

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA794/2011  
[2015] NZCA 6**

**BETWEEN**

**TAYLOR JADE SCHMIDT**  
First Appellant

**ANTHONY MIKHAL SCHMIDT**  
Second Appellant

**AND**

**EBADA PROPERTY INVESTMENTS  
LIMITED**  
First Respondent

**BRIAN PATRICK GARRITY**  
Second Respondent

**NOEL ROBERT HAIR**  
Third Respondent

Hearing: 2 September 2014 (further submissions received 29 September 2014)

Court: Wild, White and French JJ

Counsel: D G Chesterman for Appellants  
N W Woods and S G Rhind for Respondents

Judgment: 3 February 2015 at 11 am

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**JUDGMENT OF THE COURT**

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**A The appeal by the first appellant against the first and second respondents, having been abandoned, is formally dismissed, reserving any question of costs.**

**B The appeal by the first appellant against the third respondent is also dismissed.**

**C The appeal by the second appellant, having been abandoned, is dismissed.**

**D If the first appellant is legally aided in respect of this appeal, then the costs of the appeal are reserved. Memorandums may be filed if any order as to costs is sought. If the first appellant is not legally aided then she is to pay the first respondent's costs for a standard appeal on a band A basis with usual disbursements.**

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## **REASONS OF THE COURT**

(Given by Wild J)

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### **Introduction**

[1] This case concerns an 18.84 ha (46 acre) rural property on Bell Road, Mangatawhiri, near Pokeno, about 50 km southeast of Auckland. We will call it the Bell Road property. Although many of the facts in this case are disputed, the following are not. The Bell Road property was acquired by Schmidt Trustee Ltd (STL) in 2001. STL is a corporate trustee associated with family trusts of the first and second appellants on this appeal: Mrs Taylor Schmidt and Mr Anthony Schmidt. Mr and Mrs Schmidt both have several aliases.<sup>1</sup> The first respondent, Ebada Property Investments Ltd (Ebada), is a company solely owned and directed by the

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<sup>1</sup> Mr Schmidt's aliases include William Perese, Wiremu William Anthony Te Whairoa Wanoa, William Daniel Hirschkop and Bill Kahn Reichfeld. Mrs Schmidt's include Linda Ash.

second respondent, Mr Garrity. Mr Garrity was a school friend of Mr Schmidt, and was a practicing lawyer until 2008. Ebada took ownership of the Bell Road property in 2006. The third respondent, Mr Hair, is a farmer who grazed cattle on the Bell Road property from 2004. He purchased the Bell Road property from Ebada in December 2008.

[2] In the High Court Mr and Mrs Schmidt alleged Ebada held the Bell Road property in trust for their family interests, and sold it to Mr Hair in breach of trust and at a significant undervalue. They alleged Mr Hair was complicit in that fraudulent sale, or at least knew enough to put him on inquiry.

[3] In the judgment under appeal Heath J:<sup>2</sup>

- (a) dismissed an application by the Schmidts for an interim injunction preventing Mr Hair selling the Bell Road property; and
- (b) granted an application by Mr Hair for summary judgment on the cause of action (there was only one) against him in the Schmidts' statement of claim.

[4] The focus of Heath J's judgment was on Mr Hair's title to the Bell Road property, in particular whether it was protected by s 182 of the Land Transfer Act 1952. Heath J agreed with the following assessment of Associate Judge Bell in an earlier case about the sale of the Bell Road property to Mr Hair:<sup>3</sup>

[60] Section 182 protects Mr Hair. The information he had may be more extensive than he lets on in his affidavit. He may well have known that [Ebada] owned the property under arrangements which gave the Schmidts or trusts associated with them beneficial interests in the property (even if he did not know exactly what trusts were). But s 182 makes it clear that it was not his job to check whether the sale by the trustee was authorised in terms of the trust or to make sure that the vendor accounted to beneficiaries for the purchase money. In my judgment, Mrs Schmidt's case does not take the matter to the stage where Mr Hair's knowledge falls outside the protection of s 182. His title is not impeachable for fraud.

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<sup>2</sup> *Schmidt v Ebada Property Investments Ltd* HC Auckland CIV-2011-404-4752, 25 November 2011 [High Court judgment].

<sup>3</sup> *Schmidt v Hair* HC Auckland CIV 2010-404-7389, 14 March 2011 [caveat judgment].

[5] There have been some fundamental changes since this appeal was filed on 29 November 2011, now over three years ago.

[6] First, the parties have changed. Mr Schmidt has been adjudicated bankrupt. Neither he nor the representative of his bankrupt estate appeared when we heard the appeal. In amended grounds of appeal Mrs Schmidt filed on 14 April 2014, she abandoned the appeal against Ebada and Mr Garrity. This means the only parties remaining are Mrs Schmidt and Mr Hair. We have left the other parties in the entitlement to this judgment, but, at the end of this judgment, we will formally record that Mr Schmidt has abandoned his appeal. We will also dismiss Mrs Schmidt's appeal against Ebada and Mr Garrity.

[7] Secondly, events have moved on since the judgment under appeal was delivered by Heath J on 25 November 2011.<sup>4</sup> Mr Hair has sold the Bell Road property.<sup>5</sup> Mrs Schmidt accepts the present owner has an indefeasible title. Consequently she has shifted her focus from the land (that is from the Bell Road property) to Mr Hair personally.

[8] Much of the hearing before us focused on the correctness of Heath J's approach to fraud under the Land Transfer Act. We heard argument as to what constituted "fraud" in terms of ss 62, 63, 182 and 183 of that Act. We were referred to the leading authorities, in particular the judgment of the Privy Council in *Assets Co Ltd v Mere Roihi* and of this Court in *Waimiha Sawmilling Co Ltd (in liq) v Waione Timber Co Ltd*.<sup>6</sup>

[9] During the hearing, the Court inquired of counsel whether the finding of Associate Judge Bell in the judgment we have quoted from in [4] above estopped the Schmidts from a further attempt to impeach Mr Hair's title for fraud. We invited and have received and considered further submissions from counsel about that.

