IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

I TE KŌTI MATUA O AOTEAROA
AHURIRI ROHE

CIV-2019-441-000078
[2020] NZHC 2184

UNDER	the Trustee Act 1956, the Land Transfer Act 1952, the Land Transfer Act 2017, the Property Law Act 2007, the Companies Act 1993, the Senior Courts Act 2016, and the Fair Trading Act 2006
BETWEEN	GARTH BOWKETT PATERSON as Trustee of the Garth Paterson Family Trust Plaintiff
AND	LEPIONKA & COMPANY INVESTMENTS LIMITED First Defendant
	STEFAN JOZEF JOHN LEPIONKA, JOE DUNCAN and GREGORY BERNARD HORTON as trustees of the Lepionka Business Trust Second Defendants
	LEPIONKA AND COMPANY LIMITED Third Defendant
	STEFAN JOZEF JOHN LEPIONKA and NIGEL WARREN HUGHES as trustees of the SJ Lepionka Family Trust Fourth Defendants
	STEFAN JOZEF JOHN LEPIONKA Fifth Defendant

CIV-2020-441-000041

UNDER	the Senior Courts Act 2016
IN THE MATTER OF	malicious civil prosecution, abuse of process and dishonest assistance

BETWEEN	GARTH BOWKETT PATERSON Plaintiff
AND	LEPIONKA & COMPANY INVESTMENTS LIMITED First Defendant
	STEFAN JOZEF JOHN LEPIONKA Second Defendant

Hearing:	10 – 11 August 2020
Appearances:	Plaintiff in person, with D Hayes, McKenzie friend M G Colson and S J Leslie for the Defendants
Judgment:	26 August 2020

JUDGMENT OF DOOGUE J

This judgment was delivered by Justice Doogue
on 26 August 2020 at 3.30 pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Solicitors:
Bell Gully, Wellington

Introduction

[1] These proceedings are the latest in a lengthy series of litigation between Mr Paterson (and various entities related to him) and Mr Lepionka (and various entities related to him), relating to a property development located at 354 Kahuranaki Road in the Tukituki Valley in the Hawke's Bay (the property).

[2] At its core, the original dispute concerned a mortgagee's statutory and equitable duties, and the remedies to be granted in the event those duties are breached. The High Court has thoroughly considered these issues, and found Mr Paterson was wronged by some of the defendants to the present proceedings. The issue for the Court to now determine is whether Mr Paterson has exhausted his legal options in relation to the dispute.

[3] In the present proceedings, there are two substantive applications before the Court:

(a) In proceeding CIV-2019-441-78 (the current mortgagee proceeding), Mr Paterson, as trustee of the Garth Paterson Family Trust (the Paterson Family Trust), pleads eight causes of action for breaches of duties owed to him under statute, common law, and equity, relating

to the sale of the property by the first defendant, Lepionka and Company Investments Limited (LCIL) as mortgagee.

(b) In proceeding CIV-2020-441-41 (the current bankruptcy proceeding), Mr Paterson, in his personal capacity, pleads three causes of action: malicious prosecution of bankruptcy proceedings by LCIL against Mr Paterson; abuse of process; and dishonest assistance.

[4] In the current application, the defendants:

(a) in the current mortgagee proceeding, seek summary judgment or, in the alternative, ask the Court to strike out the proceeding or grant orders for security for costs;

(b) in the current bankruptcy proceeding, ask the Court to strike out the proceeding; and

(c) seek an extended order under s 166 of the Senior Courts Act 2016, restricting Mr Paterson from commencing or continuing any civil proceedings relating to the current matters (and specified related matters), for a period of five years.

[5] Mr Paterson opposes the applications for strike out or summary judgment, and for an order under s 166 of the Senior Courts Act.

[6] I pause to note at the outset that the Court shall be slow to make a restraint order, because it is a breach of a person's right of access to justice.[1] However, I also note the following comments of Hinton J in *Auckland Council v Mawhinney*:[2]

> However, considering the worry and expense that the opponents of meritless litigation face, and the barely sufficient resources of the judicial system to afford justice without unreasonable delay to those who have genuine grievances, a Court should exercise its discretion to make an order in appropriate cases.

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1 *Auckland Council v Mawhinney* [2019] NZHC 299 at [54].
2 At [55].

