***Re McKay* [2018] NZEnvC 180**

Executive Summary

- Don McKay sought a declaration from the Environment Court that the conversion of cross lease titles to fee simple titles is not a subdivision under the RMA.

- The Environment Court refused the declaration, taking the view that conversion would require new lines to be drawn on a survey plan, and so was still a subdivision.

- This means a resource consent will still be required for conversion. However, the Court also said that a cross lease reflects an existing use, and consent authorities should not impose onerous conditions on those seeking conversion.

Introduction

Don McKay, a Fellow of the New Zealand Institute of Surveyors and an experienced surveyor, planner, and engineer, filed an application for a declaration:

> "That the conversion of cross lease titles (CFR) to fee simple titles (CFR) do not constitute a subdivision within the meaning of section 218, Resource Management Act 1991."

The key goal of the application was to enable conversion from cross leases to fee simple titles with the agreement of owners, but without needing a resource consent. The application also aimed to bring attention to the significance of the problems with cross leases.

Interested Parties

By direction of the Court, the application was served on the Ministry for the Environment, LINZ, Local Government New Zealand, Auckland Council, and the Institute. To the Court's surprise – and perhaps dismay - only the Institute wanted to be heard, and given the implications of the issue, the Court appointed Associate Professor Kenneth Palmer as amicus curiae (friend of the Court).

Background

The declaration sought was described as "deceptively simple" (at [17]): there was a "strict legal issue", but also wider practical issues arising from the declaration (at [18]).

A background to cross leases was provided, along with their problems, as highlighted by the Law Commission report *Shared Ownership of Land* (NZLC R59, 1999), and the Auckland Council research report *Arrested (re)development? A study of cross leases and unit titles in Auckland* (Technical Report 2017/025, 2017). The Law Commission had found cross leases irremediately flawed, while the Auckland Council report had showed they hindered future development, with both reports suggesting a facilitated approach to conversion to fee simple.

McKay also presented submissions and evidence around local authority practice in subdivision consent conditions. The difficulties of cross leases were supported by expert witnesses called by the Institute, Warren Haynes and Tim Jones, though the Court also referred to commentary that showed the advantages of cross leases.

The RMA Background

The Environment Court naturally focused on the RMA dimension of cross leases. The Court referred to a range of provisions in the RMA, including section 2 (definitions of cross lease and survey plan), section 11 (restrictions on subdivision of land), section 218 (definition of subdivision), and section 226 (restriction upon issue of certificates of title). The Court noted that:

- The RMA provides a complete code for the control of subdivision in New Zealand: see *Waitakere City Council v Kitewaho Bush Reserve Co Ltd* [2005] 1 NZLR 208 (HC) (at [80]).
- The text of the RMA was "relatively crystalline", using "transactional langugage containing precise metres and bounds" (at [30(c)]).
- A cross lease involved the lease of a building, not of land.
- A subdivision involved wither the division of an allotment according to section 218(1)(a), or an application for a separate certificate of title for an allotment, subject to the exclusions under section 226(1).
- There was some circularity in the definitions of "subdivision", "allotment", and "survey plan" – but essentially the definition of survey plan related to a plan of division of land: *Horokiwi Holdings Ltd v Registrar-General of Land* [2007] NZRMA 360 (HC) (at [44]-[47]).

Property Law Principles

Having traversed the RMA, the Court returned to property law principles, noting there was no definition of "fee simple" in the RMA (or the Land Transfer Act or Property Law Act, for that matter), but the nature of a fee simple estate had recently been considered in *Clearspan Property Assets Ltd v Spark New Zealand Trading Ltd* [2017] NZHC 277. A leasehold estate was, by its nature, time-bound, and so less than freehold: a fee simple estate was practically unlimited in duration.

As defined in the RMA, a cross lease was a title involving an undivided share in land, and a lease of a building or part of a building: the land under the building was already an allotment. Importantly, the transfer of an undivided interest in land did not involve the disposition of a fee simple estate, and the grant of encumbrances and personal covenants did not create an estate or interest in the land: *Spark New Zealand Trading Ltd v Clearspan Property Assets Ltd* [2018] NZCA 248.

Evaluation

In the Court's view, to make an undivided share of an allotment into a separate fee simple title required the division of the allotment into two or more new allotments. This meant there was a division of a parcel of land shown separately on a survey plan, and therefore a subdivision of land within the meaning of section 218(1)(a). This further meant that a subdivision consent would be required in most circumstances. It was likely that in many cases, the boundaries on a cross lease plan would be insufficient to meet the definition of survey plan. Any common areas would be undivided areas, and so the creation of new allotments "would require lines to be drawn where none had been before" (at [41]).

Even where the boundaries of the new areas to be shown on the freehold title would follow the exact boundaries of the cross lease areas, the issue was not whether anything visible on the land would change, but rather the underlying allotment would be divided. Even where there were no common areas, the conversion nonetheless required the division of the underlying allotment. The conversion of a cross lease to a fee simple title therefore "must constitute a subdivision of the allotment on which the leased building sits" (at [43]).

Other Arguments

An argument was raised that as the grant of a cross lease of part of an allotment was a division of that allotment under section 218(1)(a)(iv) of the RMA, there could be an application for a separate certificate of title for that part under section 218(1)(a)(i). This was interpreted by the Court as an argument that as the grant of a cross lease of any part of an allotment is a division of that allotment, that allotment is already divided and no subdivision occurs. This would avoid any contravention of section 11 of the RMA, as a subdivision allowed by a resource consent and shown on a survey plan would already have taken place.

However, the Court's response was that the five methods of subdivision in section 218(1)(a) are not equivalent: there were "discrete and different in kind to one another" (at [46]). While separate areas could be identified by leases and shown on a plan, the owner of each cross lease held an undivided share in the freehold allotment, and that allotment would need to be divided to produce separate freehold titles. The conceptual distinction between freehold and leasehold meant that separating the shares of the cross lease would necessarily involve a subdivision of land under section 218.

Consent Requirements

A conversion of a cross lease title to a fee simple title therefore required an application for resource consent under section 11 of the RMA, and a section 104 assessment. The Court acknowledged there might be subsidiary issues as to the extent to which a consent authority could impose conditions on any such subdivision consent: in particular, building alterations might require upgrading works, or changes to structures, access, or services might require relocation or upgrading work.

The Court felt it appropriate to comment on the general limits within which an application to convert cross leases into freehold or unit titles should be processed and assessed by a consent authority. Two key issues were the status of what was already occuring on the land (as an existing use under section 10 of the RMA), and the scope of the power to impose conditions on subdivision. Where there was an existing use under section 10, the Court queried as to how far a consent authority could go in requiring that use to be assessed as a new use. The Court referred to section 108AA of the RMA, which sets out the requirements for resource consent conditions.

That is, while the conversion of a cross lease property into separate freehold titles was a subdivision of land and required a subdivision consent, in the Court's view:

> "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 of the proposal as if it were a new development" (at [55]).

With these pointed comments to local authorities, the Court declined to make the application sought.