

Encumbrances

I recently was involved in a matter where a local authority required an encumbrance to be registered and it is quite common for this mechanism to be used where the owner of land is required to comply with conditions on an ongoing basis, whether in relation to the deposit of a plan or in relation to some other activity that is proposed on the land.

A landowner had completed a subdivision in a semi-rural situation. One of the titles contained two lots – one lot being the residential site and the second lot a bush block not suitable for building on. The two lots were subject to an amalgamation condition requiring they be held together. The landowner had a purchaser for the title that had two lots however the purchaser was not interested in the bush covered block. The owner proposed to council that they would instead add the bush covered block to another lot in the subdivision.

The only mechanism available to formalise this arrangement was an Encumbrance Instrument that included the same provisions as set out in s241 RM Act and was to be registered over the two lots and was designed to prevent one from being transferred or leased without the other. It is important to note that unlike an amalgamation condition it would still be possible for a transfer of one of the lots to be registered although the land owner would be in breach of their obligations under the terms of the encumbrance.

In my experience this is a common occurrence and there seems to be a deficiency in the legislation*. I believe there should be legislation that allows an amalgamation condition to be varied.

These encumbrance documents should be avoided if entirely possible and instead other mechanisms such as consent notices or a covenant under s108 RM Act should be used (Section 108 covenants can be used for any matter that is to be complied with on an ongoing basis that arises as a result of a resource consent).

If they must be used then you should insist that the encumbrance is placed in terms of priority ahead of any mortgages on the title. This is because an encumbrance is, under the Land Transfer Act, deemed to be a mortgage and will fall off the title like any other charge if the mortgagee exercises power of sale.

Also, as it is deemed to be a mortgage, often when the land is dealt with the owner is required to seek consent of encumbrancee (being council) to the registration of an easement or land covenant which council may not have any interest and just creates another unnecessary impediment for the party dealing with the title.



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** Postscript September 2010 - Since this article was written the Law Commission released its report on the new Land Transfer Act. That Act will almost certainly contain provisions that allow for Covenants in Gross that will address this issue. See following article on 'The New Land Transfer Act – how the proposed changes will affect you'*