# THE EFFECT OF STATUTORY RESTRICTIONS ON LAND BETWEEN VENDOR AND PURCHASER

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The recent proliferation of instances of legislative interference with the rights of landowners means that there is currently a much greater likelihood that a purchaser of land will find that the property he has agreed to buy is affected by statute in a manner which he had not anticipated. Statutes imposing burdens, restrictions or charges on land, or in some way limiting or restricting the rights of landowners are not a novel phenomenon. It is their rapid multiplication which is new, and which points out the need to consider the position of the purchaser of land affected in this way.

The effect of statutory restrictions on land ranges from the comparatively trivial to the extremely serious, and may take a variety of forms. It may involve the payment of extra rates and taxes; it may restrict the use which can be made of the land; it could mean that the buildings on it are liable to be demolished or will have to be repaired; it may mean that part of the land is subject to use by someone else or it may mean the total loss of part of the land. The way in which land becomes affected also varies. Some statutes apply to all land within a certain locality or falling into a defined class, while others require that an administrative decision be made or some administrative act be carried out by the appropriate public body. Where the land is subject to a title registration system, it may be that a notification on the register is necessary before the land is affected.

The way in which the courts have traditionally approached the question of the rights of the parties to a contract for the sale of land subject to a statutory restriction is by categorizing the restriction as being either a defect in title or a defect in quality.[1] That categorization then determines what remedies, if any, the purchaser has in respect of the defect. If it is classified as a defect in title, then he has available to him all the remedies which he would have for any title defect, while if it is considered to be a defect in quality, the rule is *caveat emptor* and the purchaser has to accept the land subject to whatever limitation or restriction the statute imposes on it.[2] Occasionally the process of categoriza-

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1 Defects in quality is a term which is also used to describe defects in the physical condition of the land.

2 There is an exception to this, in that the existence of the defect may impose sufficient hardship on the purchaser to cause the court to refuse to decree specific performance against him, if the vendor is seeking that remedy.

tion has been bypassed, which means that a decision is made simply granting or refusing the remedy sought.

On the present state of the authorities, it is not easy to predict how the courts are going to treat a defect having its origin in statute if it becomes a matter in dispute between vendor and purchaser. The only exception to this is where the restriction is one imposed pursuant to town planning legislation which, it has now been established, will be categorized as a defect in quality.[3] The state of uncertainty which exists in the case of other defects resulting from statute obviously presents a problem to those dealing with land. It seems to have arisen partly because of the diverse nature of the defects involved, which has led to a tendency on the part of the courts to treat each one differently, and partly because of the application of the wellknown maxim that everyone is presumed to know the law, which has meant that in some circumstances the courts have adopted the attitude that the purchaser should have known the relevant statutory provision and that it would affect the land he was buying. Whatever the reason for it may be, the present position is that no principles have been expressly formulated and it is suggested that no clear rules emerge from the decisions. It is possible to obtain some guidance from the cases, but this is limited to an identification of specific points which have been considered relevant in the past and the way in which they have influenced decisions.

One point which is likely to prove of considerable importance in trying to assess whether a defect is going to be categorized as one of title or one of quality is the date on which it attaches to the land. Generally, if the land is subject to it at the date of the contract it is a title defect, while if it is merely threatened at that date and does not become a charge until later it will be considered a defect in quality. Two early Victorian cases illustrate the point vividly. Both concerned a charge imposed by a local body for part of the cost of constructing a road in front of the property, in exercise of the powers conferred by the Local Government Act 1915 (Vic.). However, in *Re Sneesby and Ades and Bowes' Contract*[4] the charge had become attached to the land before the date of the contract and it was considered to be a title defect, which the vendor had to remove before settlement, while in *Myers v. Witham*[5] it was treated as a defect in quality, in respect of which the purchaser had no remedy, because it did not affect the land until after settlement. Two English decisions show a similar contrast. In *Re Leyland and Taylor's Contract*[6] the local authority had

