

**IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY**

**CIV-2010-476-000624
[2012] NZHC 1335**

BETWEEN THE INSTITUTE OF CADASTRAL
SURVEYING INCORPORATED
Applicant
AND LAND INFORMATION NEW ZEALAND
Respondent

Hearing: 1 March 2012

Appearances: C A O'Connor for Applicant
G Gardner for Respondent

Judgment: 13 June 2012

RESERVED JUDGMENT OF CHISHOLM J

- A The application for a declaration is dismissed.**
- B The respondent is entitled to costs on the 2B scale.**
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REASONS

[1] In this originating application the Institute of Cadastral Surveying Incorporated (the Institute) seeks a declaration under the Declaratory Judgments Act 1908:

...determining what comprises the component parts of a Cadastral Survey Dataset and who is responsible or liable for each of those component parts.

Underlying these two questions is the Institute's concern about the certification cadastral surveyors are required to provide under the Rules for Cadastral Survey 2010. The application is opposed by Land Information New Zealand (LINZ), the

relevant government department.

[2] Bruce Speirs, a cadastral surveyor and secretary of the Institute, has sworn two affidavits in support of the application. Affidavits in opposition have been sworn by Robert Muir, Registrar-General of Land, Ronald Munro, Manager of Customer Systems for LINZ, and Donald Grant, the Surveyor-General. Mr Speirs and Dr Grant gave viva voce evidence.

Background

[3] When LINZ assumed responsibility for the land transfer and survey systems in 1996 those systems were largely paper-based. Since that time, and with the support of enabling legislation,¹ LINZ has developed a Landonline computer system for real property transactions and the cadastral survey system (the “cadastre” means all the cadastral survey data held by or for the Crown and Crown agencies).

[4] These developments did not, however, diminish the importance of the principles of indefeasibility of title, paramountcy of the estate of the registered proprietor, and the State guarantee of registered titles, that are embodied in the Land Transfer Act 1952. Nor did they alter the need for a precise and accurate survey definition of the parcels of land on which registered titles are based.

[5] Cadastral surveys are now governed by the Cadastral Survey Act 2002, the purpose of which is described in s 3:

3 Purpose

The purpose of this Act is –

- (a) to promote and maintain the accuracy of the cadastre by –
 - (i) requiring cadastral surveys to be done by, or under the direction of, licensed cadastral surveyors; and

¹ Land Transfer (Automation) Amendment Act 1998 which enabled the land title registers to be transferred to an electronic format; the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 which provided for the electronic lodgement of title transactions; the Cadastral Survey Act 2002 which introduced an online plan lodgement service for surveyors; and the Cadastral Survey (Compulsory Lodgement of Digital Cadastral Survey Datasets) Order 2007 which provided that from 1 September 2007, cadastral survey datasets had to be provided in digital form.

- (ii) requiring cadastral surveyors to meet standards of competence to be licensed; and
 - (iii) providing for the setting of standards for cadastral surveys and cadastral survey data; and
- (b) to provide, either on an optional or mandatory basis, for the electronic lodging and processing of cadastral surveys; and
 - (c) to provide for a national geodetic system and a national survey control system to be maintained.

The Act provides for cadastral surveys to be carried out by, or under the control of, licensed cadastral surveyors, who are required to meet standards set by the Surveyor-General.

[6] As provided by the Act, the Institute succeeded the New Zealand Institute of Surveyors. One of its objectives is to provide an organisation to which those actively engaged in cadastral surveying may belong. Another objective is to make representations about cadastral surveying.

[7] On 1 September 2007 it became compulsory for cadastral surveyors to provide digital cadastral survey datasets to the Chief Executive of LINZ.² Subsequently the Institute initiated correspondence with LINZ about two matters: the component parts of the cadastral survey dataset in the electronic environment; and the responsibility of the two parties in respect of those component parts.

[8] Despite lengthy correspondence between late 2007 and September 2009, little progress was made. In October 2009 the Institute engaged a consultant to explore the issue. Using the definitions in s 4 of the Cadastral Survey Act as a starting point, the consultant produced a paper describing the component parts of the cadastral survey dataset, and a copy of this paper was sent to LINZ for comment. Notwithstanding further correspondence and a meeting, no consensus was achieved.

[9] On 8 April 2010 Dr Grant, the Surveyor-General, wrote to Mr Speirs:

² Cadastral Survey (Compulsory Lodgement of Digital Cadastral Survey Datasets) Order 2007.

...

1. Certification Statement

We did agree at the meeting that the Cadastral Surveyor is not responsible for documents added to the dataset by others (not acting under the direction of the surveyor). Especially if this occurs after the surveyor has certified the dataset and may have no knowledge or responsibility for their addition. The most obvious example would be if a schedule of easements was added by another party after the surveyor certified the CSD³ and after LINZ had approved it. Then the surveyor would clearly not be responsible for any errors in the substituted schedule.