Factual background

The mortgagee proceedings

[7] Mr Paterson was the director of GLW Group Limited (now in liquidation) (GLW). GLW purchased the property in 2009, with the intent of subdividing it into lifestyle blocks. At that time, GLW borrowed a significant sum from Westpac Bank, which took a first registered mortgage over the property as security.

[8] By 2012, GLW had entered into an agreement to sell lot 1, and lot 2 was subject to an option to purchase.

[9] In January 2014, GLW entered into agreements for sale and purchase (the Lepionka purchase contracts) for the remaining lots, with two entities associated with Mr Lepionka (the Lepionka purchasers): Lepionka and Company Limited (LCL), and the trustees of the SJ Lepionka Family Trust. Deposits of $463,000 were paid.

[10] Over the following year, various problems emerged with the development. GLW owed obligations to the purchasers of lots 1 and 2 that were inconsistent with the rights provided for in the Lepionka purchase contracts, and caveats were lodged preventing settlement of the Lepionka purchase contracts. It also appeared GLW did not have the funds to complete the development.

[11] In early 2015, Westpac issued a default notice under the Property Law Act 2007 (the PLA). Following unsuccessful attempts to resolve the difficulties, Mr Lepionka was concerned the interests of the Lepionka purchasers may be at risk. In March 2015, he incorporated LCIL, and in early April 2015, took an assignment from Westpac of GLW's debt and securities. LCIL, as mortgagee, adopted the Lepionka purchase contracts under s 179 of the PLA, and became mortgagee in possession.

[12] On 3 April 2015, Mr Paterson enquired with LCIL's lawyers about redeeming the mortgage, and requested a repayment statement for 9 April 2015. Following correspondence between the parties, and clarification of their respective positions, LCIL's lawyer advised Mr Paterson on 9 April that GLW was no longer able to redeem

the mortgage, as LCIL had exercised its power of sale by adopting the Lepionka purchase contracts.

[13] LCIL sought to progress the development, obstructed at various stages by continued litigation brought by Mr Paterson and associated parties. In December 2017, following a three week trial in July-August 2017 (the 2017 trial), Fitzgerald J issued a lengthy decision on the substantive proceedings in *AFI Management Pty Ltd v Lepionka & Co Investments Ltd* (the Main Judgment).[3] Two proceedings were tried simultaneously (the 2017 proceedings): one set brought by GLW and Mr Paterson personally against LCIL, LCL, the SJ Lepionka Family Trust, and Mr Lepionka personally; and one set brought by AFI Management Pty Ltd (a financier with an unregistered second mortgage over the property, granted by GLW) against LCIL.

[14] Fitzgerald J set out a detailed list of the issues,[4] which for present purposes can be summarised as claims that LCIL, as mortgagee:

(a) wrongfully refused to allow GLW to redeem the mortgage;

(b) breached its statutory and equitable duties to act in good faith and for a proper purpose; and

(c) by adopting the Lepionka purchase contracts, breached its statutory and equitable duties to obtain the best price reasonably obtainable at the time of sale, as those sales were under value.

[15] GLW sought relief in the form of orders preventing the Lepionka purchase contracts from settling, and/or damages. Fitzgerald J made numerous findings,[5] the following of which are relevant for present purposes:

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3 *AFI Management Pty Ltd v Lepionka & Co Investments Ltd* [2017] NZHC 3116.
4 At [16].
5 Summarised at [494].

(a) LCIL had exercised its power of sale as mortgagee by adopting the Lepionka purchase contracts under s 179 of the PLA, effective from 7 April 2015.

(b) LCIL did not wrongfully refuse to allow GLW to redeem the mortgage in April 2015.

(c) LCIL breached its equitable duties as mortgagee, in that it exercised its powers of sale for an improper purpose.

(d) LCIL may have breached its statutory and equitable duties under s 176 under the PLA to take all reasonable precautions to obtain the best price reasonably obtainable for the property. This could not be determined until after the sales had settled.

(e) It would be inequitable to set aside the Lepionka purchase contracts, and GLW's remedy would be confined to damages. A final assessment of damages would occur after the subdivision and all sales had been completed.

