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

**CIV-2008-485-1013**

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| IN THE MATTER OF | the Land Transfer Act 1952 |
| BETWEEN | SOUTHERN AGRICULTURE LIMITED<br>Plaintiff |
| AND | THE REGISTRAR-GENERAL OF LAND<br>First Respondent |
| AND | TE KAMARU STATION LIMITED<br>Second Respondent |

Hearing: 28 January 2009

Counsel: J J Cleary for plaintiff
J A L Oliver for first respondent
S L Bacon for second respondent

Judgment: 27 February 2009

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**RESERVED JUDGMENT OF DOBSON J**

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**Nature of the dispute and the proceedings**

[1] These proceedings reflect a dispute as to the location of the legal boundary between two farming properties in Makara, to the west of Wellington City. The plaintiff (Southern Agriculture) is the registered proprietor of the more easterly of the two properties, the dispute relating to the alignment of its western boundary being the eastern boundary of the property of which the second respondent (Te Kamaru) is the registered proprietor.

[2] In recent years, Te Kamaru has facilitated access via a farm track to Meridian Energy Limited (Meridian) for the purposes of work on a wind farm that Meridian is

constructing in the area. That track is within the fenced boundary of Te Kamaru's property, but close to its eastern boundary. The title to Te Kamaru's property remains "limited as to parcels". To make sure of its legal entitlements, Meridian arranged for a survey of the area including the eastern boundary of Te Kamaru's property, therefore necessarily affecting the western boundary of Southern Agriculture's property. The survey led to the lodging of a plan (Plan 375401) intended to formally verify the boundary line as following a long-standing fence between the two properties, and thereby removing the "limited as to parcels" notation. Once Plan 375401 was lodged with Land Information New Zealand (LINZ) a requirement for service of it on affected owners put Southern Agriculture on notice of the proposal to confirm the legal boundary as reflecting the existing fence line. This provoked the lodging of a caveat by Southern Agriculture to prevent the depositing of Plan 375401 on the ground that the fence line does not reflect the legal boundary, and that the issue of new titles in accordance with Plan 375401 would therefore involve appropriation of land owned by Southern Agriculture.

[3] In form, the proceedings were filed as an originating application seeking orders that Southern Agriculture's caveat not lapse, and an injunction to restrain the first respondent (the Registrar-General) from issuing a title or identifier to the registered proprietor of the Te Kamaru property based on Plan 375401. The proceedings were commenced in May 2008. Conventionally, such a proceeding would first be the subject of an interlocutory hearing as to whether there was an arguable case that the caveat not lapse. Progress in the proceedings has been delayed for a variety of reasons and Southern Agriculture and Te Kamaru have agreed that a hearing convened on the basis of affidavit evidence, such as would be relied on at an interlocutory hearing, should nonetheless also produce the substantive outcome as to where the legal boundary between the two properties lies.

[4] There are some material differences on matters of both fact and opinion in the competing affidavits, which would normally be resolved in a substantive way after testing of the evidence on cross-examination. However, I have accepted the parties' wish to bring the entire dispute to a conclusion on the basis of the present argument. In the end, the impact of legal findings and the findings of fact that are not seriously contested do relegate the significance of the evidentiary differences.

[5] The parties were directed to settle the issues for argument, and in doing so have also helpfully recorded the extent to which they agree on the facts. The sole issue specified is whether the legal boundary is reflected in Plan 375401 surveyed to reflect the existing fence as contended for by Te Kamaru, or whether a different boundary should be confirmed, namely as recently plotted for Southern Agriculture to reflect distances and positions taken from descriptions in its existing title plus predecessor titles and source documents. For the purposes of this judgment, I will refer to this boundary at the western end of Southern Agriculture's property, and the eastern end of Te Kamaru's property, as "the disputed boundary".

**Factual background**

[6] In 1890 the property now owned by Southern Agriculture was sold to a new owner by the then owners of the Te Kamaru property. The boundaries created by the sale were described in some detail in the relevant conveyance. Shortly after that, Te Kamaru's predecessor also sold a block to the south of that now owned by Southern Agriculture. This meant the eastern boundary of the Te Kamaru property had this second block (referred to in this litigation as "the Foreman land") on the southerly part of its eastern boundary, with Southern Agriculture's block constituting the remainder of that eastern boundary to the north of the Foreman land. Thus the property now owned by Southern Agriculture and the Foreman land share a west-east boundary, both being immediately to the east of Te Kamaru.

