Re McKay

Environment Court Auckland
23 April; 25 September 2018
Environment Judge DA Kirkpatrick

ENV-2017-AKL-185;
[2018] NZEnvC 180

Declaration — Subdivision — Cross-lease — Cross-lease as method of subdivision — Whether resource consent required — Meaning of subdivision — Conversion of cross-lease to fee simple — Interpretation of subdivision provisions — Declaration — Procedural issues — Serving of s 274 parties — Local Government Act 1974; Local Government Amendment Act 1979, s 4(1); Resource Management Act 1991, ss 2, 9, 10, 11, 11(1A), 22, 87, 87(b), 104, 108, 108AA, 106, 218, 218(1)(a), 218(1)(a)(i), 218(1)(a)(ii), 218(1)(a)(iv), 218(1)(v), 226, 226(1), 259, 274 and 311.

Donald Fleming McKay (Mr McKay) filed an application for a declaration that the conversion of cross-lease titles to fee simple titles did not constitute a subdivision within the meaning of s 218 of the Resource Management Act 1991 (the Act). Mr McKay was a surveyor, planner, and roading and services engineer with nearly 40 years' experience. He was also a councillor of the North Shore City Council for two terms between 1992 and 1998, chairing a number of committees. He had substantial experience and expertise in the area of subdivision of land.

The issue before the Environment Court was whether a cross-lease title could be converted to a fee simple title without the requirement for a resource consent. Alternatively, as restated by the court, whether or not an individual cross-lease was, by itself, sufficient to be the subject of a separate certificate of freehold title.

Held: (declining to make the declaration sought)

(1) For an undivided share of an allotment to become a separate freehold title to the fee simple necessarily required the division of the allotment into two or more new allotments. It thus constituted the division of a parcel of land shown separately on a survey plan and therefore was the subdivision of land within the meaning of s 218(1)(a) of the Act. That division accordingly required a subdivision consent in terms of ss 11 and 87(b) unless it did not contravene a national environmental standard or a rule in the district plan or the proposed district plan (see [40]).

(2) While it was clear that the conversion of a cross-leased property to separate freehold titles was a subdivision of land and required a

subdivision consent, the consent authority should generally approach such an application in a way that was mindful of the possibility that there might be few, if any, material environmental implications warranting a full-scale assessment of the proposal as if it were a new development (see [55]).

Cases mentioned in judgment

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, [1947] 2 All ER 680 (EWCACiv).

Clearspan Property Assets Ltd v Spark New Zealand Trading Ltd [2017] NZHC 277, (2017) 19 ELRNZ 682.

Commerce Commission v Fonterra Co-operative Group Ltd [2007] NZSC 36, [2007] 3 NZLR 767.

Horokiwi Holdings Ltd v Registrar-General of Land [2007] NZRMA 360, (2007) 13 ELRNZ 167 (HC).

Horokiwi Holdings Ltd v Registrar-General of Land [2008] NZCA 233, [2009] NZRMA 40.

Keir v Law (2001) 4 NZ ConvC 193,306.

Newbury District Council v Secretary of State for the Environment [1981] AC 578, [1980] 1 All ER 731 (HL).

Spark New Zealand Trading Ltd v Clearspan Property Assets Ltd [2018] NZCA 248, [2018] 3 NZLR 661.

Waitakere City Council v Estate Homes Ltd [2006] NZSC 112, [2007] 2 NZLR 149, [2007] NZRMA 137.

Waitakere City Council v Kitewaho Bush Reserve Co Ltd [2005] 1 NZLR 208 (HC).

Application

Mr McKay applied for a declaration that the conversion of cross lease titles to fee simple titles did not constitute a subdivision within the meaning of s 218 of the Resource Management Act 1991.

DF McKay appeared in person.
VJ Toan for New Zealand Institute of Surveyors.
KA Palmer as amicus curiae.

ENVIRONMENT JUDGE KIRKPATRICK.

Introduction

[1] On 15 December 2017, Donald Fleming McKay (Mr McKay) 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 acronym CFR is of Computer Freehold Register.)

[2] The application is supported by an affidavit by Mr McKay sworn on 13 December 2017 and by a separate document containing his legal submissions, which together comprehensively set out his case in support of such a declaration.

