

THIRD REPORT

to

THE ATTORNEY-GENERAL

RELATING TO THE LAWS AFFECTING ENCROACHMENTS ON
LAND IN THE NORTHERN TERRITORY

DARWIN

MARCH 1930

Members of the Northern Territory Law Review Committee:

The Honourable Mr Justice Toohey (Chairman), the
Honourable Mr Justice Muirhead, I. Barker Q.C.,
Mr T.I. Pauling S.M., Messrs G.R. Clark,
T.F. Coulehan, J. Dorling, P.G. Howard, D. Mildren,
A.R. Miller, M. Maurice, T. Riley.

REPORT OF THE NORTHERN TERRITORY LAW REVIEW COMMITTEE -
RELATING TO THE LAWS AFFECTING ENCROACHMENTS ON LAND IN THE
NORTHERN TERRITORY

To: The Honourable P.A.E. Everingham,
Attorney-General for the Northern Territory of Australia.

Sir,

At a meeting of the Committee held 25th September 1979 Dean Mildren Esq., drew to the Meeting's attention the fact that the Territory lacked legislation dealing with the problems raised by Encroachments - a matter dealt with by statutory provision in the States and in New Zealand.

A survey of comparative legislation has been conducted, and a restricted Discussion Paper commented upon by Mr. A.J.N. O'Connor Registrar-General and Mr. P.G. Wells, Surveyor-General as well as by representatives of the Law Society of the Northern Territory. The Committee is indebted to the commentators for their constructive comments and specialised assistance.

Because the law relating to Real Property generally is to be reviewed this appears to the Committee to be an ideal time to consider in some detail the rationalisation of this small but basic area of law. Moves to modernize and simplify Property Law generally encourage moves to clarify associated areas of the law; and where such an area includes a matter going to indefeasibility of title, then we submit that matter demands attention.

We have considered the problem and conclude that the Committee should support legislation which permits ready resolution of problems of encroachment (including "contiguous" and "non-contiguous" encroachments). Further, it seems to us that the Supreme Court is the appropriate forum for deciding an issue fundamental to indefeasibility of title. It may be argued that a lower court or even a Tribunal could deal with matters where the extent of the encroachment or the value of the land might be considered de minimis - but if a dispute

relates to title it is suggested that it would be inappropriate to provide for alterations to be made to titles other than by order of the Supreme Court. If a dispute is so taken to Court clearly the parties do not regard it as de minimis! The Committee and the Registrar-General support separate legislation rather than waiting to incorporate appropriate legislation in a proposed review of the Real Property Act.

1. The Practical Issues

1.1 In all of the Australasian Legislation "encroachment" means encroachment by a building, and includes encroachment by intrusion of any part in or upon the soil. The words used are identical in South Australia, Western Australia, Queensland and New South Wales, and appear to be wide enough to catch both partial encroachment and total encroachment as regards an adjoining lot - however the legislation generally with the exception of the New Zealand Legislation and Division 2 of the Western Australian Act does not appear to be designed to extend beyond encroachments occurring other than as between contiguous pieces of land. In the latter jurisdictions encroachment through mistake of title, without limitation as to contiguity, is in force.

1.2 It is suggested that legislation which follows the wider paths of the Western Australian and New Zealand provisions should be introduced in the Territory and it is further suggested that such legislation should deal with the situation which arises when a house is mistakenly built on the wrong piece of land as well as that involving "contiguous encroachment". Modern building processes being what they are, pre-built, demountable or transportable homes or buildings may well simply be delivered to the wrong piece of land and affixed thereto in a matter of hours - a situation not envisaged by early legislation. Further, modern large-scale subdivisional techniques incorporating the "scorched earth approach" whereby

it is hard physically to distinguish one lot from another and themselves to the making of errors as to which lot is which on the ground.

2. Legislative Provisions in South Australia, Western Australia, Queensland, New South Wales and New Zealand

2.1 South Australia

The Legislation consists of the Encroachments Act, 1944 being "an Act to provide for the adjustment of boundaries where buildings or walls encroach on adjoining land; to facilitate the determination of boundaries and for purposes connected therewith."

The more important definitions are:-

"adjacent owner" - owner of land over which an encroachment extends.

"building" - substantial building of a permanent character and including a wall.

"encroachment" - means encroachment by a building, and includes encroachment by overhang of any part as well as encroachment by intrusion of any part in or upon the soil.

"owner" - means any person entitled to an estate of freehold in possession;

- (a) whether in fee simple or for life or otherwise,
- (b) whether at law or at equity,
- (c) whether absolutely or by way of mortgage and includes the mortgagee under a registered mortgage of a freehold estate in possession in land under the Real Property Act, 1886 to 1939.