[7] The first Certificate of Title (CT) issued under the predecessor to the Land Transfer Act 1952 (the Act) for the Southern Agriculture property was CT 341/242, issued in 1927. It was endorsed as being "limited as to parcels and title". In 1973, an area of some 7.9 hectares was subdivided off from CT 341/242, with the area involved being fully surveyed. That subdivision occurred at the eastern end of the Southern Agriculture block, the opposite end from the disputed boundary. The subdivision resulted in the issue of separate CT 11B/1424 for that area. Its boundaries having been fully surveyed, that CT was not limited as to parcels or title. A new CT was issued for the remainder of the land, being Southern Agriculture's present CT 13B/104. Although there is no evidence that there was any survey of any

of the other boundaries of this remaining lot at the time, the new title was also issued without the previous endorsement that it was limited as to parcels or title.

[8] Subsequent to the lodging of Plan 375401, Southern Agriculture retained Mr Russell Paterson, a surveyor of Porirua, to provide a survey defining the disputed boundary, as reflected in the description in its CT. That description also draws on details going back to the first CT and, prior to that, the original conveyance from 1890. It is that definition of the disputed boundary which Southern Agriculture seeks to have confirmed.

[9] The important practical difference between Mr Paterson's definition of the disputed boundary and Plan 375401 is its impact on the location of part of an access track being used by Meridian. Mr Paterson's definition would have this access track within Southern Agriculture's land, whereas according to Plan 375401 it is within Te Kamaru's land. In terms of land area, the irregularly shaped sliver that would be gained by Southern Agriculture in the southern half of the disputed boundary would be less than the amount it would lose in the northern half of the disputed boundary after the two proposed boundary lines cross over, where the existing fence lies further to the west than Mr Paterson's plotting by reference to the title.

[10] It is agreed that the fence dividing Te Kamaru from Southern Agriculture and the Foreman land has followed its present line since first fenced in the early 1890s. There is no evidence to suggest that the farming operations on either Southern Agriculture or Te Kamaru's properties have caused anyone at any stage to question the practical appropriateness of the fence line as defining the boundary. Nor is there any suggestion that Te Kamaru's own use of the access road has caused any concern in the past. It is therefore to be inferred that the difference in boundary lines has assumed relevance for Southern Agriculture because of its concerns at use by Meridian of the access track.

**The evidence**

*For Southern Agriculture*

[11] Four affidavits have been sworn and filed in support of Southern Agriculture's application by Robin Buxton, a Wellington solicitor. Although a notice of change of solicitor was filed on 19 December 2008, well after objection had been taken to some of Mr Buxton's evidence, at the time he swore the material affidavits he was the solicitor on the record for Southern Agriculture. It appears Mr Buxton intended to refer in his third affidavit (as intituled) to his position as a shareholder in a company that retains an interest in Southern Agriculture's land. This third affidavit was intended to be sworn some time before the fourth affidavit that was filed on 24 November 2008. However, apparently by inadvertence the "third" affidavit was sworn and filed only on 26 January 2009, two days before the hearing. Mr Buxton's fourth affidavit also makes reference to his interest as a shareholder in a company that has an interest in the Southern Agriculture property. I was advised at the hearing that those shares were held by Mr Buxton in a professional capacity as a trustee, and that he had no personal financial interest in the entity which, in turn, is interested in pursuit of Southern Agriculture's claims. The extent of those interests ought obviously to have been fully disclosed and explained in Mr Buxton's first affidavit.

[12] Objection was raised on behalf of Te Kamaru to material parts of the first two of Mr Buxton's affidavits. The objection referred to the conflict between Mr Buxton's position as solicitor on the record and a deponent to matters of fact and opinion that were contentious in the proceedings. More specifically, passages of both his first two affidavits were objected to on grounds that they were inadmissible as hearsay, that they constituted submission rather than evidence, that they proffered opinions that could only be admissible from an expert in surveying and surveying practice, and even then only in compliance with s 25 of the Evidence Act 2006. There was no evidence that Mr Buxton was appropriately qualified. He is obviously not in a position to comply with the Code of Conduct for Expert Witnesses as provided in Schedule 4 of the High Court Rules.

[13] Certain of the objections were well taken on the grounds of hearsay, and that the evidence proffered opinions on matters of surveying practice without any foundation for Mr Buxton being expertly qualified to so opine. In a more general way, certain parts of the affidavits might also be criticised for argumentative tone, or as submissions which ought to have been left to counsel, in terms of the approach adopted in *Donovan v Graham* (1991) 4 PRNZ 311 (HC). Mr Cleary conceded there were some passages in this last category. However, in other respects he supported the admissibility of Mr Buxton's analysis as being no more than self-evident common sense relying on factual matters, the detail of which Mr Buxton has set out.

[14] In the end, I indicated that I would read and consider all of Mr Buxton's evidence, along with the rest of the evidence, attributing to any particular part of it the weight that I consider appropriate, in light of these objections.