[3] *Milk Farm Products and Supply Co. v. Buist* (1916) 26 D.L.R. 459; *Valentine v. Chutorian* [1949] 2 W.W.R. 1198, 1201, *per* Coyne J. A.; *Mitchell v. Beacon Estates (Finsbury Park) Ltd* (1949) 1 P. & C. R. 32; *Trafalgar Township v. Hamilton* [1954] 1 D.L.R. 740, 742-743, *per* Hogg J. A.; *Royal Sydney Golf Club v. Federal Commissioner of Taxation* (1955) 91 C.L.R. 610; *Re Pongratz and Zubyk et al* [1955] 1 D.L.R. 143; *Wirth v. Kutarna* [1955] 5 D.L.R. 785; *Dell v. Beasley* [1959] N.Z.L.R. 89; *Yammouni v. Condidorio* [1959] V.R. 479; *Doust v. Hubbard* [1964] Tas. S. R. 260; *Kolan v. Solicitor* (1969) 7 D.L.R. (3d) 481, 487, *per* Lacourciere J.; *Innes et al v. Van de Weerdhof* (1970) 10 D.L.R. (3d) 722; *Amalgamated Investment & Property Co. Ltd v. John Walker & Sons Ltd* [1977] 1 W.L.R. 164.

[4] [1919] V.L.R. 497.

[5] [1924] V.L.R. 470.

[6] [1900] 2 Ch. 625.

served notices on the vendor requiring that the street in front of the property be paved, flagged and sewered, which meant in effect that the local body would carry out the work and that the cost would be a charge against the land. However, the charge would not attach until the work had been done, and the Court of Appeal decided that the service of the notices did not amount to a title defect. Conversely, in *Carlish v. Salt*[7] a party wall award, which had been made pursuant to the London Building Act 1894 (Eng.) before the date of the contract was held to be a defect in title. The effect of the award was to charge the land with half the cost of the party wall when it was completed, so that the amount payable and the date of payment were both uncertain, but the liability for its payment attached to the land at the date of the award. Canadian authorities are to the same effect. In both *Re Macdonald, Craig & Co.*[8] and *Salus and Salus v. Devkor Construction (Calgary) Ltd*[9] the land was subject to charges for the cost of water and sewer connections existing at the date of the sale, which were treated as defects in title. On the other hand, in *James v. Chiaravalle*[10] the local body had only reached the stage of resolving to construct a sewer along the street in which the property was situated and serving notices of its intention to charge the owners with part of the cost when the work was completed. It was decided that there was no defect in title, since the land had not yet become subject to any charge.

The same point remains relevant if the defect in question is something other than a charge involving the payment of a sum of money. Where, at the date of the contract, there is merely a possibility that the land is going to be affected in some way then there is only a defect in quality. In *Dormer v. Solo Investments Pty Ltd*[11] an application for a permit to enter the land to survey for a natural gas pipeline had been lodged, but it was decided that this was not a defect in title, since the land had not yet become affected and, moreover, there was a possibility that it might never be. However, the authorities go even further, in that even the existence of a definite risk at the date of the contract does not amount to a title defect. *Summers v. Cocks*[12] concerned the sale of an hotel, including what was described in the contract as a 'clean' licence. The licence was technically clean at the date of the contract, but soon after that it was removed by the Licences Reduction Board and the evidence showed that the risk of its removal had existed at the time of the sale. In spite of that, the unanimous decision of the High Court of Australia was that the purchaser was bound by the contract. In that case there was what may perhaps be most accurately described as a possibility verging upon probability, but in *Tsekos v. Finance Corporation of Australia Ltd*[13] there existed what was described in the judgment as a 'probability verging upon certainty'[14] that the land would be

7 [1906] 1 Ch. 335.
8 [1924] 2 D.L.R. 587.
9 [1982] 4 W.W.R. 162.
10 [1970] 1 O.R. 233.
11 [1974] 1 N.S.W.L.R. 428.
12 (1927) 40 C.L.R. 321.
13 [1982] 2 N.S.W.L.R. 347.
14 [1982] 2 N.S.W.L.R. 347, 356, *per* Rath J.

compulsorily acquired by the local body. However, it was considered that this did not constitute a defect in title. *Fletcher v. Manton*[15] goes even further in that the threat was one which amounted to a certainty. Demolition orders in respect of the houses sold had already been made at the date of the contract, but these were not to become effective until they had been served on the owner, which did not take place until after the sale. The majority decision of the High Court was that the purchaser had no right to rescind, because the property was not affected until after the contract had been made. In the light of these decisions, it would seem that in order for a restriction or encumbrance to be categorized as a defect in title it must be a charge on the land at the date of the contract. If it is not, then it is treated as a defect in quality, no matter how certain its eventual attachment may be.

