *Re Application by Hamilton City Council* [29] was brought to decide about the power of a local authority to levy a reserve contribution for a cross lease development and to decide whether additional lots are created:

> To adapt the provision for conventional subdivisions for application to cross lease subdivision, one should consider the reality of dwelling houses, or sites for dwelling houses, that are capable of being dealt with and disposed of separately. For that purpose *it is of no consequence* that what is dealt with or disposed of is not a freehold estate in one lot, but an undivided joint interest in a freehold estate, together with a leasehold lease in the defined site of a building and any consequential covenants about exclusive and common use of the grounds.[30] (emphasis added)

This case is further evidence that definitions (e.g. of 'subdivision') are often context specific, so in Application by Hamilton City Council, for the purpose of assessing reserve contributions, a cross lease was a subdivision.

Alternative Tenure arrangements - a) Cross Lease

Cross leases were a common form of land development since the middle of the 20th century - usually arrangements to allow for multiple dwelling units within one building or separately on one parcel of land.[31] Cross leases were a convenient form of development because they were not defined as subdivisions of land under legislation and regulation applicable at that time; surveys were simply required to illustrate buildings that were subject to a lease, and some exclusive occupation or shared spaces. The primary purpose of the cross lease plan is to illustrate the property boundaries. Infrastructure servicing could be combined and was therefore cheaper, and planning consent was not required. On the other hand, the property rights acquired were often misunderstood and caused some conflict amongst owners and perhaps also devalued the property.[32] In the RMA 1991 cross leases were incorporated into the definition of a subdivision, which meant that subdivision consent was required to create cross lease titles.

The cross lease arrangement consists of an undivided share of the underlying estate of fee simple as tenants in common,[33] along with a lease of the physical

extent of (usually) a dwelling unit for 999 years (effectively perpetual), and (also usually) a covenant assigning exclusive occupation to an area around the dwelling. This allows for separate titles to be issued to all parties (a cross lease composite title) that can be transacted as freely as any other form of title. Along with other subsequent issues with this form of tenure,[34] many owners believed that they were buying an unencumbered fee simple title to their flat, and had similar freedoms to manage their flat and land.

The lease of a cross lease title is of the three dimensional building envelope as it is at the time of the lease creation. This is a boundary fixed by the permanent structure rather than by a survey fix,[35] and it is illustrated as a building outline on the survey plan. One of the key problems with Cross lease ownership is that any alteration of the structure outside of the original structure is therefore outside of the lease, and makes the structure an illegal intrusion into jointly owned land. Similarly, if the structure is destroyed then the lease is no longer valid—the structure no longer matches the lease.[36]

The survey plans that depict this cross lease arrangement show a divided parcel: a lease area corresponding to the buildings; a covenant area corresponding to the exclusive use areas;[37] and if necessary, common land. Furthermore, if an exclusive use area is defined on a plan it is not a legal boundary and can be altered by agreement of the joint tenants.[38] Under all the relevant legislation prior to the RMA, this did not amount to a subdivision, so local authority regulations regarding allotment sizes, infrastructure services and access were avoided. However, to all intents and purposes, the land was subdivided, separate parcels could be transacted, and the land use changes resulted in increased urban residential density.

In 1991, the Resource Management Act specifically included cross leases into the s 218 definition of a subdivision.[39]

> **RMA s 2. cross lease** means a lease of any building or part of any building on, or to be erected on, any land -
> (a) that is granted by any owner of the land; and
> (b) that is held by a person who has an estate or interest in an undivided share in the land

This closed the loophole that allowed such developments to avoid the regulatory control of territorial authorities, and must necessarily have slowed the use of this tenurial device.

In 1999 the Law Commission recommended the phasing out of cross leases and conversion of their titles to separate fee simple titles or to Unit Titles.[40] The legislature chose not to intervene to promote this recommendation, but many land professionals have made efforts to avoid cross leases and to convert cross lease titles to fee simple allotments.

The efforts to convert cross lease created new problems of having to comply

(often retrospectively) with council subdivision standards. However given that the effects of this tenure change had no impact on site occupation or urban density, nor any additional impacts on urban infrastructure, many surveyors thought it was reasonable to assert that cross lease conversion to fee simple titles did not amount to a subdivision.