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<sup>4</sup> High Court judgment, above n 2.

<sup>5</sup> A transfer to Glen Leslie Brausch and H J Pryde Trustee Services Ltd was registered on 3 December 2013.

<sup>6</sup> *Assets Co Ltd v Mere Roihi* [1905] AC 176 (PC); *Waimiha Sawmilling Co Ltd (in liq) v Waione Timber Co Ltd* [1923] NZLR 1137 (CA).

[10] On reflection, we think the argument about Mr Hair's title to the Bell Road property became moot once he sold it. Upon the sale, title to the property passed from Mr Hair to the new owners. There is no legal basis on which their title may now be challenged and indeed Mrs Schmidt does not do so. Accordingly it is now pointless and irrelevant to inquire whether the title Mr Hair once had would have been impeachable for fraud.

[11] Mrs Schmidt's amended grounds of appeal, and more particularly Mr Chesterman's submissions to us on her behalf, convey an intention, if permitted by the outcome of this appeal, to amend her statement of claim to allege against Mr Hair equitable fraud in the form of causes of action for knowing receipt and for unjust enrichment. Both causes of action would be founded on Mrs Schmidt's allegation that Mr Hair purchased the Bell Road property from Ebada at an undervalue of about \$145,000. In short, the essence of Mrs Schmidt's proposed new case against Mr Hair would be that Mr Hair unjustly enriched himself to the extent of \$145,000 at the Schmidts' expense. We do not have the benefit of a draft proposed amended statement of claim, but we have enough to decide this appeal.

[12] So, as it now stands, we consider the question on appeal is: Is each of Mrs Schmidt's foreshadowed causes of action against Mr Hair for knowing receipt and unjust enrichment open on the factual allegations made in the Schmidts' statement of claim?

[13] If yes, then somewhat obviously Mrs Schmidt is free, if so advised, to pursue either or both those fresh causes of action against Mr Hair. Since the impugned sale to Mr Hair was in December 2008, Mrs Schmidt is likely to face a defence of laches.<sup>7</sup> But that is not an issue on this appeal.

[14] By interlocutory application filed on 6 August 2014 Mrs Schmidt sought leave to adduce further evidence in support of her appeal. That evidence was an affidavit sworn by her on 5 August 2014 to update this Court as to matters that had arisen subsequent to the judgment of Heath J. That application was opposed by

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<sup>7</sup> Laches is a defence which can bar a person from a remedy that would otherwise have been available where there has been long and unreasonable acquiescence by that person in the assertion of adverse rights.

Mr Hair on the ground that the proposed fresh evidence was directed to the two fresh causes of action Mrs Schmidt wished to bring against Mr Hair.

[15] We allow the application. The fresh evidence does not prejudice Mr Hair. Essentially it records his sale of the Bell Road property which is no longer subject to challenge.

### **Heath J's judgment**

[16] Heath J set out the background facts, drawing them primarily from the Schmidts' statement of claim and the joint affidavit they swore on 5 August 2011 in support of their application for an interim injunction. Both the statement of claim and the affidavit were prepared by the Schmidts themselves, and they appeared in person before Heath J. The joint affidavit runs to 158 paragraphs and contains a mass of detail about the complicated trust structure the Schmidts had set up, how Mr Garrity and his company Ebada became involved and what their involvement was, including in a second property on Kaiaua Road in Mangatangi also owned by the Schmidts, and Mr Hair's involvement as a local farmer who leased the farmland part of the Bell Road property for grazing, and subsequently purchased the property. The Judge summarised all of that.

[17] Heath J then chronicled two sets of proceedings the Schmidts had brought relating to the Bell Road property. The first was tenancy proceedings which began in the Tenancy Tribunal and ended in this Court.<sup>8</sup> The outcome of those proceedings

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<sup>8</sup> When Mr Hair purchased the Bell Road property, the Schmidts became his tenants. Mr Hair brought a proceeding in the Tenancy Tribunal to terminate the Schmidts' tenancy. The Tenancy Tribunal made an order terminating the tenancy on 17 April 2009: *Hair v Schmidt* TT Manukau 09/01949/MK, 17 April 2009. That decision was reversed by Judge Blackie on 12 October 2009, and a new hearing in the Tenancy Tribunal was directed: *Schmidt v Hair* DC Manukau CIV-2009-092-1684, 12 October 2009. On re-hearing, the Tenancy Tribunal made an order terminating the tenancy: *Hair v Schmidt* TT Manukau 10/02511/MK, 5 August 2010. Judge Gibson dismissed the Schmidts' appeal to the District Court against that order: *Schmidt v Hair* DC Manukau CIV-2010-092-3374, 7 October 2010. Miller J dismissed an appeal to the High Court against Judge Gibson's decision: *Schmidt v Hair* HC Auckland CIV-2010-404-6804, 3 May 2011 [Miller J tenancy judgment]. Miller J refused the Schmidts leave to appeal to this Court: *Schmidt v Hair* HC Auckland CIV-2010-404-6804, 23 May 2011. This Court refused an application by the Schmidts for special leave to appeal Miller J's decision: *Schmidt v Hair* CA341/2011, 2 August 2011. Miller J also gave a costs judgment relating to his 3 May 2011 judgment: *Schmidt v Hair* HC Auckland CIV-2010-404-6804, 6 October 2011; and refused leave to appeal that costs judgment: *Schmidt v Hair* HC Auckland CIV-2010-404-6804, 15 December 2011.

was that Mr Hair was successful in terminating the Schmidts' tenancy of the house on the Bell Road property.

[18] The second set of proceedings resulted from the lodging of caveats against the Bell Road property, first a caveat by Mr Schmidt<sup>9</sup> and then a second caveat by Mrs Schmidt.<sup>10</sup> In a judgment delivered on 23 July 2010 Associate Judge Christiansen refused on procedural grounds to uphold the caveat lodged by Mr Schmidt.<sup>11</sup> In each case the outcome was an order discharging the caveat. The judgment of Associate Judge Bell from which we have quoted in [4] above was the judgment discharging Mrs Schmidt's caveat.