...

Dr Grant then went on to say that he intended to modify the certification statement to ensure that cadastral surveyors were certifying the dataset provided by the particular surveyor.

[10] Pursuant to s 49 of the Act the Surveyor-General issued the Rules for Cadastral Survey 2010⁴ the following month. Rule 13 provides:

13 Certification

Every CSD must be certified and dated by the cadastral surveyor as follows:

‘I [*name*], being a 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.’

(Underlining added.)

The words “provided by me” had not appeared in the equivalent certification under the 2002 Rules.⁵

³ Cadastral survey dataset.

⁴ These Rules superseded the Surveyor-General’s Rules for Cadastral Survey 2002/2 that had been issued on 17 October 2002.

⁵ Surveyor-General’s Rules for Cadastral Survey 2002/2.

[11] It is clear that the Institute was not happy with the amendment to the certification. Mr Speirs wrote to Dr Grant on 13 April 2010 telling him that the amendment did not cover:

...the agreed principle that a Cadastral Surveyor is not certifying the accuracy or correctness of Resource Management Act documents separately certified by Territorial Authorities but included in a Cadastral Surveyor's supporting documents as required by LINZ administrative practices.

Disappointment was also expressed by Mr Speirs that the amended certification had not been open to consultation in terms of s 49(2) of the Act.

[12] Later the Institute complained to Parliament's Regulations Review Committee on the basis that when the Surveyor-General had made a number of the Rules he had breached the Act. In its report the Committee recorded that some of the evidence it had heard involved disagreement between the parties about "policy issues related to the rules" and that it could not help the parties resolve those issues. The Committee decided that the consultation undertaken by the Surveyor-General had been adequate.

[13] This proceeding was issued by the Institute on 20 October 2010.

Institute's case in support of application

[14] It is the Institute's view that notwithstanding the definitions of "cadastral survey dataset" and "cadastral survey data" in the Act,⁶ there is insufficient specificity to determine, first, what information comprises the component parts of the cadastral survey dataset and, secondly, who is responsible or liable for the component parts that are derived from sources external to a cadastral surveyor's knowledge or involvement.

[15] On the Institute's analysis the component parts of the cadastral survey dataset following transition to the digital environment are:

⁶ **Cadastral survey data** –

(a) means information in or derived from cadastral surveys, and related information; and
(b) includes survey system information and tenure system information.

Cadastral survey dataset means the set of cadastral survey data necessary to integrate a cadastral survey into the cadastre.

- (a) The Cadastral Survey undertaken by the Cadastral Surveyor (where required).
- (b) A record of the Cadastral Survey undertaken by the Cadastral Surveyor (where undertaken).
- (c) A Traverse Sheet of the Cadastral Survey prepared by the Cadastral Surveyor (optional).
- (d) Boundary definition calculations undertaken by the Cadastral Surveyor.
- (e) Other calculations undertaken by the Cadastral Surveyor as required for the Cadastral Survey.
- (f) A survey report undertaken by the Cadastral Surveyor.
- (g) The Cadastral Surveyor produced Diagram of Survey in Landonline...or equivalent plan graphic supporting document.
- (h) The Cadastral Surveyor produced Diagram of Parcel in Landonline...or equivalent plan graphic supporting document.
- (i) Cadastral Surveyor certification of the CSD.
- (j) A Cadastral Survey Dataset number provided by LINZ.

The Institute emphasises the *spatial* nature of these parts and notes that they correlate with the component parts of the “hard copy” regime that applied when the Act came into force.

[16] At the forefront of the Institute’s argument is the proposition that surveyors should not be responsible for *non spatial* information. In this regard it refers to such things as certification by territorial authorities under s 223 and s 224(c) of the Resource Management Act 1991. The Institute notes that non spatial information of this nature has been provided by parties over whom the surveyor has no control and it argues that such information is not required for a spatially based cadastral survey to be integrated into the cadastre.

[17] The Institute is also concerned about modifications made by the LINZ Landonline software after the surveyor’s certification has occurred. Examples are the cadastral survey dataset plan and title plan compiled by the Landonline system. Again, the Institute argues that surveyors should not be responsible for these changes

which are made by LINZ for its own purposes and are not a necessary part of the integration process.

[18] While the Institute is happy for its members to certify data inside the cadastral survey dataset that they have provided, Mr Speirs explained in his oral evidence that “we don’t want to see our certification used for later purposes of the Department of LINZ”. He explained that as the Institute sees it, LINZ is creating documents from both data supplied by Institute members and other data that Institute members may not have provided, and Institute members do not want to be liable for the compilation process undertaken by LINZ.