Progress through the conversion process has been slow; partly because of apathy by cross lease proprietors, but partly because of the barrier of requiring a subdivision consent to acquire new fee simple titles. In the past, territorial authorities have allowed cross leases as a way to increase urban density and to allow shared services, so arguably, the conversion process is just a tenure issue rather than a resource management issue where the sustainable management of natural and physical resources and the effects of activities needs to be considered.

Alternative Tenure arrangements—b) Exclusive use covenants

Cellphone towers are an essential part of our physical and social infrastructure, and a network of towers is required across the countryside. An easy way to accommodate the property interests of cellphone tower sites is to subdivide a utility parcel (which is often exempted from normal subdivision rules by district plans) and provide for fee simple ownership of such (usually) small parcels. Alternatively, and in order to avoid having to subdivide an allotment, telecommunication companies often enter into an occupation lease with property owners over a small parcel of their land, for less than 35 years[41] (otherwise, again the arrangement would be captured within the s 218 definition of subdivision), and also presumably for an annual lease fee to the fee simple owner.

The primary test case is *Spark v Clearspan*. This case addresses the question about whether divisions of interests in land amount to a subdivision of land. A company, Clearspan, is in the business of acquiring interests in land upon which telecommunication (telco) companies have established their cellphone towers. The company actively seeks out parcels of land encompassing cellphone infrastructure. By aggregating their interests in these parcels, they expect to benefit from their enhanced negotiating position to profit from the occupation and use leases.

The Clearspan arrangement

Under this arrangement, Clearspan acquires a share as tenant in common of the whole parcel of land and enters into covenants which identify exclusive-use areas. The original land owner has the exclusive use of the primary parcel and Clearspan has the exclusive use of the small parcel of land subject to the

lease for the cellphone tower site. In effect, Clearspan then takes over as the lessor of the land to the telco company. The original owner gets a lump sum payment for providing a tenancy in common interest (the share is related to the relative size of the leased land) over all their land, and Clearspan purchases the tenancy in common interest and gains the annual lease fee, and presumably, the ability to negotiate favourable terms for lease renewals. A survey plan must be deposited to record the exclusive use covenant areas, so in effect separate parcels are created in an identical way as is illustrated on a cross lease plan. A difference is that the lease is between one tenant in common (who has the exclusive occupation area) and an external lessee (the telco).

The telcos seem to be generally happy with the arrangements they make with each individual landowner. There are around 4000 sites around New Zealand, so there is quite an administrative burden. However, presumably there exists some threat from the increasing bargaining power of Clearspan that the telcos wish to limit. Just as cross leases were developed as a legal device to utilise different tenure possibilities and avoid costs and regulation, these arrangements are now being registered which allow for the transfer of a defined (proportional to the area provided as exclusive use) but undivided share of the fee simple title as tenants in common and the identification of exclusive possession areas for telecommunications infrastructure. A barrier to further lease takeovers is to have such tenancy in common and covenant arrangements declared as subdivisions, and therefore being subject to territorial authority regulation. This would mean that subdivision consents would be required and then territorial authorities could impose conditions including right of way easements to be registered, accessways to be formed, and development contributions to be paid. It is, therefore, no surprise that a court challenge was brought by the telcos to seek a determination that the arrangement was in fact a subdivision.

Analysis of case decisions – Clearspan

An application was made initially to the Environment Court, heard by two Environment Judges, then appealed to the High Court, with one judge, then appealed further to the Court of Appeal, heard by three judges. This all took nine months; clearly a matter of great importance to the parties, but also for an analysis of legislation, and an understanding of the effects of different tenure arrangements. All three courts observed that the arrangement was clearly designed as a device to avoid the legal definitions of land subdivision; this in spite of Clearspan's documentation (legal deeds headed Clearspan Subdivision) and advice to clients that used the term subdivision to describe the arrangement. It seems that these courts were largely dismissive of such labelling; other courts

have been free to reclassify an arrangement "… irrespective of the precise label accorded it."[42]

The Environment Court concluded that there was a division of the allotment: the sale and purchase agreement indicated an intent to create a separate allotment; the deposited survey plan defines separate parcels; the tenants in common share is exactly proportional to the defined areas; the covenants divide the operational responsibility and the exclusive occupation for each parcel;[43] and the titles were intended to be dealt with separately.[44]