[19] There is no need to do more than note all of this because it involved attempts by the Schmidts to protect claims to beneficial and lessee interests in the Bell Road property which Mrs Schmidt accepts she can no longer pursue.

[20] Heath J noted that Associate Judge Bell, in discharging Mrs Schmidt's caveat against the Bell Road property, had proceeded on the basis there "may be room to challenge" the way Ebada had exercised its power of sale.<sup>12</sup> But that, of course, was not enough to establish fraud on the part of Ebada and certainly not on the part of Mr Hair. Heath J then said this:

[27] I proceed on a footing that is more generous to Mr and Mrs Schmidt, by assuming that they can prove their allegation of fraud against Ebada and Mr Garrity. Nevertheless, I agree with Judge Bell's subsequent analysis of why Mr Hair's title ought not to be impeached for fraud. [The Judge then set out [59] of Associate Judge Bell's judgment, in which he set out s 82 of the Land Transfer Act, and [60], which we have set out in [4] above.]

[28] I have considered whether the allegations of fact on which Mr and Mrs Schmidt rely (in this proceeding) to establish a foundation for a finding of fraud against Mr Hair take the point any further. The evidence does not go far enough to establish either that Mr Hair knew Mr and Mrs Schmidt were (in any capacity) "rightful owners" of the Bell Road property at the time he acquired it. Nor does it establish grounds to allege that Mr Hair had some contractual obligation to notify Mr and Mrs Schmidt, as tenants, of his dealings with Mr Garrity.

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<sup>9</sup> Lodged on 17 February 2010.

<sup>10</sup> Lodged on 28 September 2010.

<sup>11</sup> *Schmidt v Hair* HC Auckland CIV-2010-404-3987, 23 July 2010.

<sup>12</sup> High Court judgment, above n 4, at [26].

[29] Any suggestion of breach of the grazing lease is irrelevant. There was no legal duty for Mr Hair to contact Mr and Mrs Schmidt to obtain their views on the legitimacy of his proposed contract with Ebada. None of those facts (if proved) individually or cumulatively, has any prospect of founding an allegation of fraud. It follows that Mr and Mrs Schmidt cannot establish a foundation for an inference of fraud on the part of Mr Hair. His title cannot be impeached.

(Footnotes omitted.)

### **The Schmidts' argument on appeal**

#### *Error on the Judge's part*

[21] For the reasons explained, we need not deal with Mr Chesterman's criticisms of the way in which Heath J dealt with the Schmidts' allegation of land transfer fraud. The criticisms that remain relevant are twofold. First, Heath J failed to consider material facts, in particular these four:

- (a) *Grazing lease*: from 2004 Mr Hair had leased the farmland part of the Bell Road property from one of the Schmidts' trusts. He paid his rental to that trust. The grazing lease was in place when Mr Hair bought the Bell Road property from Ebada.
- (b) *Schmidts in residence*: when he bought the Bell Road property, Mr Hair also knew the Schmidts were living in the house on the property and paying outgoings on the property.
- (c) *"Don't communicate"*: at the time Mr Garrity sold the Bell Road property to Mr Hair, he told Mr Hair not to speak or communicate about the sale with the Schmidts until after settlement and that if he did "it would put a spanner in the works". Mr Hair followed that advice.
- (d) *Purchase at undervalue*: Mr Hair purchased the Bell Road property for \$145,000 below its registered value.

[22] Mr Chesterman submitted those pleaded facts supported a finding of fraud on Mr Hair's part. His suspicions were aroused, but he abstained from making inquiries



for fear of learning the truth. He was wilfully blind and therefore committed land transfer fraud.

[23] Secondly, Heath J erred in holding “[the Schmidts’] case against Mr Hair is irreparable”.<sup>13</sup> Having held the material facts fell short of establishing actual knowledge required for land transfer fraud, the Judge needed to consider whether those facts supported a finding of knowledge sufficient to support a cause of action for knowing receipt or a cause of action for unjust enrichment, but failed to do so.

[24] Mr Chesterman also submitted the Judge failed to apply the principles which govern an application by a defendant (such as Mr Hair) for summary judgment because:

- Mr Hair did not provide evidence in the nature of a complete defence;
- material facts and issues of credibility were in dispute; and
- the pleading was capable of repair.

#### *Knowing receipt*

[25] Turning to the first of the two foreshadowed causes of action Mrs Schmidt wishes to bring against Mr Hair, Mr Chesterman outlined the law relating to knowing receipt in some detail, referring to a number of cases, texts and articles.<sup>14</sup> He made two particular points:

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<sup>13</sup> At [30(a)].

<sup>14</sup> *Westpac Banking Corp v Savin* [1985] 2 NZLR 41 (CA); *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 (CA); *Pounamu Properties Ltd v Brons* [2012] NZHC 590; *Burmeister v O’Brien* [2010] 2 NZLR 395 (HC) at [176]; *Worldtel NZ Ltd v Kim* HC Auckland CIV-2009-404-1158, 30 September 2011; *El Ajou v Dollar Land Holdings Plc* [1994] 2 All ER 685 (CA); Charles Rickett and Jessica Palmer “Restitutionary Remedies” in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2011) 383 at 393–402; Tim Clarke “Knowing Receipt and Accessory Liability” in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 575 at 576; Ross Grantham and Charles Rickett *Enrichment and Restitution in New Zealand* (Hart Publishing, Oxford, 2000) at 282; Andrew Butler *Equitable Remedies* (NZLS Seminar, Auckland, April 2013) at 31.

- (a) Unlike a claim for land transfer fraud, knowing receipt only required proof of constructive knowledge on Mr Hair's part that Ebada's sale was in breach of its fiduciary duty to the Schmidts. That element would be satisfied by establishing Mr Hair knew of facts or circumstances that would put an honest person on inquiry.
- (b) In terms of a remedy against Mr Hair, restitutionary damages or disgorgement are available remedies, enabling the Schmidts to disgorge any profits Mr Hair made from the sale of Bell Road.