[3] Mr McKay is a surveyor, planner, and roading and services engineer with nearly 40 years' experience. He is a Fellow of the New

Zealand Institute of Surveyors and a former member of a number of professional institutes and associations relating to surveying and other land use matters as well as of the Royal Society. He was a councillor of the North Shore City Council for two terms between 1992 and 1998, chairing a number of committees including the Takapuna Planning Committee. He edited the work *Land Title Surveys in New Zealand* (2nd ed, 2009) New Zealand Institute of Surveyors, contributing the chapter on "Cross Lease, Unit and Strata Titles."[1]

[4] I readily accept that Mr McKay has substantial experience and expertise in the area of subdivision of land. He also says that he has read and agrees to comply with the Code of Conduct for Expert Witnesses, so that his evidence may be received as that of an expert witness. Were he an independent witness I would have no hesitation in regarding him as being qualified as an expert on the subdivision issues before the Court but as he is the applicant I cannot treat his evidence as being expert evidence.[2] But even as a party, I acknowledge that what he says on this subject should be given careful consideration.

[5] As he expressed it before me at the hearing, the issue at the heart of his application dealing with cross-leases is one of great importance and is the greatest conveyancing issue since the introduction of the Torrens system: namely that the cross lease method of subdivision should cease to be used. He acknowledged that how it should be stopped would probably require legislation, but in the meantime he seeks the declaration to assist in the conversion of cross leases to fee simple titles by confirming that such conversion does not require resource consent.

Procedural issues

[6] Mr McKay also filed a memorandum seeking priority for the hearing of the application and that it be heard *ex parte*, that is, without being served on anyone else, so that only Mr McKay would be heard in relation to it.

[7] On 19 December 2017, I convened a judicial telephone conference with Mr McKay to discuss the issue of whether the application could properly be dealt with *ex parte*. As the declaration he was seeking was one that would have consequences generally for the administration of the Act in relation to subdivision consents, the potential for both consent authorities and landowners to be affected meant that in the public interest it would be appropriate for entities who might be regarded as having some responsibility for subdivisions at least to be served so that they could express their views. I accordingly directed Mr McKay to serve the following:

(i) the Ministry for the Environment (*MfE*) as being responsible for the administration of the Act;
(ii) Land Information New Zealand (*LINZ*) as being responsible for title transactions;

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1 Available at: http://www.nzisltsurveybook.org.nz:80/land-title-surveys/chapter-9.
2 Environment Court Practice Note 2014, para 7.2(b).

(iii) Local Government New Zealand (*LGNZ*) as the representative body of district councils which are subdivision consent authorities; and

(iv) the New Zealand Institute of Surveyors (*NZIS*) as being a professional organisation for cadastral surveyors who are usually involved in subdivision processes.

[8] I made directions that any entity which wished to be heard should give notice under s 274 of the Act by 31 January 2018. I also made directions that I would convene a further judicial telephone conference in the week of 5 February 2018.

[9] On 15 January 2018, a representative of LINZ advised that neither that organisation nor the Registrar-General of Land sought to be heard as the application does not relate to any particular transaction or local authority consent decision, but relates to the policy of the Act and the statutory regime for subdivisions and consents.

[10] The Court received notice from NZIS of its desire to be heard in support of the application on 30 January 2018.

[11] When no advice was received from either MfE or LGNZ, I directed the Registrar to make further inquiries with their offices. On 13 February 2018 a representative of MfE advised that the Ministry have no intention of joining the proceedings. No advice was received from LGNZ.

[12] I was surprised that none of MfE, LINZ or LGNZ wished to be heard. From the history of this issue and the extent to which the declaration sought, if made by the Court, may affect both existing titles to land and the future of the cross-lease method of subdivision, I would have expected one or more of them to wish to be heard. But I accept that they have expressed no such wish and that the Court cannot compel them to become involved.

[13] The continuing concern that I had was that, as NZIS supported the application, there was no-one involved in the proceeding who might advance any opposing view. The issue raised by the application is not moot, in my view: from Mr McKay's evidence there is a live issue concerning the proper interpretation and application of the Act's provisions relating to subdivision consents. While his legal submissions present a cogent argument in support of his application, the potential effects on a large number of property owners should be addressed by argument which, if not adversarial, is at least independent. While Mr McKay and NZIS might be happy enough that there is presently no-one opposing the application, the Court needs to be satisfied that it fully understands what the consequences of making such a declaration may be.

[14] In light of Mr McKay's evidence that the great majority of cross-leased subdivisions (which would be the titles most affected by any declaration) have occurred in the Auckland region, I made a further direction that the Auckland Council be served. This was done by Mr McKay and ultimately the Council advised the Court that it did not wish to be heard either.