[19] Given the potential for information to be introduced into a cadastral survey dataset by a third party post certification, the Institute believes that its members are being required to certify the accuracy of a “moving target”. It considers that a declaratory judgment would avoid future disputes and clarify possible issues of liability. The Institute also suggests that should issues involving cadastral surveys come before the Courts in the future, “the Courts (and Cadastral Surveyors) would be most grateful of any prior judgments available to them in relation to the definition of the Cadastral Survey Dataset”.

Case for LINZ in opposition

[20] The statutory definition of “cadastral survey dataset” is intentionally framed to reflect a digitised cadastral survey system. When enacting the Cadastral Survey Act and amending the Land Transfer Act in 2002, Parliament introduced a system that was sufficiently flexible and non-prescriptive to accommodate changes in technology. It deliberately avoided specifying the component parts of the dataset.

[21] In its most basic form a cadastral survey dataset is one set of data necessary to integrate a cadastral survey into another set of data. The primary purpose of the Act is to promote and maintain the accuracy of the second set of data. This purpose is achieved by: first, requiring cadastral surveys to be carried out by licensed cadastral surveyors who meet standards of competency; secondly, by setting standards for cadastral surveys; and, thirdly, by setting standards for cadastral survey

data. This is achieved by a combination of the Act, the Rules for Cadastral Survey 2010, and the Standard for the Integration and Provision of Cadastral Survey Data which was published on 15 September 2009 and became effective on 24 May 2010 (the same time as the 2010 Rules). Together these instruments determine both the scope of cadastral survey data and the responsibilities of the professionals who conduct cadastral surveys.

[22] The Surveyor-General has identified that cadastral surveyors are best able to provide certain material, including schedules or memoranda of easements and resource consents. The rules and standards he has promulgated determine the content of cadastral survey datasets. The Institute's list of components of the cadastral survey dataset omits some components required by the rules and standards, for example, certificates under the Resource Management Act.

[23] With reference to the certification Dr Grant confirmed in his oral evidence that the words "provided by me" had been included:

...to make it clear that the information that they are responsible for is the information which has been provided...by them...and on which other related processes in the whole land transfer and tenure system depend. So they provide certain information and they take the responsibility for the correctness of the information they provide. They cannot be held responsible for information which has not come from them...

[24] Later Dr Grant explained that the rules had been formulated to provide the minimum set of information and:

...the rules were designed to be technology independent and therefore not get down into the details of how exactly this information gets packaged together, and so when the Department decided to change that practice...that didn't necessitate a change in the rules because the rules were operating at...a higher level of the information...

He also explained that within the Landonline system there is an audit trail of changes, when they were provided, and who they came from.

Discussion

Principles

[25] Section 3 of the Declaratory Judgments Act 1908 relevantly provides:

3 Declaratory orders on originating summons

Where any person has done or desires to do any act the...effect of which depends on the construction...of any statute...

...

such person may apply to the High Court by originating summons... for a declaratory order determining any question as to the construction...of such statute...

The jurisdiction is discretionary and the Court may, on any grounds that it deems sufficient, refuse to make a declaration: s 10.

[26] In substance the Institute is seeking a ruling from the Court about the proper construction of the expression “cadastral survey dataset” used in the Cadastral Survey Act. While LINZ opposes the application, it does so on the merits rather than on any technical jurisdictional basis.

[27] As observed by a Bench of five in *Electoral Commission v Tate*:⁷

[30] ...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...

[31] The Courts cannot, however, refuse to give or make a declaratory judgment or order on a ground which is inconsistent with the Court’s 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...

Any suggestion that the declaratory judgment jurisdiction is of “limited availability” was firmly rejected by the Supreme Court in *Mandic v Cornwall Park Trust Board*

⁷ *Electoral Commission v Tate* [1999] 3 NZLR 174 CA.

(Inc).⁸

[28] Having said that, it is important to keep in mind that this is not an application for judicial review under the Judicature Amendment Act 1972. Thus the Court is not being called upon to scrutinise the process by which the Rules for Cadastral Survey 2010 (or any other Rules under the Cadastral Survey Act) were made by the Surveyor-General or the validity of those Rules. Rather, it is being asked to construe the relevant legislation as it stands.

The Cadastral Survey Act

[29] The first and obvious point to be made about this Act is that Parliament has chosen not to specify the component parts of a “cadastral survey dataset” or to allocate responsibility between surveyors and others for those parts. Moreover, the s 4 definition that the expression means “the set of cadastral survey data necessary to integrate a cadastral survey into the cadastre” does not readily lend itself to further refinement.

[30] That impression remains when the Act as a whole is taken into account. Its purpose and context do not provide any hint that Parliament intended the Courts to embark upon the type of refinement inherent in the application under consideration. This is not a situation where those refinements could be justified on the basis that the Court is filling a gap to make sense of the legislation.