### *Unjust enrichment*

[26] Mr Chesterman submitted all the elements of this cause of action can be satisfied here because Mr Hair was enriched, at the expense of the Schmidts, by his purchase of the Bell Road property "at \$145,000 below its market valuation and, it is assumed, further enriched by any profit he made on its sale". The enrichment was unjust because Mr Hair knew the sale was contrary to the Schmidts' interests and wishes. He also knew he would not have been able to buy the property from Ebada – certainly not at the undervalue he paid – had he told the Schmidts he was purchasing it.

### **Should the appeal succeed?**

[27] Mrs Schmidt seeks to set aside the summary judgment entered by Heath J in favour of Mr Hair, and to have Mr Hair reinstated as a defendant to the High Court proceeding so she can pursue her two foreshadowed causes of action against him.

[28] As we have noted, Mr Chesterman accepts the sale of the Bell Road property by Mr Hair means that land transfer fraud is no longer an available cause of action. Consequently, although he takes issue with the entry of summary judgment for Mr Hair on that cause of action, he does not seek to reinstate it. What he does seek is the ability for Mrs Schmidt to file an amended statement of claim in the High Court in proceeding CIV-2011-404-4752 pleading knowing receipt and unjust enrichment.

[29] We think the correct approach is to ask whether the foreshadowed causes of action are tenable on the pleaded facts. In short, to test the proposed causes of action against the well established principles that apply on a strike out application under r 15.1 of the High Court Rules. Those principles are so well known we need not recite them,<sup>15</sup> save to emphasise one point: although pleaded facts are assumed to be true for strike out purposes, that does not extend to pleaded allegations which are entirely speculative and without foundation.

[30] Because they are the fundamental basis for both the proposed causes of action, we intend to work our way through each of the four factual allegations set out in [21] above, and we deliberately deal with them in the following order.

*Purchase at under value*

[31] The relevant allegations in the Schmidts' statement of claim are:

31. EET [Excel Estate Trust, which is one of the Schmidts' family trusts] ordered and received a Registered Valuation for 'Bell Road' on 24 September 2008, which confirmed a Registered Value for 'Bell Road' of \$845,000-00.

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- 37.4.1 Mr Hair purchased 'Bell Road' at \$145,000-00 less than the Registered and Market Valuation of \$845,000-00 for \$700,000-00. Mr Hair has also advised in 2011 in another forum, that he was reliant upon the Rateable Valuation figure of \$840,000-00 when his purchase negotiations with Mr Garrity occurred in 2008. His sale price of \$700,000-00 was highly irregular as was Mr Hair's conduct surrounding the transaction.

[32] The basis for the pleaded valuation of \$845,000 was a document the Schmidts have put in evidence at least four times in previous proceedings.<sup>16</sup>

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<sup>15</sup> These principles are set out in *Attorney-General v Prince* [1998] 1 NZLR 262 (CA); which is endorsed in *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] per Elias CJ and Anderson J.

<sup>16</sup> First, it was Exhibit F to the affidavit Mr Schmidt swore on 6 August 2010 in Mr Schmidt's appeal to the District Court at Manukau from the decision of the Tenancy Tribunal: *Hair v Schmidt* TT Manukau 10/02511/MK, 5 August 2010. Secondly, Exhibit C to Mrs Schmidt's second affidavit sworn 2 December 2010 in the proceeding *Schmidt v Hair* CIV-2010-404-7389 in support of her application to sustain the caveat she had registered against the Bell Road property. Thirdly, it was Exhibit E to a third affidavit she swore on 4 March 2011 in support of that same caveat application. Fourthly, it was Exhibit D to the lengthy affidavit she swore on 6 May 2011 in support of her application in the proceeding *Schmidt v Hair* CIV-2011-404-6804

[33] As noted above at [18], Associate Judge Bell dismissed Mrs Schmidt's application to sustain her caveat on the Bell Road property in a judgment he delivered on 14 March 2011. In that judgment Associate Judge Bell said this about the document on which Mrs Schmidt relies to establish that the Bell Road property was worth \$845,000 at the time Ebada sold it to Mr Hair:<sup>17</sup>

[43] The purchase price paid by Mr Hair was \$700,000. Mrs Schmidt says that was a sale at an under-value. She has attached to her affidavit extracts from a document which she says is a report by a registered valuer. The report indicates a market value of \$845,000, plus GST. However, I cannot put any weight on that document. It is not clear that the document refers to the property in this case. The area of the property does not correspond with the areas given for the property in other documents. The report does not give a legal description for the property. The report is incomplete. No author of the report is identified. While it is written in the style used by registered valuers, there is nothing to show that the report was made by a registered valuer. The report is of a rural property in Bell Road, Mangatawhiri, but I take it that the property in this case is not the only rural property in Bell Road, Mangatawhiri.

[34] We share that assessment, and likewise can put no weight on the document.

[35] In view of that assessment by Associate Judge Bell given almost four years ago, we are surprised indeed that Mrs Schmidt still seeks to found causes of action on that document. In the minute and directions we issued on 4 September 2014 following the hearing of this appeal, we asked whether either counsel was able to provide us with a full copy of the document. Neither counsel has been able to do that.

[36] Amongst the mass of papers (some 1,002 pages of them) comprising the Case on Appeal are two valuations of the Bell Road property completed in 2005 for the purposes of assessing the compensation payable by the Crown when it acquired 2.5758 hectares of the Bell Road property for the Mangatawhiri Realignment of State Highway 2. The first of those valuations, dated 13 January 2005, was done by Curnow Tizard, Registered Valuers, and valued the original 21.4205 hectares of the property at \$735,000. The second, dated 29 March 2005, was done by CB Richard

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for leave to appeal to this Court. That leave application related to a judgment Miller J gave in the High Court on 3 May 2011 dismissing the Schmidts' appeal from a judgment of the District Court which upheld the decision of the Tenancy Tribunal terminating the Schmidts' tenancy of the house curtilage on the Bell Road property.