"the Land and Valuation Court" - means the Land and Valuation Court constituted under the Supreme Court Act, 1935 to 1969.

The South Australian Act makes provision for either an adjacent owner or an encroaching owner to apply to the Court for relief and the payment of compensation to the adjacent owner, the conveyance transfer or lease

of the subject land to the encroaching owner or the grant to him of any estate or interest therein or any easement right or privilege in relation thereto, or the removal of the encroachment. The Court also has power to grant or refuse relief sought or any part thereof as it deems proper in the circumstances of the case. In the exercise of the Court's discretion it may consider:

- (a) the fact that the application is made by the adjacent owner or by the encroaching owner as the case may be,
- (b) the situation and value of the subject land and the nature and extent of the encroachment,
- (c) the character of the encroaching building and the purposes for which it may be used,
- (d) the loss and damage which has been or will be incurred by the adjacent owner,
- (e) the loss and damage which would be incurred by the encroaching owner if he were required to remove the encroachment and,
- (f) the circumstances in which the encroachment was made.

The provisions apply to encroachment made either before or after the commencement of the Act.

Section 5 provides that the minimum compensation to be paid to the adjacent owner in respect of any conveyance (etc.) shall, if the encroaching owner satisfies the Court that the encroachment was not intentional and did not arise from any negligence, be the unimproved capital value of the subject land and in any other case three times such unimproved capital value. In determining whether the compensation shall exceed the minimum and if so by what amount the Court shall have regard to the value whether improved or unimproved of the subject land of the adjacent owner, the loss or damage which has been or will be incurred by the adjacent owner through the encroachment and through the orders proposed to be made in favour of the encroaching owner and the circumstances in which the encroachment was made.

Section 6 makes provision for the order for payment of compensation to be registered in the Land Titles Office or the General Registry Office in such manner as the Registrar-General determines and upon registration operates as a charge on the land having priority as if it were a mortgage registered at the time when the order is registered.

Section 7 gives the Court discretion to determine by whom and in what proportions the compensation is to be paid in the first instance and is to be borne ultimately and to whom and on what terms any transfer or grant etc. of the subject land is to be made.

Section 9 gives the Court power to make a vesting order with respect to the subject land.

Section 10 makes provision for application to the Court for determination under the Act of the true boundary (whether before or after the erection of buildings).

Section 11 gives the Court power to exercise any of the powers conferred by the Act and may order a stay of proceedings on terms. The Court (including the Supreme Court) may grant an injunction on such terms as it may deem proper restraining proceedings.

Section 12 makes provision for the service of notice of applications on any persons interested and joinder of parties.

2.2 Western Australia

The Legislation is contained in Part XI of the Property Law Act, 1974 and Division 1 follows almost precisely the provisions of the South Australian Act. It does however include (Property Law Act section 194) a provision relating to award by the Court as to payment of costs (to be taxed as between solicitor and client or otherwise) etc. and may take into

consideration any offer of settlement made by either parties. Division 2 makes additional provision (sections 195 to 198 inclusive) for relief in cases of improvements made under mistake of title, and allows a person making a lasting improvement on land owned by another in a genuine but mistaken belief that:-

- (a) such land is his property or,
- (b) such land is the property of a person on whose behalf the improvement is made or intended to be made may make application to the Court for relief.

The Court has power to make orders, for example, vesting the whole or part of the land on which the improvement or part thereof has been made in a person specified in the order with or without any surrounding or contiguous or other land, or of ordering the removal of the improvement or of ordering compensation. The Division particularly provides machinery to give effect to the declaration or order of the Court on the Register and includes powers to order production of title deeds or other instruments and to direct surveys to be made and plans of surveys to be prepared. The provisions of both Divisions apply notwithstanding the provisions of any other Act. The "application" provisions in Division 2 appear to extend "mistake" (within the confines of the Act) to other exceptions to the indefeasibility of registered title.

2.3 Queensland

The Legislation is contained in the Encroachment of Buildings Act, 1955 - being "an Act for the Adjustment of Boundaries where Buildings Encroach on Adjoining Land; to Facilitate the Determination of Boundaries ...". The Legislation is very similar to the South Australian Legislation except that matters are heard (pursuant to section 11) in the Supreme Court on application by originating summons, and section 14 provides in

essence that all Rules of Court, and the practice and procedure of the Court shall, to the extent that they are applicable, apply to proceedings under the Act.

2.4 New South Wales

Encroachment of Building Act, 1922 - "an Act to make the provision for the adjustment of boundaries where buildings encroach on adjoining land; to facilitate the determination of boundaries; and for purposes connected therewith". The Act is similar to the South Australian and Queensland Legislation except it contains slightly different provisions relating to registration of orders of the Court insofar as such orders may affect:-

(a) land under the provisions of the Real Property Act, and,

(b) land not under the provisions of such Act - the difference appears to lie more as a result of the early origins of the Act and the greater possibility (at the time it was passed) of land not under the provisions of the Real Property Act being involved.