[16] GLW initially appealed the Main Judgment. GLW was subsequently placed into liquidation, and LCIL entered into settlements with AFI in August 2018, and with GLW (through its liquidator) in December 2018. As part of the settlement, GLW discontinued its claims against LCIL and its appeal.

[17] On 14 November 2019, Mr Paterson commenced the current proceeding relating to the mortgagee sale (CIV-2019-441-78).

[18] In April 2020, Mr Paterson applied in his personal capacity to the Court of Appeal, for leave to appeal the Main Judgment. In a minute dated 8 June 2020, the Court found Mr Paterson had no standing to file the appeal.[6]

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6 *Paterson v Lepionka & Co Investments Ltd* CA214/2020, 8 June 2020 (Minute of Brown J).

[19] In terms of the current state of the development, in an affidavit in January 2020 Mr Lepionka recorded that LCIL is attempting to sell, as mortgagee, the remaining two lots which are in the name of GLW. This will then allow the development, and the final mortgagee accounts, to be completed.

The bankruptcy proceedings

[20] At an interlocutory stage of the ongoing litigation between the parties, Mr Paterson and GLW withdrew an application seeking an interim injunction against LCIL. On 1 October 2015, the High Court awarded costs against Mr Paterson and GLW in relation to the withdrawn application, in the sum of $8,875.24.[7]

[21] LCIL subsequently issued a bankruptcy proceeding against Mr Paterson, on the basis of the costs award, and he was adjudicated bankrupt on 5 April 2016.[8]

[22] Mr Paterson did not appeal this order; rather he applied for an order under s 309(1)(a) of the Insolvency Act 2006 annulling it. This application was declined by Associate Judge Osborne on 16 June 2016.[9] In 2018, Mr Paterson lodged a second application for an order annulling the order, which was declined by Associate Judge Johnston on 21 November 2018.[10]

[23] Mr Paterson appealed that decision to the Court of Appeal. On 12 November 2019, the Court declined Mr Paterson's application for leave to adduce new evidence, and dismissed the appeal.[11]

[24] On 18 June 2020, Mr Paterson commenced the current proceeding relating to the bankruptcy (CIV-2020-441-41), alleging the bankruptcy application was a malicious prosecution.

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7 *Paterson v Lepionka & Co Investments Ltd* [2019] NZCA 548 at [1], citing *GLW Group Ltd v Lepionka & Co Investments Ltd* HC Auckland CIV-2015-404-2168, 1 October 2015.

8 *Paterson v Lepionka & Co Investments Ltd*, above n 7, citing *Lepionka & Co Investments Ltd v Paterson* HC Wellington CIV-2015-485-973, 5 April 2016 (Minute of Associate Judge Osborne).

9 *Paterson v Lepionka & Co Investments Ltd* [2016] NZHC 1331.

10 *Paterson v Lepionka & Co Investments Ltd* [2018] NZHC 3022.

11 *Paterson v Lepionka & Co Investments Ltd*, above n 7.

[25] On 28 July 2020, Mr Paterson filed an amended statement of claim, adding the abuse of process and dishonest assistance causes of action.

Submissions

The defendants

The mortgagee proceedings

[26] Mr Colson, for the defendants, submitted that Mr Paterson is relitigating the same issues dealt with in the Main Judgment; he submitted some of the causes of action are identical, and others are the same allegations in substance "thinly masquerading as a new cause of action." The only reason the current mortgagee proceeding is being pursued, he submitted, is due to Mr Paterson's belief that a notice issued under the PLA by LCIL's solicitor was not in fact issued on 1 April 2015; an allegation that was raised in the 2017 trial, and rejected by Fitzgerald J. He relied on the fact that Mr Paterson's affidavits filed in the current proceedings rely heavily on excerpts from transcripts of evidence given, or affidavits and briefs of evidence filed, in the previous proceedings.

[27] The defendants seek summary judgment in relation to the current mortgagee proceeding on the ground that: Mr Paterson has no reasonably arguable interest in the land; or, in the alternative, none of his causes of action can succeed on the basis of any interest he may be able to establish.

[28] In the alternative, Mr Colson submitted the current mortgagee proceeding should be struck out on the basis that: none of the causes of action can succeed; and/or that the claims are barred by the principles of *res judicata*; and/or that the proceeding is vexatious and an abuse of process.