<sup>17</sup> Caveat judgment, above n 3.

Ellis Valuation Services, and also valued the property at \$735,000, but that figure included chattels of \$5,000 which were expressly excluded from the Curnow Tizard valuation. Also in evidence is a settlement statement dated 17 January 2005 (Transit New Zealand with Schmidt Trustee Limited c/- Brian Garrity) for interim compensation of \$190,000 plus GST plus interest and other adjustments – a total of \$235,946.05 for the 2.5758 hectares taken by the Crown for the Mangatawhiri Realignment. The \$735,000 valuation less \$190,000 paid for the land taken by the Crown leaves a value of \$545,000. Even making generous allowance for all the factors affecting the valuation of the remaining land, not least the lapse of some three and a half years between January/March 2005 and September 2008, we are not able to reconcile those two 2005 valuations and the compensation payment, with the purported 24 September 2008 valuation of \$845,000 for 18.3135 hectares.

[37] By the time this appeal was heard in September 2014 well over five years had elapsed since Mr Hair purchased the Bell Road property from Ebada in December 2008. Mrs Schmidt has thus had ample opportunity to obtain proper valuation evidence substantiating the sale at the alleged undervalue of \$145,000. From her failure to do so we infer such evidence is not available.<sup>18</sup>

[38] Although Mr Chesterman submitted the proposed causes of action would enable the Schmidts also to disgorge any profit Mr Hair made when he sold the Bell Road property, both the proposed causes of action rest primarily on the allegation of sale by Ebada to Mr Hair at a substantial undervalue. For the reasons we have given, we consider that allegation is without foundation. Or, to put it more accurately, the factual foundation advanced by Mrs Schmidt is deficient to the extent that no weight can be put on it.

[39] The Schmidts' pleading at [37.4.1] of their statement of claim, set out in [31] above, refers to Mr Hair relying, in his purchase negotiations with Mr Garrity, on the Rateable Valuation figure for the Bell Road property of \$840,000. In an affidavit he

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<sup>18</sup> Compare *Jones v Dunkel* (1959) 101 CLR 298 at 308, 312 and 320–321; *Ithaca (Custodians) Ltd v Perry Corp* [2004] 1 NZLR 731 (CA) at [153]–[154]; *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11, (2011) 243 CLR 361 at [63]–[64]; *Forivermor Ltd v ANZ Bank New Zealand Ltd* [2014] NZCA 129 at [15]; leave to appeal refused [2014] NZSC 89; and *Morgenstern v Jeffreys* [2014] NZCA 449 at [78]; leave to appeal refused [2014] NZSC 176.

swore on 8 September 2011 in support of his application for summary judgment against the Schmidts, Mr Hair deposed that all his negotiations with Mr Garrity over the purchase of the Bell Road property were by email and exhibited all those emails. They span a period from 28 November 2008 to 10 December 2008. The Rateable Valuation figure is in fact \$820,000, not \$840,000, and its source is an email Mr Garrity sent Mr Hair on 28 November 2008:

Do you think it would be worth getting a valuation done and using that as a basis for negotiations? I might try and sound out the agents that I've been in contact with as to their views on value (though I understand that the 2008 GV<sup>[19]</sup> for the property from Franklin DC is \$820k – though as you know, Government Valuations are traditionally more conservative than Registered Valuations).

[40] Mr Hair responded to that email on 29 November in a way dismissive of the Government Valuation, observing “prices have taken a major fall and it appears its not over around here”. The following day, 30 November, he emailed Mr Garrity offering: “For a quick settlement I do have funds of \$700k”.

[41] The negotiations proceeded with Mr Garrity lowering his asking price to \$780,000 on 2 December, then to \$770,000 later the same day, then to \$760,000 on 4 December, to \$740,000 on 9 December, and finally accepting Mr Hair's offer of \$700,000 on 10 December. So Mrs Schmidt's suggestion that Mr Hair relied on the Rateable Valuation of \$840,000 is doubly incorrect.

[42] The allegation that Mr Hair colluded with Mr Garrity to purchase the Bell Road property for \$145,000 less than its market value, and has now sold it (we are asked to assume at market value, but there is no evidence of the sale price) is the gravamen of both the proposed causes of action. For the reasons we have explained it is an unfounded allegation. For that reason alone we consider neither of the proposed causes of action should be permitted to proceed. Notwithstanding that, we deal with the other three factual allegations, albeit in less detail.

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<sup>19</sup> GV, or Government Valuation, is the same thing as Rateable Valuation. It is the value of a property as set by a local authority for the purpose of determining the rates payable on the property. It is not the same thing as a Registered Valuation done by a Registered Valuer, which assesses the market value of a house.

## *Grazing lease*

[43] The allegations in the Schmidts' statement of claim relating to this are:<sup>20</sup>

15. On 24 September 2004, Mr Hair entered into 'Land Lease' contracts with EET for the Cattle grazing land at 'Bell Road'. This came about at the request of Mr Hair contacting the Schmidts. On 7 June 2005 Mr Hair entered into a new contract, and remained bound to this contract until Mr Hair had the Title of 'Bell Road' transferred to him from Ebada on 13 January 2009. Settlement between Mr Hair and Ebada took place on 9 January 2009.

...

