

IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

CIV-2010-476-624

BETWEEN THE INSTITUTE OF
CADASTRAL SURVEYING
INCORPORATED, a body duly
incorporated under the
Incorporated Societies Act at
Timaru

Applicant

A N D LAND INFORMATION NEW
ZEALAND

Respondent

SUBMISSIONS OF APPLICANT IN SUPPORT OF INTERLOCUTORY
APPLICATION FOR ORDER UNDER DECLARATORY JUDGMENTS ACT 1908

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1. The applicant, on behalf of its members, is seeking a declaratory judgment on issues surrounding a lack of specificity under the Cadastral Survey Act 2002 regarding the content of the cadastral survey dataset required to be certified by a Cadastral Surveyor.

2. Section 3 of the Declaratory Judgments Act 1908 states:

“Where any person has done or desires to do any act the validity, legality or effect of which depends on the construction or validity of any statute, or any regulation made by the Governor General in Council under statutory authority, or any by law made by local authority, or any deed, will, or document of title, or any agreement made or evidence by writing, or any memorandum or articles of association of any company or body corporate, or any instrument prescribing the powers of any company or body corporate; or

Where any person claims to have acquired any right under any such statute, regulation, by law, deed, will, document of title, agreement, memorandum, articles or instrument, or to be in any other manner interested in the construction or validity thereof –

Such a person may apply to the High Court by originating summons ... for a declaratory order determining any question as to the construction or validity of such statute, regulation, by law, deed, will, document of title, agreement, memorandum, articles or instrument or any part thereof.

3. It is the applicant’s understanding it is not disputed that its membership of Cadastral Surveyors comes within s.3 of the Declaratory Judgments Act as being persons acquiring rights under the Cadastral Survey Act. The applicant therefore seeks a declaratory judgment determining questions arising as to the construction of the “cadastral survey dataset” which a cadastral Surveyor is required to certify in terms of that Act.

4. It is acknowledged that the jurisdiction given to the High Court in these matters is discretionary and it is accepted the procedure for obtaining declaratory orders is not designed for the resolution of factual disputes or where disputes can be resolved by regular proceedings.

5. The leading authority on the application of the Declaratory Judgments Act is New Zealand Insurance Co Limited v Prudential Assurance Co Limited [1976] 1 NZLR 84:

“The Court will not answer purely abstract questions in anticipation of an actual controversy. It will not deal with mixed questions of fact and law. The procedure is designed to provide a speedy and inexpensive

method of obtaining a judicial interpretation where the matter in dispute cannot be conveniently brought before the Court in its ordinary jurisdiction and where the declaratory judgment would be appropriate relief. But the procedure should not be adopted where the party who institutes them can without real difficulty have the matter in dispute disposed of in an ordinary action.”

(per McCarthy P at page 85)

6. Also of assistance is the more recent Supreme Court decision of Mandic v Cornwall Park Trust Board.

“Declaratory judgments are available to make “binding declarations of right” whether or not “any consequential relief is or could be claimed”. The effect of a declaratory order is to the same effect “as the like declaration in a judgment in an action”. It is “binding on the person making the application and on all persons on whom the summons has been served, and on all other persons who would have been bound by the said declaration if the proceedings wherein the declaration is made had been in action”. A declaratory judgment may be given “by way of anticipation with respect to any act not yet done or any event which has not yet happened”. The High Court may direct service of the summons on such persons it thinks fit to ensure that any person affected has notice and may take part in the determination.

The jurisdiction under the Declaratory Judgments Act enables anyone whose conduct or rights depend on the effect or meaning of an instrument, including an agreement, to obtain an authoritative ruling. In New Zealand, questions concerning the interpretation of rent or review provisions of leases have often been addressed under the provisions of the Declaratory Judgments Act, as is illustrated by the Drapery and General Importing Co of New Zealand Limited v The Mayor of Wellington. Access to the jurisdiction does not depend on their being an existing dispute. Nor is it necessary that there be a lis. It is desirable to express this disagreement with the reasons of the Court of Appeal, although, in the event, the approach it adopted is not material to the determination of the appeal.”

(paragraphs [8] and [9])

7. Finally, counsel also refers to Electoral Commission v Tate [1999] 3 NZLR 174:

“[30] A Court may, of course, decline to make a declaratory judgment or order under the Declaratory Judgments Act 1908. Section 10 expressly provides that the jurisdiction conferred upon the Court to give or make a declaratory judgment or order shall be discretionary and that the Court may, on any grounds which it deems sufficient, refuse to give or make any such judgment or order. There may be a number of sound reasons why a declaratory judgment or order should be refused. Examples of grounds on which such judgments or orders have been declined are cases where the question is one of mixed law

and fact, or where the question is an abstract or hypothetical question, or where the order would have no utility. See *Laws NZ, Courts para 133, The Rt Hon justice Hardie Boys*.