[15] Mr Buxton's first affidavit describes the boundary between the two properties as a "jinky boundary line", in contrast to other boundary lines between the survey sections comprising this part of Wellington, where such lines are straight. He notes a similarly "jinky line" which he presumes to mark the western boundary of Te Kamaru's property. He infers and opines from the irregularity that such jinky lines follow a geographical alignment rather than a mathematical alignment based on straight lines. He also identified distances measured on a roll plan of the relevant area discovered among former Land Transfer Office records maintained by LINZ as indicating that such boundaries were necessarily surveyed in order for those distances to be endorsed.

[16] Substantial parts of Mr Buxton's second affidavit recite arguments against matters that had by then been deposed to on behalf of Te Kamaru. He opines that the plan showing the legal boundary for the original sale in 1890 was plainly drawn by a surveyor "in view of the fact it was dimensioned down to tenths of a link – the standard measurement for survey plans at the time…". Because of the nature of what would have been involved on the ground, Mr Buxton contends that the person undertaking it plainly had the experience and equipment of a surveyor.

[17] Mr William Gill, a director and shareholder in Southern Agriculture, completed an affidavit which in part represents hearsay reliance on the knowledge of Mr Stehbens, mentioned below. Mr Gill acknowledges that the boundary proposed for Te Kamaru follows the existing fence line and expresses the view that that fence "…is a 'give and take' fence following a contour which is the practical solution to the farming problem of fencing the land between my company and [Te Kamaru] to the west".

[18] Mr Stehbens, who now lives in Rhode Island in the United States of America, deposed to a beneficial interest via South Makara Limited, a previous registered owner and the company for whom the present registered owner acknowledges a partial beneficial interest. It appears that Mr Buxton's relevant shareholding is in this company. Mr Stehbens lived and worked on the land from 1975 until 2006. He deposes to having done work on a section of the fence, on the assumption that it was a "give and take" fence. Subsequent to Mr Stehbens' work renewing that portion of the fence, he deposes that Transpower bulldozed away a steepish knob that prevented a straighter road branching off from an established farm road to a gate in the area where Mr Stehbens had renewed the fence. He assumed the purpose of the bulldozing was to provide better and effectively flat access from the farm road to the gate so as to make it more accessible to trucks or other vehicles. He describes much of the spoil from that bulldozing, which was to the west of the fence, as being pushed to the east to an extent that it buried parts of the new fence up to the fourth wire. After correspondence, Transpower agreed to move the spoil so that the fence could once again act as a barrier to stock.

[19] After the bulldozing had been done, Mr Stehbens recalls seeing a survey peg lying on the top of the heap of spoil adjacent to, and to the west of the fence that he had re-built. He assumes that the peg was pushed there when the bulldozing was done. He considers that it could not have been on the fence line or it would have been buried by the spoil rather than ending up on top of the spoil just to the west of the fence. Accordingly, he deposes to a belief that the peg marked that point in the boundary near the south-western corner of what is now the Southern Agriculture land, on the western boundary that it shares with Te Kamaru. This necessarily infers that the survey peg was further west than the fence at that point.

[20] Southern Agriculture also filed an affidavit from Mr Michael Warren who farms land in the same area, sharing boundaries with Te Kamaru and another landowner, Terawhiti Farming Company Limited. Mr Warren deposes to having been approached in 2008 by representatives of Meridian, with the apparent concurrence of Te Kamaru and Terawhiti, to discuss the alignment of fences relative to legal boundaries at the western end of Mr Warren's property. All of the relevant titles are limited as to parcels. The point of Mr Warren's affidavit is to attribute to Meridian the attitude that fence lines that had been in existence for well over 60 years and accepted by all farming entities as the boundaries for farming purposes were nonetheless irrelevant for the purpose of fixing legal titles. Mr Cleary sought to undermine Te Kamaru's present claim that a long-standing fence line is to be respected as the legal boundary, by attributing to Meridian inconsistent stances on this point, depending on what suited their purposes. Presumably any such inconsistency is also to be attributed to Te Kamaru in its dealings with neighbouring owners.

[21] The last of the first round of affidavits filed in support of the originating application is from the surveyor, Mr Russell Paterson. Mr Paterson has been a surveyor in practice for approximately 37 years, having substantial experience in surveying farms and dealing with old titles and difficult survey problems on farms.

[22] Mr Paterson opines that photographs of diagrams from old roll plans previously maintained by the Land Transfer Office representing the bulk of the western boundary of the land in Southern Agriculture's current title include a diagram which is complete with dimensions of all sections of that boundary on it. He opines that that diagram would have provided a satisfactory basis on which any previous restriction limiting the title as to parcels could have been removed. He describes having plotted the legal boundary by reference to the descriptions and dimensions available from these records. He does not give evidence of any surveying on the ground in the vicinity of the boundary between the parties' properties. He adds his own explanation for the origin of sensible "give and take" allowances in the line of fences between farming properties, and records his expectation that the boundary fence in the present case would be a give and take one

to facilitate practical fencing and to deal with the dips and rises as they occur in the vicinity of the legal boundary.