Clearly the arrangement creates two (or more) separate allotments[45] from the underlying allotment: (RMA s 218 (2)) - two parcels of land of a continuous area whose boundaries are shown separately on a survey plan. Therefore, there is a division of the original allotment. Furthermore, the arrangement is certainly a disposition of land as defined by s 4 Property Law Act 2007 ('… the creation of any other interest in property'). The arrangement establishes a legal right of exclusive possession. It is certainly a subdivision of the land into parcels under separate possession, however, it is not clear that it is the type of subdivision which is subject to the RMA (or in other words; to be regulated by the territorial authorities). It would seem however that it is not a subdivision of the kind listed in s 218 (1) (a). But the question could still remain about whether it is a subdivision of a kind listed in s 218 (1) (b), that is it could be a subdivision by application to the RGL for a certificate of title that is otherwise prohibited by s 226.

A tenancy in common provides for unity of possession, but the arrangements here specifically deny unity of possession.[46] The transfer of the tenancy in common of the fee simple title cannot occur without the survey plan defining the exclusive use parcels and therefore the proportionate share of the tenancy in common. The arrangement "… involves the partitioning of the land, the creation of a new allotment being part of the existing allotment. And different rights attracting to each part. It is founded, essentially, upon the plan agreed and the subsequent survey and deposited plan. It intends that these be registered with LINZ and that certificates of title be issued. It turns on a distinction between shares in the land, (with a tenant in common holding an undivided share) and the effective transfer of a share of the land in terms of part of the allotment."[47] This persuaded the Environment Court that the arrangement is a subdivision.

Why does subdivision need legislation and regulation?

On the one hand, land subdivision merely involves creating invisible boundaries on the land and has no further effect on the natural and physical resources, and on the other hand, the purpose of subdivision is to change and/or intensify land use which clearly has effects.[48] The court concludes that "… it is clear

that subdivision is not a purely technical matter and that a council is entitled to consider an application in light of the impact the subdivision will have on the management of associated resources."[49]

On appeal

It would seem reasonable to argue that the definition s 218 (1) (a) (i) ("… the issue of a separate certificate of title for any part of the allotment … .") could incorporate arrangements that provide for a part share of the interest as tenants in common, and the spatially separated exclusive covenant areas. However, the inclusion of cross lease in the alternative definition of a subdivision in s 218 (1) (a) (iv) suggests that cross lease is not captured by that earlier definition. Therefore, this arrangement is also not captured by the definition and so the appeal courts viewed the situation differently.[50]

The Court of Appeal, recognised that the statutory definitions around subdivisions and allotments are sometimes circuitous. The definition of an allotment talks of the division of land being shown on a survey plan (s 218 (2) (a)[13], and a survey plan being defined as "… a cadastral survey dataset of subdivision of land… ." (RMA s 2). The definition further includes a cross lease plan which would seem unnecessary given that a cross lease is also a subdivision. The Court has therefore sometimes resorted to common sense or dictionary meanings to words that might otherwise be defined in the Act, but the statutory statements are still heavily relied on.

The Court of Appeal concluded: firstly, Parliament chose transactional language in s 218 such that not every division of an allotment is a 'subdivision';[51] secondly, Parliament could have chosen an inclusive clause to incorporate all divisions of land, but chose not to, recognising that "... a significant number of transactions creating an interest in land would not fall within its definition.";[52] thirdly, because of the purpose of the RMA, the definition includes "… only those transactions with material environmental implications."; [53] and fourthly, there was no sale of the fee simple estate and the exclusive use covenants are encumbrances which "… are personal in nature, do not run with the land and are vulnerable to discharge or deregistration in the usual way of such charges … ."[54], "For these four reasons we conclude that the arrangement is not a 'subdivision of land' for the purpose of s 218, because the sale was not 'of the fee simple to part of the allotment'."[55]

How is this like a cross lease?

The Clearspan arrangement is similar to a cross lease in all except for the 999 year lease of the dwelling structure. If the arrangement is not a subdivision of land, then such a contrivance [56] could be used to produce the same effect as a

cross lease - a division of title by sharing as tenants in common, and a division of the parcel by reciprocal covenants providing for separate exclusive use areas. It would seem possible that this device could be used for flats, and therefore only building consent (not subdivision consent) could be required.