Another factor which has influenced decisions is whether the purchaser had any knowledge of the existence of the defect or whether the circumstances are such that he should have been aware of it. Generally, if there is evidence that the purchaser knew that the land was affected by some statutory provision, or if the means of such knowledge had been available to him, the defect is categorized as one of quality while, if there was no reason why he should have known or suspected this, it is a defect in title. This distinction relies for its validity on the reasoning already explained, *i.e.*, that the purchaser must be presumed to know the terms of the relevant statute, so that, if there is any reason why he should know that it applies to the property he is buying, he is taken to be aware of the impact which it will have. If the facts which cause the legislation to apply are within his knowledge, he is then deemed to know the rest.

Two decisions which point to the effect of the purchaser's knowledge in a striking way are *Long v. Worona Pty Ltd*[16] and *Maxwell v. Pinheiro*[17]. Both cases concerned section 317B of the Local Government Act 1979 (N.S.W.) which gives a local body power to order the demolition of any building which does not comply with the Act or with ordinances made under it, or which has not been built in accordance with plans and specifications approved by the council. In *Long v. Worona Pty Ltd*[18] plans for alterations had been approved by the council, but the builder had departed from them so drastically that the council sent a notice under section 317B, requiring rectification of the work done. The decision was that the notice was not a defect in title. On the other hand, in *Maxwell v. Pinheiro*[19] an unauthorized addition was considered to be a defect in title, even though no notice had been sent, on the basis that its existence meant that the council's powers under the section could be exercised at any time. The distinction between the two cases is that in *Long v. Worona Pty*

15 (1940) 64 C.L.R. 37.
16 Unreported, New South Wales Supreme Court, judgment 20 March 1973, Helsham J.; noted (1981) 55 *Australian Law Journal* 294.
17 (1979) 1979-1980 A.N.Z. Conv.R. 351.
18 Unreported, New South Wales Supreme Court, judgment 20 March 1973, Helsham J.; noted (1981) 55 *Australian Law Journal* 294.
19 (1979) 1979-1980 A.N.Z. Conv.R. 351.

*Ltd*[20] the purchasers were aware that the council's powers under section 317B might become exercisable, since the renovations had been in progress when they inspected the property and, moreover, an officer of the council had advised them not to enter into the contract until after the work had been completed to ensure that it was carried out in accordance with plans, while in *Maxwell v. Pinheiro*[21] there was no reason why the purchaser should have known that the addition was unauthorized, because it had been built several years before the sale took place. Powell J., in his judgment in *Maxwell v. Pinheiro*[22], relied on this point to distinguish the earlier decision.

The cases do not always provide such neat contrasts, but the purchaser's awareness or lack of it has been an important factor in a number of decisions. *Borthwick v. Walsh*[23] is another one concerning the effect of section 317B. The property sold included a carport which had been built without council approval and, while no notice had been served, the council could order its demolition at any time. The existence of the carport was categorized as a defect in title and the fact that there was no reason why the purchaser should have known that the carport was unauthorized was part of the reasoning which led to that conclusion.[24] In *Rich v. Miles*[25] the decision that a building line restriction was a defect in quality was reached using similar reasoning. The restriction had been imposed by statute on all land fronting streets less than 66 feet wide and it was considered that since the Act was 'a public Act, the provisions of which the purchaser must be taken to know as well as the vendor'[26] and 'the purchaser inspected the property and walked up Warrawee Avenue and could form his own opinion as to the width'[27], the building line restriction was not a defect in title. *Barraud v. Archer*[28] uses the same reasoning. The sale was of fen land which was subject, together with other land in the area, to district drainage and embanking taxes imposed by statute. The decision was that the purchaser had no remedy in respect of the charges, since the relevant statute

> was a public act of parliament, known to all the world: and on that ground alone, the purchaser ought to have inquired. He was besides, a near resident to the estate, and moreover an attorney, and in that capacity was very likely to know the condition of, and impositions by law upon the surrounding lands.[29]

That decision was followed by the New Zealand Court of Appeal in *Manukau Beach Estates Ltd v. Wathew*[30], which concerned a restriction, in the form of a minimum frontage for future subdivisions, imposed by statute on all land being subdivided outside a borough or town district. The requirement was considered not to be a defect in title, on the basis that the purchaser must have

20 Unreported, New South Wales Supreme Court, Judgment 20 March 1973, Helsham J.; noted (1981) 55 *Australian Law Journal* 294.
21 (1979) 1979-1980 A.N.Z. Conv.R. 351.
22 (1979) 1979-1980 A.N.Z. Conv.R. 351, 353.
23 (1980) 41 L.G.R.A. 144.
24 (1980) 41 L.G.R.A. 144, 150, *per* McLelland J.
25 (1909) 10 S.R. (N.S.W.) 84.
26 (1909) 10 S.R. (N.S.W.) 84, 91, *per* Simpson C. J.
27 (1909) 10 S.R. (N.S.W.) 84, 92, *per* Simpson C. J.
28 (1831) 9 L.J. (O.S.) Ch. 173.
29 (1831) 9 L.J. (O.S.) Ch. 173, 176, *per* Brougham L.C.
30 [1932] N.Z.L.R. 865.