*For Te Kamaru*

[23] Meridian has retained Cardno TCB Limited in relation to survey issues arising in its wind farm project on the Te Kamaru and Terawhiti Farming Company Limited properties. Mr Richard Graham, a licensed cadastral surveyor with Cardno TCB Limited completed an affidavit in support of Te Kamaru's opposition. Mr Graham has a Bachelor of Surveying with Honours and a Graduate Diploma from the University of Otago, as well as nine years' experience as a land surveyor in New Zealand. He is a registered professional surveyor and is licensed to practice as a licensed cadastral surveyor. He approached this assignment assuming that the land on both sides of the disputed boundary was limited as to parcels. His work proceeded without his having access to the old roll plans and diagrams with dimensions marked on them, which were influential in Mr Paterson's analysis of the surveying issue. Apart from Mr Stehbens' recollection of siting a survey peg, which Mr Graham suggests is surprising, he found no evidence on the ground that the boundary between the two properties had been surveyed. Mr Graham took the view that there were insufficient survey marks on the ground to confirm or complete a survey of the disputed boundary. Having satisfied himself that the existing fence represented the fence line used since some time before 1911, and that it was a continuation of the fence defining the boundary between the Foreman land and Te Kamaru's, Mr Graham settled on the fence line as representing the boundary. He relied on a "long-established survey precept that when surveying land in order to remove a limitation as to parcels from the Certificate of Title, occupation (such as a fence) that pre-dates the first Certificate of Title issued under the Land Transfer Act 1952 is determinative of the legal boundary".

[24] Mr Michael Grace, a director of Te Kamaru, deposes that Te Kamaru's land has been in his family for about 140 years. He deposes that the fence on the boundary "has been in its current position for as long as anyone can remember". He treats the road just to the west of the contested boundary as the only way of accessing the south-eastern part of Te Kamaru's land from within the farm, the

terrain including a large gully just to the west of the access road making it impracticable to relocate that access road anywhere other than in its current position. Mr Grace disputes the assumption made by Messrs Stehbens and Gill that the fence constitutes a "give and take" one, pointing out that the fence pre-dates ownership of its land by Southern Agriculture by at least 60 years (indeed possibly 85 years), so that neither of them are in a position to say on what basis the fence was built. He also suggests that his forebears would not have sold off land on the eastern boundary of their property without ensuring that "the only viable accessway to part of the farm remained on our land".

[25] One of Mr Buxton's affidavits in reply contested this last view, with Mr Buxton suggesting an alternative access way could be constructed. This in turn was the subject of a rejoinder from Mr Grace reiterating firmly his view about the necessity of this track as access to the eastern end of the Te Kamaru property.

[26] Three affidavits were also sworn on behalf of Te Kamaru by Donald McKinnon. Mr McKinnon teaches cadastral surveying at the University of Otago, has 34 years of surveying experience, is a Professional Practice Fellow responsible for the cadastral surveying courses part of the Bachelor of Surveying degree and is a licensed cadastral surveyor himself. He confirmed his acceptance of the Code of Conduct for Expert Witnesses. In the last of his affidavits (which Mrs Bacon advised was completed on the basis of access to all of the other affidavits and the submissions then filed for the opposing parties), Mr McKinnon observes that the cadastral patterns on Southern Agriculture's titles and on the 1890 conveyance do not contain bearings, that bearings are a vital component when mathematically describing a boundary, and that without bearings or directions it is impossible to plot the position of any boundary with certainty. On the basis that the fence between the properties was built in the early 1890s and the first land transfer title issued for what is now Southern Agriculture's property in 1927, he is firmly of the view that the documents do not contain sufficient information to plot the boundary with certainty. Given the age of occupation he describes it as entirely appropriate to apply the surveying precept of accepting occupation that existed prior to the issue of the first land transfer title. That occupation is obviously reflected by the long-standing fence line.

[27] For Southern Agriculture, Mr Paterson completed an affidavit in reply. An affidavit was also filed by Mr Robert Kessell, an experienced fencer. His evidence is of carrying out fencing work on the instructions of Mr Stehbens, when the steep knoll that has subsequently been bulldozed by Transpower was still a feature of the landscape in the area where Mr Kessell was renewing the fence on Mr Stehbens' instructions. Mr Kessell deposes that he would never have attempted to erect a fence over that pinnacle as it would have been quite uneconomic to try and establish a fence requiring posts in what was a large slab of rock. He adds his view that the topography would have been a compelling reason for having a "give and take" fence when the area was fenced in 1890. He also confirms the practice of landowners giving instructions to fencers on a basis that leaves it to the fencers to adopt the most practical line roughly on or adjacent to a marked boundary. He does acknowledge that this practice "is less common now as clients are more sensitive about boundaries".