37.4.2 Mr Hair purposely avoided contractual obligations under his land lease contracts at 'Bell Road', with EET signed in 2004 and 2005. The contract from 2005 was in effect at the time Mr Hair entered into the Sale and Purchase Agreement for 'Bell Road' with Mr Garrity and Ebada on 15 December 2008. These obligations were;

37.4.2.1 Clauses [41.], [5.1], [5.2], which states at

37.4.2.1.1. [4.1] *Normal Termination. This agreement may be terminated by either party giving 28 days' notice in writing, without reason.*

37.4.2.1.2. [5.1] *Good Faith & Genuine Intent. Both parties shall act in good faith to uphold this agreement and will not attempt to act in a manner whereby attempts are made to interpret any component of this agreement in a fashion, than otherwise was intended.*

37.4.2.1.3. [5.2] *Communication. Both parties shall keep each other informed where new information or factors which may effect this agreement shall arise.*

[44] The first lease is dated 24 September 2004. It is headed "Land Rental Agreement" and is between the Excel Estate Trust (EET) and Mr Hair (actually, Noel Hair & Associate Farm). EET is described as "land agent" and the agreement recites "the land agent has control over [the Bell Road property] which comprises a 52 acre block". Clause 1.1 states "land agent shall mean the trust which exercises its rights and powers over the subject property". This agreement was for a probationary

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<sup>20</sup> There is also paragraph 7, but it alleges the same thing as paragraph 15.

period of three months. It could be terminated by either party upon 28 days' written notice.

[45] There are similar land rental agreements dated 24 December 2004, 24 April 2005 and 7 June 2005. There is a further rental agreement from "Schmidt Trustees Ltd (For the Excel Estate Trust)" signed for Schmidt Trustee Ltd but not by Mr Hair. "Schmidt Trustees Ltd"<sup>21</sup> is described as lessor and the lease is described as an extension of the "original agreement" which is stated to be the 24 April 2005 rental agreement entered into by "Excel Estate Trust (on behalf of the lessor)". The term of this lease is 12 months from 24 July 2006, giving an expiry date of 23 July 2007.

[46] In the affidavit he swore on 8 September 2011, Mr Hair recounts that he approached a Mr Willy Wanoa about grazing the Bell Road property because he needed extra grazing for his dairy replacement cows and had noticed the property was not being grazed. The pasture was rank. He states that he now knows, but did not know at the time, that Mr Wanoa is Mr Anthony Schmidt's father.

[47] Mr Hair accepts he signed a succession of grazing leases and received various letters about them, successively from the Excel Estate Trust signed by Tony Schmidt, the Main & Trent Trust signed by Paige Trent, and the Excel Estate Trust signed by Paige Mindel.

[48] Mr Hair deposes that the last lease he signed was dated 16 October 2006 from Schmidt Trustee Ltd. Its term was 12 months from 24 July 2006, terminable by either party at 28 days' notice. He points out that cl 7.4 of that lease provides that it:

constitutes the entire agreement, understanding and arrangement between the parties relating to the subject matter of this Agreement and supersedes and cancels any previous agreement, understanding and arrangement relating thereto whether written or oral.

[49] Mr Hair annexed that 16 October 2006 lease to his affidavit. It is executed by an authorised signatory of Schmidt Trustee Ltd. In the affidavit they swore on 19

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<sup>21</sup> The entity was actually called "Schmidt Trustee Ltd" but this agreement wrongly described it as "Schmidt Trustees Ltd".



September 2011 replying to Mr Hair's affidavit, the Schmidts effectively ignore what Mr Hair says about that 16 October 2006 lease. They depose:

60. ... We say that the Land lease agreement to be relied on was that of 2005, signed by a Trustee of the Excel Estate Trust, and in the knowledge of the Excel Estate Trust. This Agreement was renewed by mutual Agreement right up until Mr Hair became the Registered Proprietor of 'Bell Road'.

The Schmidts then again set out cls 5.2, 5.1 and 4.1 from that agreement. There is an equivalent of cl 4.1 providing for termination on 28 days' notice in the 16 October 2006 lease (cl 6.3) but no equivalent of clauses 5.2 (communication) and 5.1 (good faith and genuine intent).

[50] Mr Hair deposes he dealt primarily with Mr Wanoa, only learning that he was Anthony Schmidt's father partway through the various leases. He stated that he had no direct communication with Taylor Schmidt.

[51] Mr Hair gives his account of his purchase of the Bell Road property. He states that he was telephoned on 27 November 2008 by Mr Garrity who introduced himself and explained the tenants of the Bell Road property did not own the property and had not paid their rent to Mr Garrity for over five months. Mr Hair put in evidence an email he received the following day from Mr Garrity. This states:

Hi Noel,

As per our discussion yesterday, I've attached the following:

1. Rates notices from both the Franklin District Council and Environment Waikato showing that the registered owner of the Bell Rd property is Ebada Property Investments Limited.
2. Online Companies Office extract showing that I am the owner and director of Ebada.

As discussed, I am looking to sell the property and am in the process of engaging 2 agents. However, yesterday you indicated a potential interest in purchasing the property. Of course it would suit me to not have to go through an agent and I would be willing to accept a fair price reduction if this were the case.

In terms of price, I guess you'd know the property as well as anyone and, from the sounds of it, you have substantial property holdings in the area, so I would be interested in getting an indication from you as to what you'd consider fair value with these factors in mind.

If you could let me know as a matter of urgency it would be appreciated, as I have Professionals and one other agency pestering me to sign agency contracts.

Please note that I am negotiable and would be happy with obtaining fair and reasonable value. I am under no illusions as to the state of the market etc.

[52] Mr Hair also deposed:

5.8 I had no concerns about the bona fides of Mr Garrity or Ebada Property Investments Limited. I still have no concerns about them.

5.9 I have no knowledge of the “impropriety” Mr Garrity or Ebada Property Investments Limited are alleged to have committed against the Plaintiffs.

5.10 I do know that whatever the Plaintiffs complaints are against Mr Garrity or Ebada Property Investments Limited, it has nothing to do with me.

[53] Apparent from all of that is the almost complete conflict between Mr Hair’s evidence and that of the Schmidts. None of those deponents was cross-examined in the High Court, so there are no findings of fact, still less of credibility, by Heath J.

[54] For that reason, we obviously cannot, and anyway need not, resolve the conflict. But one point is of obvious concern. It is the Schmidts’ failure to confront and deal with Mr Hair’s assertion that the last lease he signed was the one dated 16 October 2006, a copy of which he put in evidence. The point about that 2006 lease is that it does not contain the two critical clauses (cls 5.2 and 5.1) which the Schmidts pleaded and which form an important part of their foreshadowed causes of action. In the absence of any explanation from Mrs Schmidt as to why she says the 2005 land lease agreement is the one to be relied on, we cannot give this point in the proposed claim any weight.