[15] Anticipating that possible outcome. I also considered:

(i) whether the Court should appoint an *amicus curiae* as legal counsel to assist the Court by considering the legal issues and making independent submissions on those; or
(ii) whether the Court should appoint a special advisor under s 259 of the Act, being a person who is able to assist the Environment Court in a proceeding before it and may sit with the Court but is not a member of it.

[16] I gave the existing parties, Mr McKay and NZIS, an opportunity to comment on these possibilities. Having heard them, I appointed KA Palmer (Dr Palmer), latterly an Associate-Professor of Law at the University of Auckland and an acknowledged authority on resource management law, to act as *amicus curiae*. I also made directions for the filing and exchange of legal submissions in advance and for the opportunity to file and serve further evidence.

The scope of the issue

[17] The declaration as sought is deceptively simple in its terms. The statutory framework of the Act in relation to subdivision consents is, on the face of the provisions, reasonably straightforward. One might expect that its definitions would provide a ready answer to the question whether a cross-lease title can be converted to a fee simple title without the requirement for a resource consent. As the detailed submissions of the parties and *amicus* showed, however, the question is not as straightforward as it may appear.

[18] There are two elements to the question: the strict legal issue, turning on the relevant statutory provisions and certain fundamental principles of the law of property, and the wider practical issues relating to the operation and consequences of cross leases. Ultimately the basis on which any declaration ought to be made depends on the strict legal issue, but as the wider issues appear clearly to have provided the impetus for the application and help to illuminate aspects of the legal issue, I will briefly traverse the submissions and evidence relating to them.

[19] As set out in Mr McKay's memorandum and affidavit, cross leases emerged as a practical response of lawyers and surveyors to the difficulties faced in the middle of last century by people wishing to create some form of tenure for separate dwellings in one building. The method was to create undivided (and usually equal) shares as tenants in common in the underlying freehold or leasehold title and then separate leasehold interests (usually for 999 years, being effectively in perpetuity) for each separate dwelling or flat. At first each owner held two certificates of title, one for each interest, but in about 1968 District Land Registrars began issuing single composite titles. In about 1971, the area of land around the building began to be divided into areas of common use and exclusive use. The former usually included such things as pedestrian and vehicle accessways where all cross lease owners and their invitees had rights of user. The latter were usually yard areas allocated to each flat and were the

subject of restrictive covenants in favour of one cross lease owner, giving them rights to exclude the other cross lease owners from such areas.

[20] The surveying and conveyancing arrangements became more complex over time. Statutory recognition and local authority control followed with a definition of "cross lease" being inserted in the Local Government Act 1974 by s 4(1) of the Local Government Amendment Act 1979. When the Resource Management Act 1991 was passed, it repealed the subdivision provisions of the LGA and enacted the current regime governing the subdivision of land which I discuss in detail below. As Dr Palmer notes, a particular reform of the RMA was to integrate subdivision with the purposes of the control of land use and the promotion of sustainable management of resources, and to provide an holistic approach and procedure for all relevant consents required by rules under regional and district plans.

[21] Notwithstanding the complexity and sophistication of the cross lease system, Mr McKay is firmly of the view that it is a compromised form of title, lacking full guarantees as to survey and presenting ongoing problems stemming from its composite nature.

[22] Detailed background information can be obtained from two reports where the conclusions are largely consistent with Mr McKay's view:

(a) *Shared Ownership of Land* by the Law Commission (Report 59, November 1999); and
(b) *Arrested (re)development? A study of cross lease and unit titles in Auckland* by Craig Frederickson of Auckland Council's Research and Evaluation Unit (Technical Report 2017/025, October 2017).

[23] The Law Commission concluded that the cross-lease scheme is irremediably flawed in its combination of leasehold and freehold interests in land and that there should be a policy objective of replacing it either by subdivisions or by unit titles. Mr Frederickson came to a similar conclusion and went on to find that cross-leases also hindered future development of subject land and had some effect in reducing subject property values. Both recommended enabling conversion of cross-leases to freehold, together with exemptions for certain requirements for land use planning (such as minimum lot sizes) and services (such as separate drains) to facilitate the process.

[24] Mr McKay also presented submissions and evidence about current problems confronting owners who wish to convert their cross lease title to a freehold title or a unit title. These problems essentially relate not only to the difficulties of getting all owners of shares in the underlying freehold or leasehold title to agree on the terms of any conversion, but also the approach taken by territorial authorities to the consents required for any such process. Mr McKay says that the Auckland Council insists on a full de novo subdivision application and does not treat existing situations, such as in relation to water and wastewater services, fire separation and vehicle crossings, as providing a basis on which new titles should be issued. Instead, according to Mr McKay, the Council will impose

conditions requiring the upgrading of such matters to current standards. He submits that this is unreasonable as such conditions serve no resource management purpose where the only change taking place is a change in tenure.