2.5 New Zealand

The Legislation is contained in the Property Law Act, 1952. Section 129 of that Act vests in the Magistrates' Courts similar powers to those variously vested in the Land Valuation Court or the Supreme Court as the case may be in Australia. Provision is reserved for any party as of right to have the action or proceeding transferred to the Supreme Court (in addition to any right of appeal that might otherwise lie in that Court).

An article by Mr. E.K. Phillips (former Registrar-General of Land New Zealand) (1964) N.Z. L.J. 13 reads in part: "... (the provisions of) section 129 of the Property Law Act, 1952, which gives the Court power to grant special relief in cases of encroachment, are substantially redrawn by section 5 of the

Property Law Amendment Act, 1957 and in its present form (the section) appears to be working satisfactorily giving adjoining owners the opportunity of determining their rights. The Court may, in the case of mistake and where it considers it just and equitable, make an order vesting property, or create an easement over it, subject to such terms and conditions as the Court deems fit.

The Legislature obviously had in contemplation the usual sense of the word "encroachment" as that which exists where a building is inadvertently placed partly over the boundary of an adjoining land and section 129 is drawn solely towards rectifying such a position. Subsequently the position was raised with the Law Revision Committee where a house or other building is mistakenly erected wholly on the wrong property. Strouds Judicial Dictionary gives a definition of encroachment as: "an unlawful gaining upon the right of possession of another man" and in these terms the use of section 129 could have been contemplated even where the building erected was totally on the wrong property. The phraseology of the section was, however against this concept, and the Law Revision Committee recommended that a separate section be passed to meet the position.

2.6 New Zealand - Definition of land affected

Section 3 of the Property Law Amendment Act, 1963 accordingly provided for a new section 129A to be added to the Principal Act. Section 129A provides that where a building has been erected on the wrong piece of land because of a mistake as to any boundary or as to the identity of the land, any person who has or had any interest or estate in the land upon which the house should have been built, or any person in possession of the building or having any estate or interest in the land wrongly built upon or anyone claiming to be entitled to any benefit under any instrument affecting either piece of land or any local authority concerned may apply to the Supreme Court,

either in an action already initiated or by an originating application, for an order under the section.

. The section (129A) is a long one but basically oriented towards the philosophy of the other legislation - i.e. the provision of a statutory basis for relief in very wide terms to be available to enable resolution in as just and equitable a manner as is possible under the circumstances practical difficulties arising out of mistake.

SUMMARY OF RECOMMENDATIONS

The Committee recommends that -

- (a) legislation be enacted in the Territory to provide for relief in cases where:
 - (i) buildings or other improvements encroach on or over adjoining land;
 - (ii) buildings or other improvements are erected or partly erected on the wrong piece of land whether by mistake as to boundaries or as to the identity of the land.
- (b) the statutory relief so made available should be in such terms as will enable the resolution, in as just and equitable a manner as is possible, of practical difficulties arising out of all forms of encroachment.
- (c) the Supreme Court of the Northern Territory should be named as the proper forum for the determination of issues arising out of encroachment.
- (d) the legislation should encompass all land in the Territory whether such land has been brought under the provisions of the Real Property Act or not, and should apply notwithstanding any provisions as to limitation of action.
- (e) the legislation should bind the Crown, and should apply in respect of encroachments made either before or after the commencement of the legislation.
- (f) the Court should have powers to make orders with respect to:
 - (i) payment of compensation to the owner affected by the encroachment;
 - (ii) the preparation of such plans and the execution of such documents as may be necessary to give effect to any determination of the Court;
 - (iii) the removal of the encroachment.
- (g) the Court be given discretionary powers to take into account all relevant facts including the prior conduct of the parties relating to the case when determining:
 - (i) such order, if any, as it sees fit to make

pursuant to the powers set forth in
sub-paragraph (f) supra;

- (ii) any order as to payment of costs charges
and expenses as it may deem just;
 - (iii) the exercise by it or any other and further
ancillary powers and procedures as may be
necessary to determine the issue in as just
and equitable manner as may be.
- (h) enabling provisions be included in the legislation to
provide for registration of orders and documents made and
executed pursuant to the legislation and notwithstanding
the provisions of the Real Property Act.
- (i) the prevention of the bringing of claims against the
Assurance Fund and any employee (acting bona fide and
whether ex officio or in personam) of any Government
Department or Municipal authority service arising out
of any loss claimed to be suffered by the owner of any
land the subject of any action under the Act.

E H Moushead T

Chairman

A R Mills

Executive Member

T F Coulehan

Member