[28] The only evidence for the Registrar-General was an affidavit from Mr Moyes and I will comment in detail on that when dealing with the issue to which it principally relates.

**The issues**

[29] The parties' opposing contentions on their respective arguments as to how the boundary should be drawn do not respond precisely on each point. However, a convenient sequence in which to address the issues as proposed by the parties can be broken down into the following points:

a) Whether Southern Agriculture's title is a guaranteed, indefeasible title in terms of the Act;

b) Whether the information referred to in Southern Agriculture's CT and preceding documents is sufficient to accurately survey its western boundary as proposed by Southern Agriculture;

c) Whether survey precepts have sufficient standing to dictate that the fence line should henceforth be respected as defining the boundary between the properties;

d) Whether the fence is to be treated as a "give and take" one under the Fencing Acts;

e) Whether the possession of the land to the west of the fence by Te Kamaru, adverse to the title of Southern Agriculture (if the boundary is as recently surveyed for Southern Agriculture), entitles Te Kamaru to title to that land pursuant to s 79 of the Act.

**Does Southern Agriculture have a fully indefeasible title?**

[30] An important plank in the arguments for Southern Agriculture is that, since 1973, there has been no limitation as to its title so that s 62 of the Act effectively guarantees it ownership of the full extent of the land described in the title. That position was maintained notwithstanding the stance on behalf of the Registrar-General that the removal of the limitation as to parcels on the title to the Southern Agriculture land in 1973 occurred by mistake.

[31] That view on behalf of the Registrar-General is reflected in the affidavit of Mr Warren Moyes. Mr Moyes was formerly the District Land Registrar for Wellington for a period of about 10 years until that position was abolished on the re-organisation of LINZ. He still holds a position as a senior adviser in the office of the Registrar-General of Land. Mr Moyes' affidavit traced the documentary records as to ownership of the properties sharing the disputed boundary and exhibited relevant documents. He analyses the extent of survey work undertaken on the eastern end of the Southern Agriculture property in 1973, leading to the new CT to reflect the subdivision of some 7.9 hectares into its own CT 11B/1424. He confirms that the newly created parcel was fully surveyed, justifying the issuance of a guaranteed title so that limitations as to parcels did not appear on it. Next he analyses that the residue of the Southern Agriculture property was not otherwise redefined so normally that would have resulted in the title for that residue continuing to be limited

as to parcels as its predecessor had been. He considers there is no apparent explanation for the omission of the notation "limited as to parcels" from CT 13B/104 other than that it "was inadvertently omitted". He notes that any survey deficiency in respect of this residue was not cured by the deposit of a new plan in 1973 that reflected the survey of the eastern area subdivided off.

[32] I consider this explanation for the omission to be reliable, and the one most likely to be correct. Mr Moyes is highly experienced in the matters involved in removing the uncertainties that warrant a limit on titles. He has responsibly analysed the circumstances in which the 1973 title issued without the notation he would expect. The acknowledgement of error is one against the Registrar-General's interest and, as Mr Oliver accepted, is not one that would be lightly made, given the potential adverse consequences if any affected party can establish loss flowing from the error.

[33] Mr Cleary urged that Mr Moyes' explanation should be rejected, because the survey work completed to effect the 1973 subdivision, plus all the previously existing information as to the precise location of other boundaries, was sufficient to allay previous doubts as to the accuracy of all boundaries to the remaining title. On that basis, without any evidence of contemporaneous survey of the remaining parts of the Southern Agriculture land, Mr Cleary submits that the state of uncertainty previously justifying the limitation on the title should now be treated as having been consciously removed in 1973.

[34] That argument does not appeal. It depends in part on a greater degree of confidence in the accuracy and adequacy of the information available in relation to the contested boundary on the western side of the Southern Agriculture property than I consider is justified. It was not enough to warrant removal of the limitation on the title before 1973, and the events at that time did not alter such information.

[35] The consequence of this finding is that Southern Agriculture does not have a guaranteed title to which s 62 of the Act would apply. Rather, the boundary dispute between the present parties is to be approached on the basis that the titles to land on both sides of the disputed boundary continue to be limited as to parcels.

**Can the boundary be transposed from the descriptions in the title and predecessor documents, into survey marks on the ground?**

[36] Mr Cleary was at pains to demonstrate that Mr Paterson's work reflected mathematical certainty in the lengths and angles of the eight lines making up the western boundary of the Southern Agriculture property. Their accuracy was anchored by their intersection at the northern and southern-most points of that boundary, with both the fence line and the undisputed straight line boundaries running from west to east and which define the northern and southern boundaries of the Southern Agriculture property. Mr Cleary argued that the sum total of all the precise distances for each of those angles of the boundary would not have so precisely started at the northern end and ended at the southern end, unless Mr Paterson had got the angles correct in his reconstruction on the map.