[25] In this proceeding, I also received evidence from two expert witnesses called by the NZIS:

(a) Warren John Haynes, a registered cadastral surveyor with over 30 years' experience, the holder of several awards in his profession and a fellow if the NZIS; and

(b) Timothy Jones, a barrister in the area of property land law and unit title advisory work with over 30 years' experience who has been involved extensively in the New Zealand Law Society and the Auckland District Law Society in educational and law reform projects in that area.

[26] While, as one might expect, these experts identify some matters where they do not fully agree with Mr McKay, the differences are not material to their central conclusions that the cross lease form of title presents various problems for landowners and their professional advisors.

[27] As noted above, there is no contradictor to Mr McKay's application, and in his role as *amicus curiae*, Dr Palmer mainly focused on the legal issue before the Court. He did note that there are problems associated with cross leases, making reference to the well-known texts of which he is the author: *Planning and Development Law in New Zealand*,[3] *Local Government Law in New Zealand*[4] *and Local Authorities Law in New Zealand*.[5] The first of those includes the observation that cross leases have disadvantages of lacking a simple freehold title, possibly restricting disposition of the interest and continuing joint administrative obligations with other owners.

[28] I should add that it is not universally accepted that all aspects of cross leases are bad and there may be a range of circumstances where their attributes offer advantages to their owners.[6] In any event, this application is not really about the merits or demerits of them: it is simply background material intended, as I understand it, to demonstrate that the conversion of cross leases can be a desirable option for owners.

Relevant statutory provisions

[29] There are a number of relevant statutory provisions, which are set out below for ease of reference in the discussion that follows.

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3 Kenneth A Palmer, *Planning and Development Law in New Zealand* (vol 2, the Law Book Company, 1984) in Chapter 12 "Land Subdivision and Development" at pp 555–683; see esp p 567.

4 Kenneth A Palmer, *Local Government Law in New Zealand* (2nd ed, The Law Book Company, 1993) at s 16.6.10.

5 Kenneth Palmer, *Local Authorities Law in New Zealand* (Brookers, 2012) at s 18.4.7.

6 See Thomas N Gibbons and DW McMorland, *Unit Titles and Cross-Leases*, Chapter 13 at 13.102 in *Principles of Real Property Law* (2nd ed, LexisNexis, 2014) and Rod Thomas, *Corss Leases*, Chapter 11 at 11.1.03 in *New Zealand Land Law* (E Toomey, 3rd ed, Thomson Reuters, 2017).

2 Interpretation

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

survey plan has the meaning set out in the following paragraphs, in which cadastral survey dataset has the same meaning as in section 4 of the Cadastral Survey Act 2002:

(a) **survey plan** means—

(i) a cadastral survey dataset of subdivision of land, or a building or part of a building, prepared in a form suitable for deposit under the Land Transfer Act 1952; and

(ii) a cadastral survey dataset of a subdivision by or on behalf of a Minister of the Crown of land not subject to the Land Transfer Act 1952:

(b) **survey plan** includes—

(i) a unit plan; and

(ii) a cadastral survey dataset to give effect to the grant of a cross lease or company lease

11 Restrictions on subdivision of land

(1) No person may subdivide land, within the meaning of section 218, unless the subdivision is—

(a) a subdivision permitted by subsection (1A); or

...

(1A) A person may subdivide land under subsection (1)(a) if—

(a) either—

(i) the subdivision is expressly allowed by a resource consent; or

(ii) the subdivision does not contravene a national environmental standard, a rule in a district plan, or a rule in a proposed district plan for the same district (if there is one); and

(b) the subdivision is shown on a survey plan that is—

(i) deposited under Part 10 by the Registrar-General of Land, in the case of a survey plan described in paragraph (a)(i) or (b) of the definition of survey plan in section 2(1); or

(ii) approved as described in section 228 by the Chief Surveyor, in the case of a survey plan described in paragraph (a)(ii) of the definition of survey plan in section 2(1).

87 Types of resource consents

In this Act, the term resource consent means any of the following:

...

(b) a consent to do something that otherwise would contravene section 11 (in this Act called a **subdivision consent**): ...

106 Consent authority may refuse subdivision consent in certain circumstances

(1) A consent authority may refuse to grant a subdivision consent, or may grant a subdivision consent subject to conditions, if it considers that—

...