[29] In the event the Court allows the proceedings to continue, Mr Colson submitted an order requiring security for costs is appropriate, and sought indemnity costs.

The bankruptcy proceeding

[30] Mr Colson submitted the bankruptcy proceeding should be struck out as it: discloses no reasonably arguable cause of action; is an abuse of process, as it is an attempt to mount a collateral attack on previous judgments; and is vexatious.

[31] In relation to the malicious prosecution cause of action, Mr Colson submitted the proceeding discloses no reasonably arguable cause of action. He submitted that in order for this claim to succeed, the allegedly malicious proceeding must have been decided in favour of the tort plaintiff (Mr Paterson), and noted that all litigation relating to the bankruptcy has been decided against Mr Paterson.

Application for order under s 166 of the Senior Courts Act

[32] Ms White, for the defendants, submitted an extended order under s 166 of the Senior Courts Act, restricting Mr Paterson from commencing or continuing any civil proceedings relating to the current matters (and specified related matters), for a period of five years, is appropriate. She submitted that Mr Paterson has not previously been deterred by adverse decisions, adverse costs orders, or a Court order preventing him from lodging caveats over the property. She submitted the defendants have incurred and continue to incur substantial legal costs, which ultimately cannot be recovered from Mr Paterson.

Mr Paterson

The current proceedings

[33] Mr Paterson denied mounting a collateral attack on the Main Judgment, but rather submitted the current mortgagee proceeding is "in a way seeking that the result of the 2017 trial … be properly complied with … rather than entirely avoided, as has been the case so far."

[34] He submitted the principle of *res judicata* does not bar this proceeding, as the Main Judgment is affected by fraud. It appears that the new evidence he relies on, to

evidence this fraud, is the 2003 Court of Appeal decision in *Roseneath Holdings Ltd v Grieve*.[12]

[35] At the hearing before me, Mr Paterson's submissions consisted of the following arguments:

(a) that the Court of Appeal's findings in *Roseneath* in relation to Mr Duncan are evidence of fraud;

(b) the allegation that the s 179 PLA notice was backdated;

(c) that he had provided a bank cheque to LCIL for the sum for which he was bankrupted; and

(d) an attempt to reopen the valuation evidence determined in the Main Judgment.

Application for order under s 166 of the Senior Courts Act

[36] Mr Paterson refuted bringing any proceedings without merit. He submitted that when there have been issues with a proceeding, he has responsibly withdrawn it.

[37] He submitted LCIL or associated entities have pursued a number of meritless claims against him, and there have been multiple costs awards against LCIL.

[38] He submitted the application for a s 166 order itself is an abuse of process, and an order would breach his rights under the New Zealand Bill of Rights Act 1990 (BORA).

Applications for strike out/summary judgment

The law

[39] Rule 15.1 of the High Court Rules 2016 provides a court may strike out all or part of a pleading if it:

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[12] *Roseneath Holdings Ltd v Grieve* [2004] 2 NZLR 168.

(a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or

…

(c) is frivolous or vexatious; or

(d) is otherwise an abuse of the process of the court.

[40] The principles relating to striking out a claim under r 15.1(a), on the basis that it discloses no reasonably arguable cause of action, are:[13]

(a) Pleaded facts, whether or not admitted, are assumed to be true. This does not extend to pleaded allegations which are entirely speculative and without foundation.

(b) The cause of action or defence must be clearly untenable; it is inappropriate to strike out a claim unless the Court can be certain that it cannot succeed.[14]

(c) The jurisdiction is to be exercised sparingly, and only in clear cases.

(d) The jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive argument.

(e) The Court should be particularly slow to strike out a claim in any developing area of the law.

