IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA327/2019
[2020] NZCA 226

BETWEEN	EPSOM WOODS LIMITED Appellant
AND	WAITAKERE FARMS LIMITED Respondent

Hearing: 5 March 2020

Court: Courtney, Ellis and Brewer JJ

Counsel: D Hayes for Appellant
AAH Low for Respondent

Judgment: 10 June 2020 at 10 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Costs are awarded to the respondent for a standard appeal on a band A basis plus usual disbursements.

REASONS OF THE COURT

(Given by Brewer J)

Introduction

[1] Waitakere Farms Ltd (WFL) is the registered proprietor of a 51 ha forestry lot at 131–149 Anzac Valley Road, Waitakere (the land). WFL became the registered proprietor on 14 March 2017 having purchased it from a mortgagee exercising its power of sale.

[2] The mortgagee from which WFL purchased the land was Nags Head Horse Hotel Ltd (Nags Head). Its mortgage was registered on 27 August 2010. The registered proprietor of the land changed subsequently on two occasions but Nags Head's mortgage remained registered as the first mortgage.

[3] Epsom Woods Ltd (EWL) sued WFL claiming ownership of trees on the land. It relied on an unregistered agreement to lease the land entered into in 2009 between the then registered proprietor (a Mr Vesey) and "North Kaipara Nominees Ltd as trustee of the Anzac Valley Forestry Trust". EWL took an assignment of the agreement for $1 on 29 October 2018.

[4] WFL applied for summary judgment against EWL. Associate Judge Bell granted WFL summary judgment on 17 June 2019.[1]

[5] EWL now appeals this decision.[2]

The appeal

[6] In its statement of claim, EWL pleaded that a Mr Buttling (who originally agreed to purchase the land from Nags Head as mortgagee but who nominated WFL as purchaser) was informed on or about 16 February 2017 in writing that the Anzac Valley Forestry Trust and/or its trustees had claimed rights to the trees.

[7] The statement of claim went on to plead:

> 14. [WFL] is estopped from denying [EWL's] ownership of the trees.
>
> 15. [WFL] holds the trees on the land in trust for [EWL].

[8] The notice of appeal states the ground of the appeal as:

> The Land Transfer Act 1952 sections 105 and 182 have no application in an in personam claim for a declaration as to ownership of the trees on the land. (para 28 of decision)

---

1 *Epsom Woods Ltd v Waitakere Farms Ltd* [2019] NZHC 1374.

2 EWL's proceeding against WFL included a prayer for a declaration that the land is subject to a residential tenancy. Associate Judge Bell granted WFL summary judgment on that cause of action also. EWL appeals only the decision granting WFL summary judgment on the cause of action claiming ownership of trees and so we will say nothing further about the residential tenancy claim.

[9] Paragraph [28] of the Associate Judge's decision reads:

> [28] In that context, mere knowledge of unregistered interests in the land can have no bearing on the ability of a purchaser to take a clean title from a mortgagee exercising a power of sale. Knowledge that there may be unregistered interests does not make it fraudulent for the purchaser to take title. To the contrary, he is taking title on the basis that, whatever the interests in the land before, they will be cleared off on his taking title. Knowing that does not make him fraudulent. It does not matter if he gained that knowledge before entering into the agreement or after entering into the agreement and before taking title or after having obtained title.

[10] We will come to EWL's argument in relation to paragraph [28] shortly. But, first, we point out that Associate Judge Bell's decision was based on the simple application of s 105 of the Land Transfer Act 1952 (the Act). This provides:

> **105 Transfer by mortgagee**
>
> Upon the registration of any transfer executed by a mortgagee for the purpose of exercising a power of sale over any land, the estate or interest of the mortgagor therein expressed to be transferred shall pass to and vest in the purchaser, freed and discharged from all liability on account of the mortgage, or of any estate or interest except an estate or interest created by any instrument which has priority over the mortgage or which by reason of the consent of the mortgagee is binding on him.

[11] The agreement to lease was never registered against the title and there was no suggestion that Nags Head had ever consented to be bound by it. Therefore, and tritely, WFL took title to the land "freed and discharged from all liability" on account of the agreement to lease.

[12] Associate Judge Bell accepted that fraud may be an exception to s 105. He referred to *Halliday v Bank of New Zealand* in this regard.[3] But he was careful to point out that "fraud" means actual dishonesty and that constructive fraud arising from mere notice is not enough. His paragraph [28] quoted above at [9] elaborates on this point. It is the point challenged on appeal.

[13] At the hearing we asked Mr Hayes for EWL to identify the errors of fact or law which he relies on to have the Associate Judge's decision set aside. Mr Hayes candidly accepted that Associate Judge Bell did not make a factual error and neither did he

---

3 *Halliday v Bank of New Zealand* [2012] NZHC 3099, [2013] 1 NZLR 279 at [60].

make an error on the law as it stands currently. Mr Hayes's submission to us was that a claim in personam should be able to be brought, notwithstanding s 105, if a purchaser had knowledge of an unregistered claim or interest in the land. If, with such knowledge, a person purchases land from a mortgagee and then denies the unregistered claim or interest then that should amount to actual dishonesty and permit an in personam claim to be brought.

Discussion

[14] We cannot accept Mr Hayes's submission.