[31] The Courts cannot, however, refuse to give or make a declaratory judgment or order on a ground which is inconsistent with the Courts' essential function. Broadly speaking, that function is to interpret and apply the law to the facts of a particular case. With respect to statutes, the Courts have the function of authoritatively construing legislation, that is, determining the legislation's legal meaning so far as is necessary to decide a case before it. See *Laws NZ, Statutes para 120, Garth Thornton*. It is the Courts' task to interpret and enforce provisions which confer rights, or impose duties, or vest powers in named persons or bodies, including governmental agencies. In discharging this task, they are giving effect to the will of Parliament. See *Peter Cane, An Introduction to Administrative Law (Oxford, Clarendon Press, 1996) at p 12*. To the extent that the task is not discharged a person or body may be deprived of a statutory right, or may fail to perform a statutory duty, or may be divested of an intended power. Consequently, it is imperative that persons or bodies have access to Courts of law to determine the rights, duties or powers which Parliament has conferred on them by statute.

[32] The Courts' function to interpret and enforce statutory law has implications for the rule of law. Unless the meaning of a statute is declared when it is validly in dispute, the law, and with it, the lawfulness of the person or body's actions, will be uncertain. Thus, where a body purports to act in accordance with a disputed interpretation of a statutory provision, and on the proper interpretation it does not have that power, the body will be acting illegally and any person affected will be deprived of a right or rights which he or she is entitled to enjoy under the law. To avoid this situation the Courts' authoritative interpretation is required. No one under the rule of law is able to escape the disinterested judgment of the law, and rendering that disinterested judgment is the function of an independent judiciary.

[33] For these reasons it is fundamental that the Courts are never entitled on the principle *non liquet* (it is not clear) to decline to determine the legal meaning of a relevant enactment. See *F A R Bennion, Statutory Interpretation: A Code (3rd ed, Butterworths, 1997) at p 14*. In so far as Parliament has not conveyed its intention clearly it is therefore the Courts' role to provide that clarity. Experience demonstrates that statutory provisions which are not clear are not uncommon, but the Court cannot use the very lack of clarity which it is constitutionally entrusted to clarify as a reason for declining to do so. The fact a statutory provision is perceived to be unclear, therefore, is not an acceptable ground on which to decline to make a declaratory order.

[34] Nor is it a sufficient ground that the question is considered to be "very much a political question" to which it is "desirable" that Parliament rather than the Court give the answer. Much legislation has a "political" content and indeed, may be "politically" controversial. That "political" content or controversy cannot excuse the Court from

its task of interpreting and applying the legislation to the facts of the particular case. The principle of judicial independence is jealously preserved for this very reason. Statutory law is to be declared independently of political considerations. If Judges are complaisant or accommodating towards political power or considerations, politicians can be expected to take what is given. The function of the Courts and the independence of the judiciary will be diminished accordingly."

8. Rule 13 of the Rules for Cadastral Survey 2010 requires every cadastral surveyor to provide the following certification:

I [name], being the licensed cadastral surveyor, certify that
(a) this dataset provided by me and its related survey are accurate, correct and in accordance with the Cadastral Survey Act 2002 and the rules for Cadastral Survey 2010, and
(b) the survey was undertaken by me or under my personal direction.

9. It is noted this is very similar to the previous certification set out in Schedule 1 of the Surveyor General's Rules for Cadastral Survey 2002/2.

"I [name], being the person entitled to practice as a licensed cadastral surveyor, certify that
(a) the surveys to which this dataset relates are accurate, and were undertaken by me or under my direction in accordance with the Cadastral Survey Act 2002 and the Surveyor-General's Rules for Cadastral Survey 2002/2
(b) this dataset is accurate, and has been created in accordance with that Act and those rules.

10. The earlier certification applied in respect of a process involving "hard copy" documents, as opposed to electronic information. As such it was very clear as to what documents a cadastral surveyor was required to certify.

11. The phrase "dataset" is not defined under the Cadastral Survey Act but appears to be generally accepted to be a shorthand phrase for a cadastral survey dataset.

12. "Cadastral survey dataset" is defined in the Act as "*the set of cadastral survey data necessary to integrate a cadastral survey into the cadastre*".

13. In turn, "cadastre" is defined as "*the cadastral survey data held by or for the Crown and Crown agencies*" and "cadastral survey data" is defined as "*(a) information in or derived from cadastral surveys, and related information; and*
(b) includes survey system information and tenure system information."