Notwithstanding that cross leases are generally considered to be unsatisfactory forms of title division, the lease (that is, the reciprocal grant of a 999 year lease that is registered upon a title) does not seem to be critical to a division of title that allows a development where separate owners have exclusive occupation of a site and a separate CT is granted by way of exclusive use covenant (as is the situation with the Clearspan arrangement). In other words the effect of a cross lease title could be achieved without the actual lease. In fact this could avoid the issues that arise when a proprietor alters the footprint of a building defined by a lease document.

Is there anything different in practice between a fee simple subdivision and a tenancy in common with exclusive occupation area?

In the Clearspan arrangement, there is a clear spatial division of the underlying allotment which creates separate and distinct allotments with surveyed and recorded boundaries (as defined in RMA 1991 s 218 (2) (a) - any parcel of land … that is a continuous area and whose boundaries are shown separately on a survey plan). The title that is then issued for these parcels is a composite title including the tenancy in common of the underlying lot and an encumbrance; the reciprocal covenant allocating exclusive possession rights to the separate areas. It also includes a reciprocal deed of covenant to ensure the arrangement continues to be recorded on titles. This composite title is only different from a cross lease composite title in the absence of a registered lease.

In the Clearspan case, there is a well-defined allocation of property rights - all entitlements are completely specified (universality), ability to freely buy and sell (transferability), ability to hold possession exclusively (exclusivity), all rights are secure from seizure or encroachment and enforceable under the law (enforceability), ability to take income from (profitability), ability to grant separate subsidiary interests like leases and easements (dividability) and ability to mortgage (security). The covenant agreement separately requires all parties to ensure that the arrangement is retained as an encumbrance of future transactions, so it is effectively perpetual. Furthermore, the purchase price for the Clearspan arrangements would appear to be directly proportionate to the full fee simple value of the underlying property.

The courts have recognised that the list of arrangements that make up a subdivision in s 218 RMA are "… discrete and different in kind to one another … ." [57] A subdivision of one sort does not imply a subdivision of another sort.

So a potential argument that if a cross lease is already a subdivision then the further conversion to fee simple title may not also be a subdivision is untenable. A cross lease is one type of subdivision, then if established as a fee simple title it is a different type of subdivision.

Cross lease litigation - Analysis of case decisions - Re McKay

Don McKay, a fellow of the NZIS, sought a declaration from the Environment Court that "… the conversion of cross lease titles to fee simple titles do not constitute a subdivision within the meaning of section 218 Resource Management Act 1991."[58] In receiving this application the Environment Court was concerned that due to the effect its decision would have on so many cross lease proprietors that the hearing should be, if not adversarial, at least independent and widely discussed. It is interesting to observe that the Court invited participation of Ministry for the Environment (MfE), Land Information New Zealand LINZ), Local Government New Zealand (LGNZ) and the New Zealand Institute of Surveyors (NZIS),[59] and then from the Auckland Council (given that a large proportion of cross leases are in the Auckland region). To the surprise of the Court, only NZIS accepted the invitation. The Court therefore found it necessary to appoint an amicus curiae (Dr K Palmer) to assist the court with legal issues and additional submissions.

The Court described the issue as "… deceptively simple in its terms …", but "… not as straightforward as it might appear."[60] The arguments brought to the Court seemed quite compelling: no additional environmental effects were introduced in the conversion process, and as a cross lease was already a subdivision (providing for separate composite titles to be issued defining exclusive interests over separate parcels), the further title conversion was not an additional subdivision.

The Court stated that "While the plan of the cross leases may show separate areas of the allotment, those divisions are for the purposes of the lease and are not of the fee simple of the allotment." [61] The court focused on the division of the underlying fee simple title (which is shared as tenants in common), rather than the spatially separated encumbering interests.

The Court examined the statutory regime in detail, particularly RMA s 218. The Court again acknowledged that there is some circularity in the RMA definitions that link subdivision, allotment and survey plan such that they each define each other. This required the court to sometimes treat the word subdivision to just mean division of land. The Court also clarified "… the five methods listed in s 218 (1) (a) are not equivalent with each other except as being [different] types of subdivision." [62]

The court summarised these provisions as: "No person may divide a parcel

of land of continuous area and whose boundaries are shown separately on a survey plan by applying for a separate certificate of title for part of that parcel unless allowed by a district rule or a resource consent and is shown on a survey plan suitable for deposit under the Land Transfer Act 1952."[63]