known that the land he was buying fell into the class affected by the statutory provision.[31]

There are several other cases in which the purchaser's state of knowledge was not the sole reason for the decision, but in which it was a contributory factor. One example is *Re Leyland and Taylor's Contract*[32], which was based partly on the fact that the local body's requirement that the owner should pay for the cost of the paving, flagging and sewering the street in front of the property sold had not yet become a charge on the land at the date of the sale, but also partly on the grounds that the purchaser should have expected, from the condition of the property, that such a requirement would be made. Lord Alverstone M.R. was of the opinion that 'buying such property, the purchaser must be taken to have known that such a notice might be served at any time, and to have bought subject to such contingency'[33] and Rigby L.J. considered that the purchaser 'must be taken to have known the state of the property, and the fact that the local authority might serve such notices as were served at any time'.[34] Another example is *Fletcher v. Manton*[35], in which the main reason for the decision that the purchaser had to accept title subject to demolition orders was that the orders did not become effective until after the date of the contract. However, it seems that the purchaser's possible awareness of the risk of such orders being made influenced the decision of at least one member of the High Court, since Dixon J., (as he then was) remarked on the fact that 'the parties were bargaining for the transfer from one to the other of slum property liable under a general Act of Parliament to be affected at any moment of time by service of a demolition order'.[36] Similarly, the judgment in *James v. Chiaravalle*[37] mentions that it had been conceded that the purchaser 'either knew or ought to have known that the property contained a septic tank and was not serviced by sewers'[38] which seems to indicate that this was a factor contributing to the decision that the service by the local body of a notice stating its intention to construct sewers and charge the land with part of the cost was not a defect in title.

The extent of interference represented by the defect is a factor which has not been stressed in the authorities but, nevertheless, it is suggested that it has had an influence on a number of decisions. The more serious the defect, the more likely that it will be categorized as a defect in title, a result which is, of course, consonant with justice, since a purchaser has far more extensive remedies available to him for a title defect. The existence of a demolition order affecting the property, or the applicability of a statutory provision which renders powers to order demolition exercisable at any time, have both been considered to be title defects unless some contrary factor is presented, and it is suggested that

31 [1932] N.Z.L.R. 865, 868-9, *per* Myers C. J.
32 [1900] 2 Ch. 625.
33 [1900] 2 Ch. 625, 630.
34 [1900] 2 Ch. 625, 631.
35 (1940) 64 C.L.R. 37.
36 (1940) 64 C.L.R. 37, 49.
37 [1970] 1 O.R. 233.
38 [1970] 1 O.R. 233, 234, *per* Parker J.

the reason for this is the severity of their effect, a point which is supported by comments in the decisions. In *Maxwell v. Pinheiro*[39] the severe effect of the applicability of section 317B of the Local Government Act 1919 (N.S.W.), which gives a local body power to order demolition of illegal buildings, was pointed out[40] and in *Vukelic v. Sadil-Quinlan*[41] the effect of the same kind of provision in Queensland was stressed.[42] Similarly, in *Zsadony v. Pizer*[43] the existence of a demolition order was considered to be 'so substantial a burden on the land'[44] that it was treated as a defect in title.

Another kind of restriction having a serious effect is one involving the loss of a portion of the land itself and, again, it seems that a defect with this effect will be categorized as one of title. There appear to have been only two reported cases concerning the impact of such a provision on a contract for the sale of the affected land, in both of which it was treated as a title defect. In *Moss v. Perpetual Trustees Estate and Agency Company of New Zealand Ltd*[45] the land sold fronted an underwidth street, which meant that the purchaser would be required to dedicate a strip of land eight and a half feet wide along his frontage. The judgment emphasizes the disastrous result of this requirement[46] and the decision that it was a defect in title seems to be largely based on that point. In the Canadian case of *Rodd v. Cronin*[47] part of the land had been used as a public harbour in the past, which meant that it was subject to compulsory acquisition at any time. It was decided that the applicability of the statutory provision conferring the power to take the land was a defect in title.