[37] Independently of this, I understood Mr Cleary to say that the accuracy of the boundary as drawn was also consistent with the inferred purpose of an original survey proceeding from high point to high point along the boundary, that being a logical and well-used surveying practice at the time. Mr Buxton inclined to the view from an inspection on the ground that the boundary line as calculated by Mr Paterson was consistent with it moving from high point to high point, but that non-expert attempt to transpose lines on an aerial photograph onto the contour of the land cannot claim any persuasive weight.

[38] If accepted, the level of certainty as to the accuracy of the lines attributed to Mr Paterson's work would arguably constitute a survey of sufficient integrity to found an application for a guaranteed title, and its standing as such would blunt the justification for attempts to use some other means of settling the line of what is now a disputed boundary between titles limited as to parcels.

[39] Mr Paterson's work did not involve any survey on the ground. He was able to satisfy himself as to the line the boundary should take by reference to its historical description and measurements marked on old plans. It is drawn on an aerial photograph, the accuracy of which is questionable given the recognised and unavoidable prospect for some distortions. Notwithstanding the vigour of

Mr Cleary's appeal to the mathematical logic of the way the line has been drawn, I am not satisfied that the Paterson proposal as to the boundary line should determine the outcome. Mr McKinnon's is the only independent expert evidence on the preferable means of settling this boundary dispute. His opinion is that none of the documentary references supporting Southern Agriculture's title going back to the 1890 conveyance contain bearings, and that such bearings are a vital component when accurately surveying a boundary. I accept his conclusion that without bearings or directions, it is impossible to plot the position of any boundary with sufficient certainty. The outcome of the present dispute must be a boundary defined in terms able to be translated onto the ground. None of the evidence for Southern Agriculture persuades me that that could occur with certainty, and Mr Cleary's submissions to that effect did not afford a reasoned basis for rejection of Mr McKinnon's opinion.

**Are the surveying precepts adopted on behalf of Te Kamaru a sufficient basis for surveying a boundary to henceforth reflect the legal boundary?**

[40] In carrying out his instructions for Meridian, and with the concurrence of Te Kamaru, Mr Graham proceeded by a process of eliminating other grounds for establishing the boundary, to a recognition of the long-standing fence line as dictating what should be the legal boundary between the two properties. He did so in reliance on a surveying precept that is included within cadastral survey guidelines produced by LINZ, in a chapter addressing the surveyor's task when surveying to remove limitations as to parcels from the title to a property. Mr Graham summarised this as a long-established surveying precept that when surveying land in order to remove a limitation as to parcels, occupation such as a fence that pre-dates the first CT issued under the Act is determinative of the legal boundary.

[41] Mr Graham's analysis led him to the view that the boundary had not been surveyed at all. I do not accept that. As Messrs Buxton and Cleary rationalise the precise measurements on each angle of the boundary as described from 1890, that extent of precision is consistent with a survey having been carried out. Mr Stehbens' evidence of an isolated survey peg having been dislodged by Transpower's bulldozing work near the fence is more equivocal. Given the number of angles in the contested boundary, on whatever alignment is adopted, that could hardly justify

treating the boundary as surveyed when no other pegs can be identified. The point I take from Mr McKinnon's opinion is that whatever survey work had been done, it is inadequate without bearings. In all the present circumstances, that makes it appropriate for Mr Graham to move on, in the sequence of surveying options, to the precept he applied.

[42] Mr Cleary objected strongly to any notion that the ultimate determination should reflect acceptance of any surveying precept. He argued that surveyors are to apply the law, not to create it, and that the recognition of Southern Agriculture's legal title would be unlawfully subverted if Mr Graham's rationale for the boundary drawn in accordance with the long-standing fence were now the basis for issuing new titles, confirming the boundary line as defined by the fence.

[43] With respect, however, this objection overstates the effect of application by surveyors of precepts such as that relevantly relied on in the present case. It is sensible that surveyors have settled rules for the procedures to be followed when confronted with a surveying uncertainty, and the outcome of their work in the lodging of a plan that results from the application of precepts does not dictate the outcome. It is no more than the proposal in accordance with settled guidelines, advanced by the party that has initiated a survey to settle the uncertainty arising from the limitation endorsed on one or more titles. The process requiring notice of that initiative to other affected owners ensures that competing views, if they arise, can be advanced and competing contentions tested. Ultimately, as these proceedings demonstrate, it is for the Court to determine whether application of the precept was justified, or whether other bases for settling the boundary are to apply in given circumstances.

[44] Mr Graham was also influenced in adopting the long-standing fence line by reference to the situation with the Te Kamaru boundary with the Foreman land, on the continuation to the south of the boundary presently in issue. A 1931 survey to settle that boundary appears to have adopted the already long-standing fence. It is tolerably clear that the fence relied on for that survey is a continuation to the south of the same fence now relied on by Te Kamaru in the present dispute. Although it

would never be determinative, this factor clearly provides a measure of support for the approach that Mr Graham adopted.