(c) sufficient provision has not been made for legal and physical access to each allotment to be created by the subdivision.

...

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.

(2) In this Act, the term **allotment** means—
(a) any parcel of land under the Land Transfer Act 1952 that is a continuous area and whose boundaries are shown separately on a survey plan, whether or not—
  (i) the subdivision shown on the survey plan has been allowed, or subdivision approval has been granted, under another Act; or
  (ii) a subdivision consent for the subdivision shown on the survey plan has been granted under this Act; or
(b) any parcel of land or building or part of a building that is shown or identified separately—
  (i) on a survey plan; or
  (ii) on a licence within the meaning of Part 7 A of the Land Transfer Act 1952; or
(c) any unit on a unit plan; or
(d) any parcel of land not subject to the Land Transfer Act 1952.

...

226 Restrictions upon issue of certificates of title for subdivision

(1) The Registrar-General of Land shall not issue a certificate of title for any land that is shown as a separate allotment on a survey plan (being a certificate issued to give effect to the subdivision shown on that survey plan), unless he or she is satisfied, after due inquiry, that—
(a) the plan has been deposited in accordance with section 224 or has been approved by the Chief Surveyor for the purposes of section 228 and the provisions of section 228(2) have been complied with; or
(b) the plan has been deposited in accordance with section 306 of the Local Government Act 1974 or was a Crown plan to which section 306(7) of the Local Government Act 1974 applied; or
(ba) the plan has been approved under Part 25 of the Municipal Corporations Act 1954; or
(bb) the plan has been approved under Part 2 of the Counties Amendment Act 1961; or
(bc) the plan did not require the approval of the Council under Part 2 of the Counties Amendment Act 1961 and was deposited under the Land Transfer Act 1952 after the said Part 2 came into force; or
(c) the plan has been deposited in accordance with the Unit Titles Act 2010; or

(d) the certificate of title is issued to enable effect to be given to any agreement for sale and purchase or agreement to lease or other contract to create an interest in land or a building or part of a building made before the commencement of this Act; or

(e) the territorial authority has given a certificate signed by the principal administrative officer or other authorised officer to the effect—

(i) that there is no district plan for the area to which the survey plan relates, and that the allotment is in accordance with the requirements and provisions of the proposed district plan; or

(ii) that the allotment is in accordance with the requirements and provisions of the district plan and the proposed district plan (if any) for the area to which the survey plan relates; or

(iii) that the allotment is in accordance with a permission or permissions granted under Part 2 or Part 4 of the Town and Country Planning Act 1977.

(2) Nothing in section 11 shall apply to the issue of a certificate of title pursuant to subsection (1).

[30] These provisions contain several interlocking connections. Important points to note are:

(a) The RMA provides a complete code for the control of subdivision of land in New Zealand.[7]

(b) The correct approach to statutory construction is that the meaning of an enactment must be ascertained from its text and in the light of its purpose.[8] Consideration of the purpose is a cross-check rather than the starting point.[9]

(c) The text of the RMA in relation to subdivisions is relatively crystalline, using transactional language containing precise metes and bounds, and listing the forms of subdivision which are regulated.[10]

(d) A cross lease is by definition in s 2 the lease of all or part of a building held by a person who has an estate or interest in the land on which the building is or is to be erected; it is not a lease of that land.

(e) For present purposes, a subdivision of land involves either:

(i) the division of an allotment by one of five specified methods in s 218(1)(a); or

(ii) an application for a separate certificate of title for land shown as a separate allotment on a survey plan, unless that plan already comes within one of the ten categories listed in s 226(1), being the ways in which survey plans are formally approved, whether for deposit under the Land Transfer Act or otherwise.

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7 *Waitakere City Council v Kitewaho Bush Reserve Co Ltd* [2005] 1 NZLR 208 (HC) at [80].

8 Section 5 of the Interpretation Act 1999.

9 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22]; *Spark New Zealand Trading Ltd v Clearspan Property Assets Ltd* [2018] NZCA 248, [2018] 3 NZLR 661 at [22].

10 *Spark New Zealand Trading Ltd v Clearspan Property Assets Ltd*, above n 9, at [22]–[23].

(f) Some circularity arises because of the inclusion of "subdivision" in the definition of "survey plan" and the connections among the definitions of:
  (i) a subdivision, being the division of an allotment; and
  (ii) an allotment, being a parcel of land of continuous area, the boundaries of which are shown separately on a survey plan; and
  (iii) a survey plan, being a plan of subdivision of land.