A restriction on the owner's rights of alienation has also been considered a sufficiently serious interference to be categorized as a title defect. The effect of such a restriction between vendor and purchaser seems to have come before the courts only in New Zealand, where there has been a line of cases which has established that the restriction imposed by Part XIII of the Land Act 1908 (N.Z.), which limits the class of persons to whom the land can be sold, is a defect in title[48] and it appears from the judgments that it was the extent to which the owner's rights were interfered with which largely determined the categorization.[49] In addition, in *Ferguson v. Hansen*[50] the applicability of a different statutory provision having a similar effect was also considered a title defect.

39 (1979) 1979-1980 A.N.Z. Conv.R. 351.
40 (1979) 1979-1980 A.N.Z. Conv.R. 351, 353, *per* Powell J.
41 (1976) 13 A.C.T.R. 3.
42 (1976) 13 A.C.T.R. 3, 10, *per* Connor J.
43 [1955] V.L.R. 496.
44 [1955] V.L.R. 496, 502, *per* Dean J.
45 [1923] N.Z.L.R. 264.
46 [1923] N.Z.L.R. 264, 269, *per* Hosking J.
47 [1936] 2 D.L.R. 337.
48 *McDonald v. Wake* [1919] G.L.R. 106; *Schollum v. Francis* [1930] N.Z.L.R. 504; *Rayner v. R.* [1930] N.Z.L.R. 441.
49 *McDonald v. Wake* [1919] G.L.R. 106, 108, per Cooper J.; *Schollum v. Francis* [1930] N.Z.L.R. 504, 509, per Ostler J.; *Rayner v. R.* [1930] N.Z.L.R. 441, 455, per Adams J. (delivering the judgment of the Court of Appeal).
50 [1931] N.Z.L.R. 1156.

Where the application of legislation means that there is some restriction on the use which can be made of the land its categorization seems to depend largely on the degree of interference caused, so that a severe limitation on the owner's rights of use is generally treated as a defect in title. Thus in *Re Ponsford and Newport District School Board*[51] a total prohibition on building, which had been imposed by statute on all disused burial grounds, was categorized as a title defect. Similarly, in *Micos v. Diamond*[52] the existence of a sewer main on the property was considered to be a title defect, largely due to the restriction on building caused by its presence.[53] *Cook v. Griffiths*[54] is another example. The land was subject to a right conferred by statute on the River Board to fence a bank which it had constructed on the land, which was categorized as a defect in title, largely, it seems, because of the severe restriction on use which the fence caused.[55]

Conversely, where a restriction on use is comparatively trivial in effect, it has generally been classified as a defect in quality. One example is a building line restriction, which has been categorized in this way in two different cases in different jurisdictions. In *Rich v. Miles*[56] the judgment concerns itself mainly with the point that the purchaser should have been aware that the statute which imposed the restriction applied to the land, but it is suggested that the relatively slight interference which it caused also influenced its being treated as a defect in quality. The same conclusion in *Harris v. Weaver*[57], on the other hand, appears to have been reached solely on the basis of the nature of the restriction.[58] The judgments in *Manukau Beach Estates Ltd v. Wathew*[59] seem to indicate that the reason for the decision was that the purchaser should have known that the statute applied to the land, but it is arguable that the fact that it only imposed a minimum frontage for future sub-divisions, with provision for obtaining consent to a smaller frontage, also influenced the court in regarding it as a defect in quality.

Where only one of these factors is present, it is suggested that it is possible to achieve a limited degree of certainty as to the likely categorization of the defect. This certainty is increased if more than one exists in the circumstances of the case and they both point to the same conclusion. However, if several factors are present and they indicate opposite results, it is not easy to work out which way a decision will be likely to go, since it is not possible to identify any one factor as being more important than any other. The uncertainty which exists in this area does cause difficulties. However, it may be that, since there is such a diversity in the nature and effect of these restrictions and in the circumstances in which disputes concerning them arise, the development of fixed rules would not serve the cause of justice.

51 [1894] 1 Ch. 454.
52 (1970) 72 S.R. (N.S.W.) 392.
53 (1970) 72 S.R. (N.S.W.) 392, 396, *per* the New South Wales Court of Appeal.
54 (1913) 32 N.Z.L.R. 1109.
55 (1913) 32 N.Z.L.R. 1109, 1111, *per* Stout C. J.
56 (1909) 10 S.R. (N.S.W.) 84.
57 [1980] 2 N.Z.L.R. 437.
58 [1980] 2 N.Z..L.R. 437, 440, *per* Chilwell J.
59 [1932] N.Z.L.R. 865.