[45] There is a measure of uncertainty, first because of the endorsement that I have found should have remained on the title, and secondly because the detail as to the line of the original boundary on the title is inadequate to determine the lines with certainty on the ground. The overwhelming practical factor must be the apparently unquestioned acceptance of the practical boundary as satisfactorily determining the extent of the adjoining properties, and the lack of any economic impact on the farming operations on both farms, in the event that the existing boundary as defined by the fence remains undisturbed.

[46] I agree with Mrs Bacon that the approach suggested by Sir Charles Skerrett in *Attorney-General v Nicholas* [1927] GLR 340 is appropriate:

> …where the granted land cannot be fixed from the original survey, or where there are no natural boundaries and the original survey marks are gone, a long occupation, acquiesced in throughout the period by the surrounding owners, is evidence of a convincing nature that the land so occupied is that which the grant conveys in the absence, of course, of striking differences in admeasurement, or some significant countervailing circumstance.

[47] I am satisfied that those circumstances apply here so that the boundary, reflected in Plan 375401 and reflecting the long-standing fence line, should proceed to be deposited and reflected in titles or identifiers issuing in reliance on it.

**Is the present a "give and take" fence?**

[48] To resist any claim as to adverse possession, and more generally to explain the deviations between the line of the boundary as asserted by Southern Agriculture, and the line of the fence, it was argued for Southern Agriculture that the long-standing fence was erected as a "give and take fence". Witnesses for Southern Agriculture deposed that fencing the actual boundary, which was recorded as surveyed from the series of high points in the topography between the two properties, was impracticable, hence the need for a give and take fence.

[49] Fencing Acts since 1881 (with later Acts in 1908 and 1978) have recognised the status of "give and take fences". These may either be settled by agreement between adjoining owners where it is impracticable or undesirable to erect a fence on the legal boundary or, in the event of lack of agreement between such owners, the course for such a fence may be directed by the Court. Mrs Bacon argued that for a fence erected in 1890, the terms of the 1881 Act should apply and the relevant section (s 20) provided as follows:

> When a river, creek, natural watercourse or rocky or impracticable land, forms the boundary of contiguous lands, the occupiers of such contiguous land may agree upon a line of fence on either side of such river, creek or natural watercourse, and, in the event of their not making any such agreement either party may apply to the Resident Magistrate of the district, who may appoint one or more persons to inspect the proposed line of fencing and who shall determine whether any fence is necessary, and decide the line of fence to be erected.

[50] I am not attracted to Mrs Bacon's technical argument that the section could not, in any event, apply where the reason for deviation was not because of a river, creek or natural watercourse, but rather because of "rocky or impracticable land". If other requirements were satisfied, I would treat the section as applying to a fence line, the course of which was dictated by rocky or impracticable land on the legal boundary, rather than because of the need to fence around a river, creek or watercourse.

[51] A give and take fence prevents occupation of land on either side of such a fence, to the extent inconsistent with the legal boundary, as being "occupied" for the purposes of establishing adverse possession. That position is presently stated in s 21(4) Fencing Act 1978.

[52] Given that the fence has followed its present line since 1890, it is unrealistic to expect first-hand evidence of any oral agreement between the respective owners. There is also an obvious likelihood that any written agreement to deviate from the legal boundary would not have been attributed significance by all of the successive owners – even if it were passed on by the original ones – so as to have survived for some 118 years. However, that cannot reduce the requirement for proof of any

agreement to merely one of inference, when the existence of such an agreement is disputed.

[53] Mr Stehbens' impression that it must be a give and take fence arises from his familiarity with the land from 1975, and rests on his view that the fencing line would have been chosen to avoid the steep knobs which he treats as the "obvious" survey points from which various angles of the boundary were calculated. He provides no explanation as to how he formed the view that the legal title defined a boundary by reference to such high points. It can reasonably be expected that if Mr Stehbens had been able to build such reasoning on an analysis comparing the line shown in the diagram to the CT with the topography on the ground, that he would have confirmed that step in his reasoning. In the end, his evidence cannot stand for more than the proposition that he would have expected the original boundary to be defined by lines between high points, and that deviations from the lines so prescribed would have been taken for practical purposes to pursue the most efficient fencing of the boundary. None of the other evidence for Southern Agriculture can take this point any further.