*“Don’t communicate”*

[55] In their statement of claim the Schmidts allege:

37.4.4 Mr Hair [avoided] advising Mr Schmidt during two telephone conversations in December 2008 (regarding the land lease), about Mr Hair’s dealings with Mr Garrity and Ebada. These conversations occurred both before and after the Sale and Purchase Agreement of 15 December 2008 for ‘Bell Road’ was signed. The conversations

took place the week prior to, and the week after 15 December 2009 [this should obviously be 15 December 2008].

...

37.4.6 Mr Hair also explained to the Second Plaintiff [Anthony Schmidt] just after 'Bell Road' was transferred, that Mr Garrity had advised him not to speak or communicate with the Plaintiffs' until after 'Bell Road' had settled. Mr Hair stated that if he had, "it would have put a spanner in the works". This Fraud allegation has been levelled at Mr Hair on no less than seven occasions in sworn evidence, and Mr Hair has made no attempt to respond to it.

[56] In the joint affidavit they swore on 5 August 2011 the Schmidts state that Mr Hair has never attempted to rebut these allegations, in particular his "spanner in the works" comment to Mr Schmidt, although the Schmidts have made the allegation on a number of occasions in the course of their tenancy and caveat proceedings.

[57] Certainly, as far as we can see, Mr Hair has not denied the allegations in his 8 September 2011 affidavit in relation to the applications dealt with by Heath J.

[58] We must, in any event, assume the allegations are correct.

[59] We do not think the allegations support the foreshadowed causes of action. We have deliberately said little about Mr Garrity, since Mrs Schmidt has abandoned her appeal against him and Ebada and consequently neither were represented at the hearing before us. We have, however, read an affidavit Mr Garrity swore on 18 May 2009 in a District Court appeal against a decision of the Tenancy Tribunal, and the affidavit he swore on 19 September 2011 opposing the Schmidts' application for an interim injunction. The reasons why Mr Garrity may well have asked Mr Hair to say nothing to the Schmidts about the proposed sale are set out in those affidavits. In broad summary, Mr Garrity states he was a practicing solicitor until September 2008, when he took a job as a funds manager. He is the sole shareholder and director of Ebada. He had known Anthony Schmidt for many years. They were at school together and were once close friends. Mr Schmidt was a director and shareholder of Schmidt Trustee Ltd which owned the Bell Road property. Ebada purchased the Bell Road property from Schmidt Trustee Ltd in October 2006. Mr Schmidt had

approached Mr Garrity to buy the property because he (Mr Schmidt) could no longer afford to service the mortgage outgoings because he was in prison.<sup>22</sup>

[60] Mr Garrity deposed, in his 19 September 2011 affidavit:

70. I do acknowledge that at one stage Anthony Schmidt had indicated that should he recover his position financially, he would like to buy the Bell Road Property back. However, neither a price, nor a formula for calculating that price, was ever discussed or agreed. Consequently, I did not view Ebada's ownership rights as being encumbered in any way.

[61] Following the sale and Mr Schmidt's release from prison, the Schmidts continued to live in the house on the Bell Road property, renting it from Ebada at \$260 per week. There was no written tenancy agreement. Payment of rental was sporadic, sometimes it was paid only in part and sometimes not at all. At other times it was paid by Mr Schmidt's father, Mr Wanoa.

[62] Mr Garrity states that from June or July 2008 the Schmidts stopped paying the rent and, despite demands, paid no more. Mr Garrity says that Mr Hair approached him in about November 2008 to buy the property and a sale ensued in December 2008.

[63] Mr Garrity then describes events subsequent to the sale, which cause us some concern. Subsequent to the sale, he states that Mr Schmidt presented him with a tenancy agreement dated 12 November 2008 (in other words, it was backdated) and wanted Mr Garrity to sign this. Mr Garrity states that he refused to do so, and in no uncertain terms. Mr Garrity deposes that the rental agreement dated 12 November 2008 which the Schmidts put in evidence before the Tenancy Tribunal – an agreement purportedly signed by Ebada – is a forgery. Mr Garrity says that the signature for Ebada on that agreement is not his and nor did he authorise anyone else to sign the agreement for Ebada. In a brief of evidence Mr Hair swore in relation to a Tenancy Tribunal hearing in August 2010, he noted that Paige Mindel, in a letter dated 25 March 2009 filed with the Tenancy Tribunal, stated she had signed the 12 November 2008 tenancy agreement in the capacity of landlord and also stated "I

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<sup>22</sup> In November 2005 Mr and Mrs Schmidt were both imprisoned for a crime which did not involve dishonesty and is unrelated to this case, and thus irrelevant for the purposes of this judgment.

am only willing to disclose that Mr Garrity was not the rightful owner of the property, and the sale was done under dubious circumstances”.

[64] As far as we can see, the Schmidts take no issue in their 20 October 2011 affidavit with what Mr Garrity and Mr Hair stated about the 12 November 2008 tenancy agreement. That account accords with the following description of the decision of the Tenancy Tribunal which Miller J gave in his judgment of 3 May 2011.<sup>23</sup>

[15] The Schmidts alleged that the adjudicator lacked jurisdiction to determine the landlord’s status, maintaining that the Excel Estate Trust was the beneficial owner and claimed there was a fixed tenancy. They produced the tenancy agreement purportedly signed on 12 November 2008. It described the landlord as “Ebada Property Investments Limited (Corporate Trustee) The Excel Estate Trust” and the tenants as the Schmidts. It was for a fixed term until 12 September 2009 and contained a right of renewal. Also written on the document were the words “refer original agreement between parties and renewed 2005. Agreement shall take precedent if required. Original agreement can therefore take precedent over this” [sic]. This agreement was signed by the Schmidts and by a person called Paige Mindel for the landlord. Mr Garrity said that he did not know Ms Mindel, nor had he given her or anyone authority to enter into any such agreement. His evidence was that when he purchased the premises a periodic tenancy was agreed orally; on the basis that market rent would be paid. Mr Schmidt asked him to sign a tenancy agreement, which he produced, but he flatly refused to do so. It was an unsigned copy of the 2008 agreement. Mr Hair maintains that Ms Mindel is actually Ms Schmidt, and he observes that the bank account given in the agreement for payment of rent is one controlled by Mr Schmidt; it is the same account to which he formerly paid rent to the Schmidts.