[15] Associate Judge Bell's finding on the claim of equitable estoppel cannot be criticised:

> [37] Epsom Woods Ltd has pleaded the first cause of action against Waitakere Farms Ltd as a claim of equitable estoppel. The estoppel pleading is not adequate to establish a claim binding Waitakere Farms Ltd. There is nothing in the way of any representation or conduct on the part of Waitakere Farms Ltd that would suggest that Epsom Woods Ltd had been lulled into some sense of assurance that it has an interest in the land. There is nothing else that would make estoppel by representation reasonably arguable. At best the claim is that Waitakere Farms Ltd took title subject to an interest, where the purchaser was advised of the interest after having entered into the agreement for sale and purchase. For reasons I have explained, being informed of that interest does not stand in the way of Waitakere Farms Ltd taking a clear title.

[16] The law is clear that mere notice of an unregistered interest is not enough to found an in personam claim. The starting point is s 62 of the Act:

> **62 Estate of registered proprietor paramount**
>
> Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority but subject to the provisions of Part 1 of the Land Transfer Amendment Act 1963, the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register constituted by the grant or certificate of title of the land, but absolutely free from all other encumbrances, liens, estates, or, interests whatsoever,—
>
> (a) except the estate or interest of a proprietor claiming the same land under a prior certificate of title or under a prior grant registered under the provisions of this Act; and

(b) except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and

(c) except so far as regards any portion of land that may be erroneously included in the grant, certificate of title, lease, or other instrument evidencing the title of the registered proprietor by wrong description of parcels or of boundaries.

[17] Justice Tipping observed of s 62:[4]

> [136] That section was rightly described by the Privy Council in *Frazer v Walker* as the key section for understanding the scheme of the Act. Section 62 says that except in the case of fraud the registered proprietor holds his interest in the land subject only to such encumbrances and other estates or interests as are notified on the register and absolutely free from all other encumbrances, estates or interests. It is the fact of becoming the registered proprietor without fraud that gives the estate of the registered proprietor paramountcy. Whether the registered proprietor has given value for the estate or interest for which he or she is registered can therefore have no relevance to the paramountcy of that estate.

[18] In *Nathan v Dollars & Sense Finance Ltd*, this Court observed that an in personam claim must have three elements: [5]

(a) It must not be inconsistent with the objects of the Torrens system.

(b) It must involve unconscionable conduct on the part of the current registered proprietor.

(c) It must be a recognised cause of action.

[19] The Court said:[6]

> Further, in personam claims based merely on notice (particularly constructive notice) of any trust or unregistered interest would offend s 182 of the LTA (see para [25]). There must be something more before an in personam claim would lie. The "something more" is in each case the second element set out at para [139](b): unconscionable conduct.

[20] In this case, there is no pleaded allegation of unconscionable conduct and no evidential basis for such a claim. All that is pleaded, and the evidence supports, is that

---

4 *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433.
5 *Nathan v Dollars & Sense Finance Ltd* [2007] NZCA 177, [2007] 2 NZLR 747 at [137].
6 At [139].

the person who nominated WFL as purchaser had notice of the claimed agreement to lease.

[21] There was never any relationship between WFL and those who claimed the benefit from time to time of the agreement to lease.

[22] Relevantly, Tipping J in *Regal Castings v Lightbody* said:[7]

> [147] Regal seeks to invoke what is often called the in personam exception to indefeasibility. It is a moot point whether this is a true exception as opposed to being simply a situation which the indefeasibility principle does not reach. It is not necessary to dwell on that issue. The cardinal feature of the indefeasibility principle is that, absent fraud, it entitles the registered proprietor and those dealing with the registered proprietor to rely on the register. Sections 62 and 63 allow the registered proprietor to deny unregistered interests and resist claims for possession. Sections 182 and 183 allow purchasers and others dealing with the registered proprietor to rely on the register for the purpose of gaining assurance as to what the registered proprietor can convey. On this basis those dealing with the registered proprietor do not have to go behind the register to ascertain the state of the registered proprietor's title.
>
> [148] An in personam claim against a registered proprietor looks to the state of the registered proprietor's conscience and denies him the right to rely on the fact he has an indefeasible title if he has so conducted himself that it would be unconscionable for him to rely on the register. Such a claim is concerned with the personal obligations of the registered proprietor rather than with the sanctity of their title. A successful in personam claim indirectly affects the registered proprietor's title, such as when a decree of specific performance is made; but the claim is not a claim to the land as such. It is a claim that the registered proprietor perform the contract of sale.
>
> [149] The in personam jurisdiction must not, however, be allowed to impinge on the fundamental purpose of the Torrens system. In terms of s 62, that purpose is to make the registered proprietor's estate (or title, as it is usually put) paramount against interests which are not notified on the register. It is, in my view, immaterial whether such an interest could have been registered. Hence, if Regal had an unregistrable interest in the land which was not susceptible to in personam relief, that interest would not prevail against the paramountcy provisions of s 62.

Decision

[23] It follows that WFL was entitled to summary judgment. EWL had brought a case which simply could not succeed on the facts and on the law in application to those facts.

---

7 *Regal Castings Ltd v Lightbody,* above n 4 (footnotes omitted).

[24] The appeal is dismissed.

[25] WFL submits there is a basis for an uplift from scale costs. We understand the reason for the submission but in the circumstances have decided a standard award is best. We award costs to WFL for a standard appeal. on a band A basis plus usual disbursements.

Solicitors:
Hunwick Law Ltd, Hamilton
Alexandra Low and Associates, Auckland