The Court recognised that the issue being brought before it was both a strict legal issue and that it had wider practical issues relating to cross leases. It is therefore, worth noting that the composite cross lease titles are supported by a cross lease survey plan, which clearly identifies the spatial extent of the lease, the exclusive covenant area, the common area and the area of the fee simple title held as tenants in common. These boundaries can be used for the fee simple boundaries, so no new parcels or boundaries need be created (although they would need to be shown on a new survey plan as allotments). However, the court returned to statutory definitions: "… it thus constitutes the division of a parcel of land shown separately on a survey plan and therefore is the subdivision of land within the meaning of s 218 (1) (a)." [64] The court refused the application for the declaration as applied for, and confirmed that the conversion of a cross lease to fee simple title was a subdivision that required a resource consent.

However, the court proceeded to comment on the practical issues raised, to suggest that the existing use of a cross lease development and the fact that no practical effects were involved might be a way to encourage consent for a conversion. It stated that planning consent conditions must: a) be imposed for the purposes of the RMA and not for any ulterior purpose; b) fairly and reasonably relate to the development; and c) not be unreasonable. Furthermore, "… the consent authority should generally approach such an application in a way that is mindful of the possibility that there may be few, if any, material environmental implications warranting a full-scale assessment." [65] The next step might be to try and get territorial authorities to record cross lease conversions as permitted activities and therefore exempt from the consenting conditions.

This case has clarified the legislation and provided implicit guidance to councils to facilitate cross lease conversions. The judge's statements in the previous paragraphs should be relied upon to support any subdivision consent application for a cross lease conversion. It is to be hoped, therefore, that in line with the Law Commission's views, the conversion of cross lease titles to separate fee simple titles is greatly facilitated.

Discussion

The establishment of a cross lease is a subdivision of land because it is specifically stated to be so in RMA s 218 (1) (a) (iv). [66] The conversion of a

cross lease to a fee simple title is also a subdivision (of a different type - s 218 (1) (a) (i)) because it spatially separates the interests in the land in separate fee simple titles. In spite of the fact that the Clearspan arrangement has essentially the same effect as a cross lease (spatial division defined on a plan and separate exclusive interests defined in separate titles which can be bought and sold), it is not a subdivision because it does not precisely fit in any of the s 218 definitions; specifically it does not create new fee simple parcels.

There is enough doubt about judicial interpretations to assume that all three cases discussed herein could have been decided differently. The Congreve decision takes a common sense view of interpreting 'subdivision' and upholds the intent of the arrangement to put limits on land development. But that court could have taken a more expansive view of s 218 and concluded it to be a subdivision of land under the RMA. The Clearspan arrangements clearly serve to create separate interests in land which can be exclusively used and managed by defined parties and which can be bought and sold as separate cadastral interests, and yet do not come under the court's interpretation of subdivision—rather, they are based on contractual documents which both parties are expected to understand and apply. No doubt similar arrangements will be used in future to create separate interests without the necessary oversight of a subdivision consent. It is entirely possible that if the Clearspan device (or anything similar) is used regularly and in new contexts such that it is seen by the legislature to be a regulatory evasion, the legislature may add additional clauses to s 218 to include such a device in the same way that cross leases were brought within the 'subdivision' definition in the RMA. The McKay decision, if decided in the opposite way, could have facilitated a transition towards more secure and clearer tenure of cross lease properties.

It would be useful for the government to reconsider the statutory details of s 218. It must be seen as regrettable, that the government chose not to take up the 1999 Law Commission's recommendations to facilitate cross lease tenure upgrade and that the court decided that a tenure conversion was a subdivision under the RMA (so the effects have to be regulated), even though the effects were established in the past and cannot be undone.

The cases discussed above illustrate different ways of understanding words. In Congreve, 'subdivision' is given a meaning that is a common sense meaning. In Clearspan, 'subdivision' is given a strict statutory meaning that excludes the type of division of a parcel and issue of distinct title rights provided in the arrangement. In Re McKay, 'subdivision' is also given a strict statutory definition, that clearly identifies that s 218 lists separate and distinct types of subdivision, such that a subdivision under one definition is different to a subdivision under another definition.

The use of words and their interpretations in legal contexts is a key role

of our judicial system. Legal word interpretations may always be challenged, and there are numerous opportunities to argue for alternative interpretations. Statutory definitions only apply to specific statutory considerations. Contractual arrangements can be devised to avoid statutory implications. The cases discussed herein demonstrate interpretative uncertainties that will have significance for surveyors and for the creation of new land parcels and land titles.