[41] An abuse of process for the purposes of r 15.1(d) includes various instances of misuse of the Court's processes, including a proceeding that is an attempt to relitigate matters already determined, for example by bringing substantively the same proceeding "in a different garb".[15]

[42] Rule 12.2(2) of the High Court Rules provides that the Court may give summary judgment against a plaintiff if the defendant satisfies the Court that none of the causes of action in the plaintiff's statement of claim can succeed. Summary

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13 *Attorney-General v Prince* [1998] 1 NZLR 262.
14 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33]
15 *Collier v Butterworths of New Zealand Ltd* (1997) 11 PRNZ 581 (HC) at 586.

judgment will generally only be entered against a plaintiff where there is a complete defence to the plaintiff's claim, or a clear answer to the claim which cannot be contradicted, and the onus is on the defendant to prove that to the balance of probabilities.[16]

[43] The Court of Appeal has noted the distinction between an application for summary judgement, and an application for strike out:[17]

> [60] Where a claim is untenable on the pleadings as a matter of law, it will not usually be necessary to have recourse to the summary judgment procedure because a defendant can apply to strike out the claim under R 186. Rather R 136(2) permits a defendant who has a clear answer to the plaintiff which cannot be contradicted to put up the evidence which constitutes the answer so that the proceedings can be summarily dismissed. The difference between an application to strike out the claim and summary judgment is that strike-out is usually determined on the pleadings alone whereas summary judgment requires evidence. Summary judgment is a judgment between the parties on the dispute which operates as issue estoppel, whereas if a pleading is struck out as untenable as a matter of law the plaintiff is not precluded from bringing a further properly constituted claim.

The current mortgagee proceeding

The principles of res judicata

[44] Cooke J summarised the principles of *res judicata* in *Walker v Nelson District Council*:[18]

> [8] …When a court finally determines a matter between parties, what it determines operates as a res judicata — meaning that it has conclusively determined the question as between those parties, and the parties cannot reopen that issue. To seek to relitigate that issue in another proceeding is an abuse of process.[19] The key principle has been described in the following terms by the Supreme Court:[20]
>
> > The principle of finality in litigation gives rise to a rule of law that makes conclusive final determinations reached in the judicial process:
> >
> > > Unless a judgment of a Court is set aside on further appeal or otherwise set aside or amended according to law, it is conclusive as to the legal consequences it decides.

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16 *Westpac Banking Corp v MM Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) at [61].
17 At [60]; *Mills v ASB Bank Ltd* [2020] NZCA 228 at [17].
18 *Walker v Nelson District Council* [2018] NZHC 1967, [2018] NZAR 1454.
19 See *Dotcom v District Court at North Shore* [2017] NZHC 3158 at [25]–[26].
20 *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94; [2013] 1 NZLR 804 at [28].

> The rule reflects both the public interest in there being an end to litigation and the private interest of parties to court processes in not being subjected by their opponents to vexatious relitigation. …
>
> …
>
> [12] …Res judicata operates even if the arguments could have been made better the first time around. Indeed it operates with respect not only to all arguments that were made, but also all arguments that could have been made with respect to the legal question in issue in the first proceeding.[21]

[45] I also note the following statement in *Henderson v Henderson*,[22] approved by the Court of Appeal in *Beattie v Premier Events Group Ltd*:[23]

> … where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[46] For the current mortgagee proceeding to be barred by the principles of *res judicata*, the Court must be satisfied that the Main Judgment:[24]

(a) was final;

(b) was made on the merits;

(c) was made by a Court with jurisdiction over the parties and subject matter;

(d) determined a question raised in the current mortgagee proceeding, or that the question raised in the current mortgage proceeding is one which properly belonged to the subject matter of the Main Judgment;

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21 See *Beattie v Premier Events Group Ltd* [2014] NZCA 184; [2015] NZAR 1413 at [43]–[46].
22 *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313 (Ch) at 114-115.
23 *Beattie v Premier Events Group Ltd*, above n 21, at [43].
24 K R Handley *Spencer Bower and Handley: Res Judicata* (5th ed, Lexis Nexis, London, 2019) at [1.02].

(e) was made following proceedings involving the same parties as those in the current mortgagee proceeding, or their privies; and

(f) was not obtained by fraud, creating an exception to the principles of *res judicata*.

[47] The issues at [46](b) and [46](c) do not appear to be in dispute; the Main Judgment was made on the merits, by a Court with the necessary jurisdiction.

Was the Main Judgment final?