[54] For Te Kamaru, Mr Grace's ability to trace familial connection with those in possession when the fence was built in 1890 cannot add materially to his grounds for challenging the existence of any agreement that the fence be located as a "give and take" one. His views include an assumption that the title boundary and the fence line are one and the same. That cannot literally be correct because if one accepts Mr Paterson's representation of the boundary line as reflecting one of a range of possible alignments of the lengths of the various lines making up that "jinky" boundary line, they could not conform with the agreed line of the fence as demonstrated on the map. More materially, Mr Grace questions the logic of the then owners of his family's property subdividing off an eastern section, bounded so as to deprive the farm being retained by his family of what he describes as the only viable access to that part of what remained a very large farm. Although Mr Buxton disputes Mr Grace's view that the existing access track is effectively the only viable way of accessing the eastern part of the Te Kamaru property, Mr Grace relies on the existence of a steep gully immediately to the west of the access track as support for his view that the existing line of the track is, if not the only viable, then certainly the

most practicable mode of accessing that part of the Te Kamaru property. There is therefore logic in the owners not consciously subdividing so as to deprive themselves of that when they could equally prescribe a boundary a very short distance further east, and preserve the access to their own property.

[55] Making every allowance for the passage of time, I am accordingly not satisfied that Southern Agriculture can establish the fence as having been built, by agreement, as a give and take one. There is no suggestion that the fence has that status as a result of a Court order.

**Adverse possession**

[56] The alternative basis advanced on behalf of Te Kamaru for recognition of the fence as the legal boundary, is that if in fact another line is the boundary between the two properties, then there has nonetheless been adverse possession by Te Kamaru of all the area to the west of the fence for more than the requisite period required to mount a claim to it under s 79 of the Act. That provides:

> **79 Certificate void in certain cases**
>
> Any certificate of title issued upon the first bringing of land under this Act, whether upon application or by force of any statute or of the order of any Court, and every certificate of title issued in respect of the same land, or any part thereof, to any person claiming or deriving title under or through the first registered proprietor shall be void as against the title of any person adversely in actual occupation of and rightfully entitled to that land, or any part thereof, at the time when the land was so brought under this Act, and continuing in such occupation as aforesaid at the time of any subsequent certificate of title being issued in respect of the said land; but [subject to the provisions of Part 1 of the Land Transfer Amendment Act 1963] every such certificate shall be as valid and effectual against the title of any other person as if that adverse occupation did not exist.

[57] The argument for Te Kamaru is, irrespective of whether Southern Agriculture's title is guaranteed or limited as to parcels, the circumstances contemplated by s 79 apply in this case.

[58] The first title under the Act for the Southern Agriculture property was issued in 1927. It is common ground that the relevant boundary between the two farms has been the same fence line since 1890. Therefore by 1920 Te Kamaru's predecessors

had been in actual possession of any parts of the Southern Agriculture property which, on a view of the boundary different from the fence line, lay to the west of that fence line, for 30 years.

[59] Mr Cleary resisted the application of s 79, among other grounds on the basis that such occupation by Te Kamaru's predecessors was not such that they were "rightfully entitled to" in terms of the section. In the decision in *Zachariah v Morrow and Wilson* (1915) 34 NZLR 885, the Supreme Court, Cooper J, observed in relation to this concept, as applied in s 79:

> The "adverse occupation of a person rightfully entitled" does not mean what is ordinarily known as adverse possession. It means the occupation of a person who, but for the Certificate of Title, would be rightfully entitled to the land. (893)

[60] In present circumstances, I interpret the requirement that the adverse possessor be "rightfully entitled" to mean that the period of uncontested adverse possession had to have continued for the requisite period required to establish a title by adverse possession under the Limitation Act 1950. Mrs Bacon submitted that in fact the relevant limitation period was that dictated by the Real Property Limitation Act 1833 (UK), which stipulated 20 years. Alternatively, the limitation period could not have been any more than 30 years.

[61] My prior finding that the fence cannot be established as a "give and take" one also means that Southern Agriculture cannot resist a finding of adverse possession in respect of the area to the west of the fence on account of "give and take" status.

[62] I accordingly consider that adverse possession for the purposes of s 79 can be made out. This renders void Southern Agriculture's title to any land to the west of the fence. Correspondingly, any claim Te Kamaru sought to make to any parts of the land along this contested boundary lying to the east of the fence line, on the basis of its apparent exclusion from the legal description of Southern Agriculture's title, is equally void.

**Summary**

[63] I accordingly find:

a) Southern Agriculture's present title ought to be endorsed "limited as to parcels", and the issues in this case are to be resolved on that basis;

b) The information referred to in Southern Agriculture's Certificate of Title and preceding documents is insufficient to accurately survey its western boundary;

c) Surveying precepts were appropriately applied in proposing that the fence line should henceforth be respected as defining the boundary between the properties. Plan 375401 should proceed to be deposited and reflected in titles or identifiers issuing in reliance on it;

d) The fence is not a "give and take" under the Fencing Acts; and

e) Alternatively to c), adverse possession by Te Kamaru of all land to the west of the fence is made out, pursuant to s 79 of the Act.

**Costs**

[64] If the parties are unable to resolve costs' issues, I will receive Memoranda.

**Dobson J**

Solicitors:
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