The circularity may be overcome by treating the reference to subdivision in the definition of survey plan be treated as simply a division of land.[11]

[31] Taking these points into account and conscious of the dangers of summarising or paraphrasing complex statutory provisions, this set of provisions might be summarised in very broad terms for present purposes as being that 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 as shown on a survey plan suitable for deposit under the Land Transfer Act 1952.

Title, estates and interests

[32] While the RMA is a code for the control of subdivision, some aspects of the common law in relation to real property need to be recalled in order to provide a proper foundation for understanding the operation of that code.

[33] Although it is used in the definitions of "owner" in s 2 and "subdivision of land" in s 218(1)(a)(ii), there is no definition of *fee simple* in the Act. The term is also not defined in the Land Transfer Act 1952 or in the Property Law Act 2007.

[34] A fee simple is a freehold estate of practically unlimited duration. The origins of the term reach far back in English legal history.[12] A summary of its current meaning in the context of the Act can be found in the decision of the High Court in *Clearspan Property Assets Ltd v Spark New Zealand Trading Ltd*:[13]

> [48] A fee simple estate is well understood as "the largest estate known to the law".[34] As Mr Casey and Ms Ash submit, fee simple ownership carries the exclusive right to possess, to use and enjoy and to alienate. Tenants in common acquire the fee simple to the undivided whole of the land they buy—"in common" with the other owners—to the extent of their share.[35] They have "unity of possession"—the equal right to occupy, use and enjoy all the land. This is a form of co-ownership to the fee simple of the whole of an allotment, not of "part of' an allotment. As Mr Casey acknowledges, a sale

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11 *Horokiwi Holdings Ltd v Registrar-General of Land* [2007] NZRMA 360, (2007) 13 ELRNZ 167 (HC) at [44]–[47]; upheld in *Horokiwi Holdings Ltd v Registrar-General of Land* [2008] NZCA 233, [2009] NZRMA 40 at [28].

12 See generally GW Hinde, *The Doctrine of Tenure*, Chapter 2 in *Principles of Real Property Law* (2nd ed, LexisNexis, 2014) and T Bennion, *Introduction*, Chapter 1 in *New Zealand Land Law* (E Toomey, 3rd ed, Thomson Reuters, 2017).

13 *Clearspan Property Assets Ltd v Spark New Zealand Trading Ltd* [2017] NZHC 277, (2017) 19 ELRNZ 682 at [48], with footnotes included.

> of fee simple to tenants in common does not fall within the definition. I accept fee simple "to part of' an allotment refers to a specific physical portion of the property rather than an undivided share. It is different from fee simple to the whole of an allotment. Indeed, court orders of further division of property owned by co-owners are explicitly subject to the requirement not to contravene the s 11 restrictions on subdivision.[36]

[34] G W Hinde, D W McMorland, NR Campbell, P Twist, J L Foster, T Gibbons, S Scott, *Principles of Real Property Law* (2nd ed, LexisNexis, Wellington, 2014) at 3.004(a).
[35] John Burrows (ed) *Land Law* (online looseleaf ed, Brookers) at CO6.
[36] Resource Management Act 1991, ss 339(2)(b) and 340.

[35] This approach has now been upheld on appeal.[14]

[36] The texts referred to by the High Court address these concepts in detail, as did Dr Palmer's submissions before me as *amicus*. Relevantly, a lease creates a leasehold estate which is less than the freehold and is therefore not a fee simple. A fundamental difference between the two types of estate is that a lease is limited in duration, while the freehold is perpetual. The difference remains at a conceptual level in the doctrine of estates even where the term of the lease is, say, 999 years and is therefore treated for practical purposes as being perpetual. As with the origins of the fee simple, it is not necessary on this application to explore the details of this, but the fundamental nature of the difference is of significance to a proper understanding of what may be involved in converting a cross lease title to a fee simple title.

[37] A cross lease, as defined in the Act, is a title where the owner holds a combination of a lease of a building or part of a building on land with an undivided share in the land under that building. Analogous to the physical arrangement, the leasehold estate or interest in the building sits on top of the freehold estate in a share of the undivided land: the leasehold is not an estate or interest in the land itself. The land under the building is already an allotment and the cross lease owner's estate is an undivided share of the whole of that allotment. That undivided share of the land is an estate in fee simple, being the right to possess, use and enjoy and alienate that land for an unlimited term, but it is not exclusive as it is shared with other tenants in common.