[16] The adjudicator rejected the Schmidts’ evidence and appears to have accepted that of Messrs Hair and Garrity. She found that the Schmidts had not proved there was an “existing valid fixed term tenancy” when Mr Hair purchased the property. The tenancy was periodic. It followed that it might be terminated by notice.

[65] Later in his judgment Miller J said this:

**Periodic or fixed tenancy?**

[43] The argument that there was a fixed tenancy challenges the adjudicator’s findings of fact. I have summarised the Schmidts’ case above. They say that because Ebada held the property in trust for the Excel Estate Trust by agreement with Mr Garrity, the Excel Estate Trust, to which Ms Mindel is in some way connected, was able without further authority to

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<sup>23</sup> Miller J tenancy judgment, above n 8. As noted above at n 8, this Court refused special leave to appeal that decision of Miller J.

commit Ebada to the tenancy. The adjudicator rejected this implausible account and preferred the evidence of Mr Garrity the gist of which is that the fixed tenancy agreement was not authorised and not genuine and that he entered an oral periodic agreement with the Schmidts. As Judge Gibson found, the adjudicator's findings were amply available on the evidence. The appeal on this point raises no question of law.

[66] For his part, Mr Hair deposed in his 8 September 2011 affidavit to receiving a letter dated 31 May 2005 from the Excel Estate Trust, signed by Paige Mindel as trustee. He exhibited this letter which offered him “an entire month’s free rental if you choose to pay for the next period of lease within the next 10 days, or prior 4 pm before June 10”. Mr Hair deposed this “inducement”:

made me think that Taylor Schmidt/Anthony Schmidt/Paige Mindel/Paige Trent/Willy Wanoa/The Excell Trust/The Excell Estate Trust/NBSL & Teet Limited and/or The Main and Trent Trust were not being straight with me. I did not accept the proposal and treated the grazing leases cautiously from thereon.

[67] So, for the reasons they outlined in their affidavits, both Mr Garrity and Mr Hair had their reasons for treating the Schmidts with caution. Mr Garrity was under no legal obligation to tell the Schmidts he was selling the Bell Road property. On his view, subsequently upheld in the tenancy proceedings, the Schmidts were periodic tenants of the house on the property, and were months in default of payment of their rent under the oral tenancy agreement. Nor was there any legal obligation on Mr Hair to tell the Schmidts that he was purchasing the property. On his view, he was leasing the grazing on the property, most recently from Schmidt Trustee Ltd under a lease which had expired on 24 July 2007 but which appears to have run on.

[68] Mr Garrity’s surmise that the Schmidts would put “a spanner in the works” if apprised of the sale was accurate. As soon as the Schmidts became aware of the sale they did, indeed, seek to put a spanner in the works. First by claiming they had a fixed term tenancy of the house on the property. Secondly by Mr Schmidt claiming a caveatable interest in the property, and then, when Mr Schmidt’s claim failed, by Mrs Schmidt doing the same, in both cases on the ground that Ebada held the property in trust for Schmidt family interests. Those successive attempts were all unsuccessful, though doubtless very costly for the parties required to respond to them. Mr Hair’s solicitors provided to us a supplementary bundle of authorities. It contains no fewer than 19 decisions of the Tenancy Tribunal, District Court, High

Court and Court of Appeal in the various proceedings between the Schmidts and (either singly or in various combinations) Ebada, Mr Garrity and Mr Hair.

*Schmidts in residence*

[69] Knowledge on Mr Hair's part that the Schmidts were living in the house on the Bell Road property is implicit, if not explicit, in their allegations set out in [55] above. But one of the exchanges of emails between Messrs Garrity and Hair in the course of the negotiations for purchase of the property indicates that Mr Hair was not aware who lived in the property. This is the exchange:

*Email 9.25 am 2 December 2008 Garrity to Hair:*

Hi Noel,

I'm willing to move to \$780k, representing a \$50k deduction from the GV. I do not have room to move much further, but I think this represents a fair show of goodwill.

One other question, you mentioned that you were currently leasing the whole property from Anthony and Willie. Does this include the house?

...

*Email 12.28 pm 2 December 2008 Hair to Garrity:*

Brian we are leasing the land content of property only I do not know who is in the house. all the time this place has the curtains shut, any sale would have to be done with vacant position on settlement

as far as price goes we are not there yet but getting closer !!! you will not understand just how much land has come on the market unless you live here,

[70] Assuming, as we must, that the Schmidts established Mr Hair knew they lived in the house on the property, that does not support the Schmidts' allegation that Mr Hair was complicit in a fraudulent purchase of the property. Viewed in the way most favourable to the Schmidts, it indicates Mr Hair was prepared to purchase the property subject to whatever right the Schmidts had to live in the house on the property.

[71] All of this drives us to conclude, on the pleaded allegations, considered against the vast amount of factual material before this Court, that each of the two proposed causes of action against Mr Hair is untenable.

## **Result**

[72] We formally record that the appeal by the first appellant against the first and second respondents was abandoned. We therefore formally dismiss it, reserving any question of costs.

[73] The appeal by the first appellant against the third respondent is also dismissed.

[74] The appeal by the second appellant, having been abandoned, is dismissed.

[75] If the first appellant is legally aided in respect of this appeal, then the costs of the appeal are reserved. Memorandums may be filed if any order as to costs is sought. If the first appellant is not legally aided then she is to pay the first respondent's costs for a standard appeal on a band A basis with usual disbursements.

Solicitors:  
Holland Beckett, Tauranga for Appellants  
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