14. "Cadastral survey" is defined as *"the determination and description of the spatial extent (including boundaries) of interests under a tenure system."*
"Survey system information" is defined as *"information derived from, or relating to, survey observations in cadastral surveys"* and "tenure system information is defined as *"the information necessary to enable the creation or transfer of interests under a tenure system."*
15. For completion, "tenure" and "tenure system" are defined (respectively) as *"the kind of right or title by which land is held"* and *"a system that provides for the creation and transfer of interests in land."*
16. The object in undertaking a cadastral survey is for the integration of the spatial extent of interests in land into the cadastre. The cadastral survey is solely undertaken for this purpose but is also generally being undertaken in terms of s.167 of the Land Transfer Act (ie. to effect the issue of new or the alteration of Certificates of Title/Computer Registers).
17. The issuing of new or altered Certificates of Title/Computer Registers involves four parties each having complimentary functions and each with their own responsibilities. These can be summarised as follows:

Cadastral Surveyor

Field Survey

Record of Observations

Definition calculations

Survey report

Other calculations

Landonline data

- Survey Transaction
- Survey Header
- Vector, mark & attributes

Diagram of Parcel/Title graphic

Diagram of Survey/Survey graphic (if required)

Territorial Authority

Section 223 Resource Management Act certification

Memorandum of easement documents
Vesting documents
Amalgamation documents
Esplanade documents
Reserve documents
Section 224(c) Resource Management Act 1991 certification
Consent notices
Bonds
Completion certificate
Other certifications required by Resource Management Act 1991

Legal Representative

Requesting issue of computer freehold registers
Schedule of easement documents
Vesting documents (owner)
Covenant documents
Other party consent documents

Land Information New Zealand

Auditing of cadastral surveys datasets
Approval of cadastral survey dataset as to survey
Integration of cadastral surveys into cadastre
Survey plan compilation
Title plan compilation
Issue computer registers

18. The applicant submits that the component parts of the cadastral survey dataset under the current legislation should include the following:
- Field survey (where required)
 - Record of field survey
 - Boundary definition calculations
 - Other calculations undertaken by a cadastral survey
 - Survey report
 - Survey number (provided by LINZ)
 - Cadastral survey information entered into Landonline
 - Manage survey transaction screen information

- Cadastral surveyor entered Landonline survey capture survey header screen information
- Cadastral surveyor entered Landonline survey capture mark list screen information
- Cadastral surveyor entered Landonline survey capture traverse boundary capture screen information
- Cadastral surveyor entered Landonline survey capture parcel list screen information
- Cadastral surveyor entered Landonline survey capture title allocation screen information

Cadastral surveyor produced diagram of survey (via Landonline plan gen screen or hard copy plan graphic) (where required)

Cadastral surveyor produced diagrams of parcels (via Landonline plan gen or hard copy plan graphic)

Cadastral surveyor certification

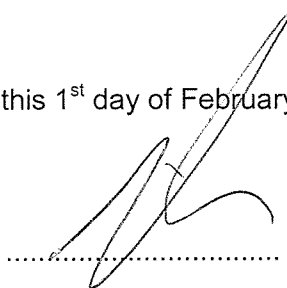
19. It is the applicant's concern the respondent is wishing to include other non-spatial information within the cadastral survey dataset, including LINZ memoranda, schedules of easements, resource management certificates and plans. Much of this non-spatial information is being directly created and lodged by territorial authorities, legal representatives and LINZ representatives outside the control of a Cadastral Surveyor.

20. Despite ongoing discussions and documentary exchanges between the parties the respondent has not provided any indication as to what it considers comprises a cadastral survey dataset.

21. The applicant is concerned as to liability issues inherent in the provision of a certification of accuracy information when such information is not directly, or indirectly, provided by a cadastral surveyor, or capable of certification as accurate. This is particularly the case in respect of non-spatial information of which a cadastral surveyor has no input or control. Accordingly it is submitted that a declaratory judgment is required to determine the components of a cadastral survey dataset for the purposes of the Cadastral Surveyor's certification.

22. The applicant submits that a clear understanding of what elements comprise a cadastral survey dataset will be of benefit to both parties in avoiding potential disputes, as well as addressing the applicant's concerns regarding possible liability problems arising out the certification provisions of the Cadastral Survey Act.

Dated this 1st day of February 2012

A handwritten signature in black ink, consisting of several loops and a long, sweeping stroke that extends upwards and to the right. The signature is positioned above a horizontal dotted line.

CA O'Connor

Counsel for the Applicant