

Knocking at the Compensation Door – What Might a Deprived Owner Expect Under the Land Transfer Act 2017?

Professor Elizabeth Toomey, School of Law, University of Canterbury

This paper focuses on the expanded compensation regime under the Land Transfer Act 2017 (LTA 2017) and explores how recent judicial decisions under the Land Transfer Act 1952 (LTA 1952) might be decided differently under the new Act. It also explores the correlation of the new “manifest injustice” principle with the expanded compensation regime.

The guiding principle for determining the amount of compensation is to put the person in the same position as if the wrongful act had not been done.¹ As can be seen from both the legislative framework for compensatory claims and resulting judicial interpretation, this simple principle comes with a number of fish hooks. As well as exceptions in the legislation itself,² decisions such as *Marriott v Attorney-General*,³ *Schmidt v Registrar-General*,⁴ *Registrar-General of Land v Burmeister*⁵ and *Burmeister v Registrar-General of Land*⁶ demonstrate the complexities of state guarantee of title.

Section 58 of the LTA 2017 re-enacts s 172(a) of the LTA 1952 but extends its application to include system failure. Thus it covers loss or damage resulting from a Registrar’s error or from system failure. Perhaps one of the most significant differences between this provision and s 59 of the LTA 2017 (s 172(b) of the LTA 1952) is the basis for determining the amount of compensation payable.

Under the former, a successful claimant is entitled to damages assessed on the normal basis for assessment of damages in accordance with ordinary common law principles. In *Marriott v Attorney General*, the Court sought assistance from the approach of the courts to the assessment of damages in professional negligence cases involving lawyers whose mistakes have led their clients to incur losses.⁷ The Court concluded that the trustee plaintiffs lost the chance of taking proceedings to enforce a buy-back agreement when the Registrar failed to notify the trustees of an application for the lapse of a caveat and treated the application as a withdrawal of caveat. On that lost chance principle, damages were assessed at \$850,000. There is nothing in the LTA 2017 that would change that.

Under the latter (compensation for loss of estate or interest in land), calculation of that loss is carefully circumscribed by setting maximum amounts: s 64 of the LTA 2017 (replacing, but changing considerably, s 179 of the LTA 1952). The cluster of *Burmeister* decisions provides a valuable tool for comparative comment. How would the *Burmeisters* - who, having entered into a series of transactions in which they were defrauded, eventually recovered ownership of their home albeit encumbered by a registered mortgage well in excess of the value of the home - have fared under the LTA 2017? This paper describes the judicial interpretation of the word “deprived” and the phrase “barred from the Act” and then mirrors the compensation calculation against significant changes in the 2017 Act. The start date for assessing compensation is different – it is the date of “reasonable discovery (s 65) - and the interest rate is at a prescribed rate (s 70). The court has a discretion to adjust compensation up or down (s 68) and to reduce compensation as a result of an applicant’s carelessness. Under the new regime, the

¹ *Registrar of Titles v Spencer* (1909) 9 CLR 641 at 645.

² Section 61 of the Land Transfer Act 2017 consolidates the scattered provisions in the Land Transfer Act 1952.

³ *Marriot v Attorney-General* [2011] 1 NZLR 354.

⁴ *Schmidt v Registrar-General* [2016] 2 NZLR 121.

⁵ *Registrar-General of Land v Burmeister* [2012] 13 NZCPR 504(CA).

⁶ *Burmeister v Registrar-General of Land* (2014) 15 NZCPR 91.

⁷ See, for instance, *Morrison Morpeth v Hanrahan* CA 81/93, 17 December 1993, *Fletcher v Cavell Leitch Pringle and Boyle* HC Christchurch AP 31/00, 27 July 2001 and *Benton v Miller & Poulgrain (a firm)* [2005] 1 NZLR 66(CA), all of which considered “loss of chance” principles.

Burmeisters would no longer be sheltered from their careless actions and undoubtedly would have suffered a brutal downward adjustment.

The extensive litigation as to whether the Burmeisters were out of time to bring their claim (the 6 year limitation rule in s 180 of the LTA 1952) would no longer be necessary. Section 180 not repeated in the 2017 Act - the Limitation Act 2010 is considered adequate.

Sections 54 and 55 of the LTA 2017 give the courts the ability to override the concept of immediate indefeasibility of title on the ground of manifest injustice. If that power is exercised, the current owner loses his or her interest. Section 59(2)(c) allows that owner to bring a proceeding against the Crown for compensation. This is more complex than it seems. Section 55(4) provides guidelines that the court may take into account in determining whether to make an order cancelling the owner's interest. Several of those guidelines import an element of carelessness. As noted above, carelessness is also factored into the new compensation regime. This part of the paper demonstrates the potential for a deprived owner to suffer a further set back in any compensation proceedings.