[31] The “cadastral survey dataset” concept makes sense as it stands. Equally importantly, one of the purposes of the Act (s 3(b)) is to provide for the *electronic* lodging and processing of cadastral surveys. In other words, the Act was passed with the electronic environment in mind and it can be inferred that the relatively broad definition of “cadastral survey dataset” was intended to provide flexibility within the rapidly changing electronic environment in which we live.

[32] The next highly significant feature of the Act is the role assigned to the Surveyor-General. Section 7(1) provides:

⁸ *Mandic v Cornwall Park Trust Board (Inc)* [2012] 2 NZLR 194 (SC) at [5] – [9], [82].

7 Functions and duties of Surveyor-General

- (1) The functions and duties of the Surveyor-General are –
- (a) to maintain a national geodetic system:⁹
 - ...
 - (c) to determine how the spatial extent (including boundaries) of interests under a tenure system must be defined and described, by setting standards under section 49:
 - ...
 - (e) to set standards for integrating new cadastral surveys into the cadastre by the chief executive:
 - (f) to set standards for the structure, storage, and provision of cadastral survey data by the chief executive:
 - (g) to set standards for determining when cadastral survey datasets may be used to define interests under tenure systems:
 - ...

Subsection (2) provides that in exercising those functions the Surveyor-General must have regard to the matters listed in that subsection, which include the risks of inaccuracies in cadastral surveys and the efficiency of measures to manage those risks.

[33] Linked to those functions and duties is the statutory power vested in the Surveyor-General under s 49(1) to make rules about the conduct of cadastral surveys. In terms of that subsection such rules can specify:

- (a) standards for the conduct of cadastral surveys...:
- (b) standards for cadastral survey datasets.

Before making such rules the Surveyor-General must consult in accordance with subs (2) and have regard to the matters listed in subs (3). The matters in subs (3) include the extent to which the proposed standards will promote the purpose of any tenure system, the costs and benefits of maintaining the accuracy of the cadastre, and the maintenance of public confidence in the cadastre.

⁹ As defined in the Act, this means a system that enables positions on the surface of the Earth to be determined by reference to a mathematical model that describes the size and shape of the Earth.

[34] Given that this is not an application for judicial review it is unnecessary to consider whether the requirements of s 7(2) and s 49(2) and (3) were met when the Rules were made. Rather, it is a matter of applying those Rules as they stand (to the extent that they are relevant).

[35] For present purposes the final element of the overall statutory scheme is to be found in s 47 of the Act:

47 General duties in relation to cadastral surveys

- (1) A cadastral survey must be conducted by a cadastral surveyor or a person acting under the direction of a cadastral surveyor.
- (2) In conducting a cadastral survey, a cadastral surveyor or a person acting under his or her direction must comply with this Part and any...rules made under it.
- (3) A cadastral surveyor is responsible for a cadastral survey conducted by a person acting under his or her direction.

...

Subsection (5) contains the only exception to those obligations. In a particular case the Surveyor-General may grant an exemption or specify alternative requirements if the Surveyor-General considers that the rules are impracticable or unreasonable.

[36] Taken as a whole the statutory scheme indicates that the Surveyor-General has been entrusted with wide functions that directly impact upon cadastral surveyors. To the extent that it has deemed necessary, Parliament has included statutory safeguards in the legislation (ss 7(2), 47(5) and 49(2) and (3)). All in all it is a comprehensive package.

[37] In my view it would be contrary to that statutory framework for the Court to attempt to determine the component parts of a cadastral survey dataset and to allocate responsibility for such component parts. In substance the Court would be re-writing the legislation.

Discretion

[38] Even if I had not reached a clear view that the declaration should be declined for the above reasons, I would have declined the application on discretionary grounds. There are three primary grounds.

[39] First, it is clear that the underlying purpose of the application is to obtain a ruling of the Court about potential liability under the Rule 13 certification completed by cadastral surveyors. However, the circumstances in which issues concerning liability might arise are variable. The Court is being asked to answer a hypothetical question involving mixed issues of law and fact. It would be contrary to principle for it to attempt to do so.

[40] Secondly, the Court is effectively being asked to re-visit the certification contained in Rule 13, with which the Institute disagrees. If the Court acceded to that request it would be embarking upon a judicial review through the back door. Again, that would be contrary to principle.

[41] Thirdly, if this litigation has achieved no other purpose, it has at least provided a forum for the competing views to be debated in public. Given the explanations provided by the Surveyor-General about the underlying intention of the certification, it seems that the fears of the Institute might have been overstated.

Result

[42] I decline to make the declarations sought and the application is dismissed. The respondent is entitled to costs against the applicant on the 2B scale.



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