Notes

[1] *Spark v Clearspan* Court of Appeal [2018] NZCA 248 at [24].

[2] *Re Application by Donald McKay* [2018] NZEnvC 180.

[3] This text constitutes an analysis of the multiple hearings of the cases: *Big River Paradise v Cosgrove, Clearspan v Spark, and Re Application by Donald McKay.*

[4] *Re An Application by Hamilton City Counc*il (1993) 1A ELRNZ 428.

[5] *Ibid* at p.441.

[6] *Waitemata County v Expans Holdings Ltd* [1975] 1 NZLR 34.

[7] *Ibid* at p.36.

[8] *Ibid* at p.44.

[9] *Ibid* at p.48.

[10] *In re Transfer to Palmer* (1903) 23 NZLR 1013.

[11] *Ibid* per Williams J. at p.1020.

[12] I have specifically avoided using the term 'ownership' as that term has its own definitional issues.

[13] In other words: " …the sustainable management of natural and physical resources." (RMA s 5).

[14] Town and Country Planning Act 1977 Schedule 2 s 6.

[15] s 218 (1) (a) (iii) RMA 1991. This RMA section was amended in 2003 to read "could be for a term of more than 35 years."

[16] Land Transfer Act 1952: s 70 – "… separation of a parcel of land … ", s 89A "… in every allotment of a subdivision … ", s 167 "… a plan of the land or subdivision … ". In the Land Transfer Act 2017: s 184 "… lots in the subdivision … "

[17] Property Law Act 2007 s 4 "… a separate allotment in the subdivision … "

[18] It is worth noting firstly, that a covenant is a form of privately accepted regulation of land use which restricts the use of land for activities that would otherwise be legal. In other words, while regulatory land use restrictions imposed by local authorities provide minimum rules of compliance, a covenant may impose many other restrictions or enforcement opportunities for higher levels of amenity. Gray & Gray (1998:22 at

FN146) note that "… private restrictive covenants often came to operate as a localised form of private legislation, preserving various kinds of residential and environmental amenity for future generations of successive owners."

[19] Registered under the Land Transfer Act 1952, and note that covenants were subject to s 126 Property Law Act 1952 (now Part 5 Sub-part 4 Property Law Act 2007).

[20] Lang J. records that the commissioner hearing the consent application observed that '… the application was "carefully crafted" so as not to offend against "… the letter of the covenant" … and whilst the proposal did not offend the literal wording of the covenant, it may nevertheless fall outside the spirit and overall meaning to be ascribed to it'. (*Congreve* 2005 at para [40]).

[21] See the list of case citations in the Reference List.

[22] Lang J. quoted a previous decision (*Sanders v Northland Regional Council* 1998): "… a resource consent application is not concerned with private property rights at common law. … Actions for enforcement of private property rights are not within the jurisdiction of the Environment Court" (*Congreve* 2005 at para [26]).

[23] The 2003 RMA amendment changed the lease period of a subdivision from 20 years to 35 years (s 218 (1) (a) (iii)).

[24] *Congreve* 2005 at para [54] Williams J. decision as quoted from *Waitemata County v Expans Holdings Ltd* [1975] 1 NZLR 34 at 48.

[25] *Ibid* at para [62].

[26] *Ibid* at para [70].

[27] *Congreve* [2008] NZCA 78 at para [32], [2008] 2 NZLR 402.

[28] *Congreve* [2008] NZSC 51, (2008) 9 NZCPR 327.

[29] *Re Application by Hamilton City Council* (1993) 1A ELRNZ 428.

[30] Quoting the Planning Tribunal *Re Application by Hamilton City Council* (1993) at 438. Note: this was quoted slightly differently by Williams J. in *Congreve* 2005 at para [63].

[31] For a simple explanation of cross leases, see Ryder (2017).

[32] The tenancy in common does not provide the freedom of use usually associated with fee simple.

[33] A tenancy in common is a division of title usually by a defined share (not a division of the parcel).

[34] See Law Commission 1999. Shared Ownership of Land.

[35] In other words it is not fixed by polar or rectangular coordinates of a survey.