[38] The transfer of an undivided interest in certain land does not involve disposing of the fee simple to part of that land.[15] The grant of encumbrances and personal covenants, which may form part of the arrangements between cross lease owners, are a form of charge on the land and create no estate or interest in the land.[16] In particular, exclusive use covenants do not effect a division of the land, nor do they destroy the unity of possession of the owners in common.[17]

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14 *Spark New Zealand Trading Ltd v Clearspan Property Assets Ltd*, above n 9, at [15] and [26].
15 *Spark New Zealand Trading Ltd v Clearspan Property Assets Ltd*, above n 9, at [26].
16 Above at [27].
17 *Keir v Law* (2001) 4 NZ ConvC 193,306 at [18]; cited with approval in *Spark New Zealand Trading Ltd v Clearspan Property Assets Ltd*, above n 9, at [27].

Evaluation

[39] The issue raised by this application may be restated as whether or not an individual cross lease is, by itself, sufficient to be the subject of a separate certificate of freehold title.

[40] For an undivided share of an allotment to become a separate freehold title to the fee simple necessarily requires the division of the allotment into two or more new allotments. 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). That division accordingly requires a subdivision consent in terms of ss 11 and 87(b) unless it does not contravene a national environmental standard or a rule in the district plan or the proposed district plan.

[41] From the examples put before me, especially those presented by Dr Palmer, it appears that in many cases the boundaries shown on the relevant plan might be insufficient, in terms of the definition in s 2 of "survey plan," to allow that to happen. If there are any common areas on the cross lease property, then those are plainly undivided areas in relation to both the leasehold and the freehold and so any creation of new allotments would require lines to be drawn where none had been before.

[42] This outcome must be so even where the boundaries of the new areas to be shown in the freehold title follow exactly the boundaries that may be shown of the cross lease areas. The issue is not whether the process changes anything visible on the land: the issue is whether the underlying allotment must be divided. Even in relation to a cross lease of a property with no common areas (say of a single-story building covering the whole allotment) where the plan of the cross leases might show all the boundaries necessary to enable a division of the allotment to be undertaken without any other issue, the conversion none the less requires the division of the underlying allotment.

[43] On that analysis, the conversion of a cross lease to a fee simple title must constitute a subdivision of the allotment on which the leased building sits.

[44] An alternative argument advanced by counsel for NZIS and described in evidence by Mr Jones is that as the grant of a cross lease in respect of any part of an allotment is a division of that allotment in terms of the portion of the definition of "subdivision of land" in s 218(1)(a)(iv), that may suffice as the basis on which there could be an application to the Registrar-General of Land for the issue of a separate certificate of title for that part of the allotment in terms of another portion of the definition in s 218(1)(a)(i).

[45] This appears to be an argument that it is within the bounds of s 11 of the RMA to convert a cross lease title (in terms of s 218(1)(a)(iv) of the RMA) into a fee simple title (s 218(1)(a)(i) or s 218(1)(a)(ii)) or a unit title (s 218(1)(a)(v)) because all of those are within the bounds of a division of an allotment. That is, as the grant of a cross lease in respect of any part of an allotment is a division of that allotment, then that allotment is already divided, so no subdivision occurs. On that argument, there would be no contravention of s 11 of the RMA because such a conversion

would be a subdivision already permitted by s 11(1A), having been expressly allowed by a resource consent and shown on a survey plan.

[46] In my opinion, the answer to that argument is that the five methods listed in s 218(1)(a) are not equivalent with each other except as being types of subdivision. They are discrete and different in kind to one another such that it would be incorrect to treat them as equivalent and interchangeable options for subdivision. In particular for present purposes, at the foundation of a cross lease is an existing undivided freehold allotment. While separate areas may be identified by the leases and shown on a plan, the owner of each cross lease holds an undivided share in the freehold allotment. If the lessees are each to obtain their own separate freehold title, then that allotment must be divided to produce separate freehold titles or unit titles. While the plan of the cross leases may show separate areas of the allotment, those divisions are for the purposes of the leases and are not of the fee simple of the allotment.

[47] On that approach, the conceptual distinction between the freehold as the largest estate known to the law and a cross lease being an undivided share of the freehold overlaid with a leasehold interest means that separating the shares of the cross lease would necessarily involve a subdivision of land as defined in s 218 and restricted by s 11.

Subsidiary issues

[48] It follows from this conclusion that, unless permitted by the district plan, a conversion of a cross lease into a freehold title will requires an application for resource consent to comply with s 11. Such an application will in turn require fresh assessment under s 104 of the RMA.

[49] There may be, as Mr McKay asserted, subsidiary issues as to the extent to which an assessment of effects on the environment should go in assessing such an application. There may also be issues as to the extent to which the consent authority can or ought to impose conditions on any subdivision consent, whether under ss 108 and 22 of the Act or under statutory provisions that may affect the development of land, especially where a conversion may require changes to the existing buildings or services (including rights of way and vehicle crossings).

[50] The most likely source of conflict will be where the owners and the Council disagree as to the extent that the terms and conditions on which the cross lease was first granted consent remain sufficient and otherwise appropriate at the time of the conversion. While it is true that the Council may not impose conditions which would require the owners, in carrying out any building work associated with the conversion, to achieve performance criteria that are additional to, or more restrictive than, performance criteria prescribed in the building code in relation to that building work or take any action in respect of that building work if it complies with the building code,[18] it is possible that alterations to existing buildings will entail upgrading work to be undertaken.[19] There may be

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18 Section 18 of the Building Act 2004.
19 Section 112 of the Building Act 2004.

other changes to structures or other arrangements (such as access and services) on site which similarly could require relocation or upgrading work.

[51] As to the practical issues raised by Mr McKay, while this application does not provide a basis for any determination or other ruling, it is appropriate to say something about 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. There are at least two aspects which can sometimes be inter-related depending on the particular circumstances:

(i) the status of what is already occurring on the land as existing uses under s 10 for the purposes of s 9 of the RMA; and
(ii) the scope of the power to impose conditions on subdivision.

[52] An assessment of effects on the environment is required to include information which is *specified in sufficient detail to satisfy the purpose for which it is required*.[20] This standard is applicable both to the applicant, who must provide enough information, and to the consent authority, which ought not to require too much. Where the use of land is protected as an existing use under s 10, then it is at least doubtful how far the consent authority can reasonably go in requiring that use to be assessed as if it were a new use.

[53] In considering the conditions of consent, the consent authority must now comply with the requirements of s 108AA of the RMA:

> **108AA Requirements for conditions of resource consents**
> (1) A consent authority must not include a condition in a resource consent for an activity unless—
> (a) the applicant for the resource consent agrees to the condition; or
> (b) the condition is directly connected to 1 or both of the following:
> (i) an adverse effect of the activity on the environment:
> (ii) an applicable district or regional rule, or a national environmental standard; or
> (c) the condition relates to administrative matters that are essential for the efficient implementation of the relevant resource consent.
> (2) Subsection (1) does not limit this Act or regulations made under it.
> (3) This section does not limit section 77 A (power to make rules to apply to classes of activities and specify conditions), 106 (consent authority may refuse subdivision consent in certain circumstances), or 220 (condition of subdivision consents).
> (4) For the purpose of this section, a district or regional rule or a national environmental standard is applicable if the application of that rule or standard to the activity is the reason, or one of the reasons, that a resource consent is required for the activity.
> (5) Nothing in this section affects section 108(2)(a) (which enables a resource consent to include a condition requiring a financial contribution).

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20 Schedule 4 and cl 1 of the RMA.

[54] This provision appears to codify, in part, the common law requirements for valid conditions[21] that that planning consent conditions must:

(a) be imposed for the purposes of the Resource Management Act 1991 and not for any ulterior purpose;
(b) fairly and reasonably relate to the development authorised by the consent on which they are imposed; and
(c) not be unreasonable in the sense that no reasonable consent authority, duly appreciating its duties, could have imposed them.[22]

[55] The short point that can be made in the relatively abstract circumstances of this application is that while it is clear in my judgment that the conversion of a cross leased property to separate freehold titles is a subdivision of land and requires a subdivision consent, 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. As the Court of Appeal has noted:[23]

> The concern of s 218 of the Act is not therefore with land transactions unlikely to intensify development and thereby neither increase the density of occupation nor impact adversely on infrastructure and other amenities.

Decision

[56] For the reasons set out above, I decline to make the declaration sought by Mr McKay.

[57] In circumstances where there was no contradictor to the application, there is no basis on which to consider any award of costs.

Orders

(A) The application for a declaration is declined.
(B) There is no order as to costs.

Reported by: Rachel Marr, *Barrister and Solicitor*

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21 As identified *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, [1980] 1 All ER 731 (HL) and confirmed in relation to the RMA in *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149, [2007] NZRMA 137 at [20] footnote 6.

22 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, [1947] 2 All ER 680 (EWCACiv).

23 *Spark New Zealand Trading Ltd v Clearspan Property Assets Ltd*, above n 9, at [24].