[36] It is, however, worth pointing out that in Christchurch, if a cross lease structure moves with surface ground shift, the lease boundary moves with the structure, even though it may appear in a different location than shown on the plan. See Canterbury Property Boundaries and Related Matters Act 2016 s 8 (2) "The boundaries are deemed to have

moved or to move with the movement of land caused by the Canterbury earthquakes (whether the movement was horizontal or vertical, or both)."

[37] The cross lease can be completed without defining any exclusive use covenant area.

[38] See also statements made by counsel (although not necessarily confirmed by the Environment Court judge): "a survey plan for cross leasing could be deposited without detailing exclusive or common areas and … those involved could alter the boundaries of exclusive or common areas by agreement" (*Re An Application by Hamilton City Council* (1993) 1A ELRNZ 428 at 438). I make a similar assertion in a summary of *Boyer v McCracken* [2017] NZHC 755 – questioning whether the line shown on a cross lease plan showing the exclusive use area was legally a boundary. I suggest that the boundary was the existing and long-accepted fence (in other words, the evidence of possession) rather than the line shown on the plan (Strack, M. 2018. Cross lease boundaries. *Surveying+Spatial.* 93:41-42).

[39] Note, under the Town and Country Planning Acts, cross leases were not defined as subdivisions.

[40] New Zealand Law Commission, 1999. Shared Ownership of Land. Summary of Recommendations: 33.

[41] In one example used in the *Clearspan* case, the lease was for 12 years - CT1073/298.

[42] See Gray & Gray 1998;6 at FN30. Furthermore, Gray & Gray state, with respect to an analogous case about what was a lease and what a licence: "The courts are therefore empowered to overturn an superficial label which falsely describes the parties' legal relationship, and any contractual terms which are blatantly or cynically inconsistent with the reasonably practical circumstances of an agreed occupancy are liable to be discarded as 'pro non scripto'" at p7.

[43] Note the very strong priority in the common law of a property right proven by exclusive possession. Gray & Gray 1998:5 FN20, quote a judicial statement: "Exclusive possession de jure or de facto, now or in the future, is the bedrock of English land law." Common law exclusive possession as indication of property is perhaps more accepted in the UK, while here in New Zealand, statutory interruption of the common law is more arguable, given that the purpose of the Land Transfer Acts was to establish a new and different basis of title to land. The status of fee simple property in New Zealand is as granted by the issue of a Record of Title (the terminology of the Land Transfer Act 2017) explicitly stating that the identified proprietor is 'seized of an estate in fee simple' (the terminology of earlier LT Acts). Note however that the Acts do not provide a definition or interpretation of fee simple. However, the common law recognised fee simple proprietorship irrespective of the issue of a registered or documented interest. Perhaps the *Clearspan* case could have been argued on the basis of what is the reality of possession rather than the label accorded to the arrangement.

[44] see *Hamilton* case FN 32 above.

[45] See for example the plan of Land Covenants; Areas A-E on DP 450 403.

[46] See *Spark v Clearspan* 2016 Env Court at para [43].

[47] *Spark v Clearspan* 2016 Env Court at para [39].

[48] see Environment Guide n.d.

[49] quoting *Mawhinney v Waitakere City Counci*l [2009] NZCA 335 at para 27.

[50] The final appeal judgement is *Spark NZ Trading Ltd v Clearspan Property Assets Ltd* [2018] NZCA 248.

[51] *Ibid* at para [22].

[52] *Ibid* at para [23].

[53] *Ibid* at para [24].

[54] *Ibid* at para [27] It is worth noting that as part of the composite title arrangement and the covenant, any new party to the arrangement is required to carry the arrangement documents forward, ensuring the agreement runs with the land and is effective and perpetual (for as long as the Telco tower is required).

[55] *Ibid* at para [28].

[56] The High Court [2017]NZHC 277 at [52] described the arrangement as an "artificial contrivance to avoid an undesired set of regulatory requirements."

[57] *Spark v Clearspan* 2018 at para [46].

[58] *Re Application by Donald McKay* [2018] NZEnvC 180 at [1]. This case was also discussed in Strack (2018b).

[59] Now Survey and Spatial New Zealand.

[60] *McKay* at [17].

[61] *Ibid* at [46].

[62] *Ibid* at [46].

[63] *Ibid* at [31].

[64] *Ibid* at [40].

[65] *Ibid* at [55].

[66] even though most cross lease titles became subdivisions retrospectively with the introduction of the RMA 1991.

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