[48] The Main Judgment determined liability in respect of each cause of action pleaded, except for the question of whether LCIL breached its statutory duty under s 176 of the PLA to take all reasonable precautions to obtain the best price reasonably obtainable for the property. The s 176 claim was unable to be resolved, as liability depended on quantum issues which could not be resolved until the subdivision was completed; although finding LCIL's actions demonstrated it did not take reasonable precautions to obtain the best price reasonably obtainable, Fitzgerald J could not find a breach of s 176 without proof of damage on the part of the mortgagor.[25] Fitzgerald J could not assess damages at the time of the judgment, as the actual price achieved by the mortgagee was not yet known.[26]

[49] Mr Colson submitted that the Main Judgment was akin to a split trial, where liability and quantum were determined separately. The first decision in a split trial is considered final for the purposes of *res judicata*.[27] This is consistent with the Court of Appeal's approach in *Johnson v Felton*, where the Court held it would be unrealistic to regard the splitting of claims as having been intended to result in a situation in which parties could relitigate before the same judge issues determined in an earlier judgment.[28]

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25 *AFI Management Pty Ltd v Lepionka & Co Investments Ltd*, above n 3, at [323].
26 At [374].
27 Handley, above n 24, at [5.28].
28 *Johnson v Felton* [2006] 3 NZLR 475 (CA) at [56].

[50] I consider the Main Judgment was final, for the purposes of the principles of *res judicata*. Additionally, the rights and liabilities of the parties were fully and finally determined by the settlements in 2018, and GLW discontinued its appeal. I also note that this Court has previously considered Fitzgerald J's decision to be final, because the proceeding was settled and the appeal was abandoned.[29]

Are the issues raised in the current mortgagee proceeding the same as those in the Main Judgment (or sufficiently connected that they properly belonged to the subject matter of the Main Judgment)?

[51] In the current mortgagee proceeding, Mr Paterson pleads eight causes of action:

(a) First, breach of duty pursuant to the Trustee Act 1956: LCIL's execution of the adoption notice under s 179 of the PLA was for an improper purpose (to prevent redemption of the mortgage), and LCIL is a trustee for any surplus funds made from sales, and owes a duty of care to the Paterson Family Trust in its capacity as trustee.

(b) Second, breach of duty pursuant to the Land Transfer Act 1952: the transfer of the Westpac mortgage to LCIL was designed for the purpose of fraudulently defeating the interests of those with unregistered interests in the property.

(c) Third, breach of duty pursuant to s 6 of the Land Transfer Act 2017 (the LTA 2017): execution and use of memoranda of transfers for LCIL in 2019, pursuant to its power of sale, were executed and utilised in breach of s 6 of the LTA 2017.

(d) Fourth, breach of duty pursuant to s 176 of the PLA: LCIL breached its duty as mortgagee to take reasonable care to obtain the best price reasonable obtainable.

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[29] *Lepionka & Co Investments Ltd v Naldapat Ltd* [2019] NZHC 1646 at [75].

(e) Fifth, breach of duties pursuant to ss 131, 133 and 137 of the Companies Act 1993: various courts have held that LCIL did not act in good faith and used its powers for an improper purpose, and Mr Lepionka has therefore acted in breach of the Companies Act.

(f) Sixth, breach of common law and equitable duties to act in good faith, for a proper purpose, and not to act with fraudulent intent: the defendants have colluded to enable various illicit acts against various duties of good faith.

(g) Seventh, breach of duty pursuant to s 9 of the Fair Trading Act 1986 (the FTA): the defendants have conspired between them, causing a breach of the statutory obligation under s 9 of the FTA.

(h) Eighth, breach of duty pursuant to s 14 of the FTA: the defendants have conspired between them, to cause a breach of s 14 of the FTA.

[52] The first, second, third, fourth and sixth causes of action are clearly barred by the principles of *res judicata*, as they seek to relitigate matters already determined. They are either the same claim already determined in the Main Judgment, or the same claim in a "different garb".

[53] The fifth, seventh and eighth causes of action are new arguments; breaches of the Companies Act or the FTA were not considered in the Main Judgment. However, they rely entirely on issues already determined by Fitzgerald J, and appear to seek largely the same remedies as sought in the Main Judgment, via a new route. I consider these fall within the realm of issues which should have been raised in the 2017 proceeding.

[54] I also note that in the 2017 proceeding, GLW pleaded a range of what Fitzgerald J labelled "miscellaneous" causes of action, including oppressive conduct under the Credit contracts and Consumer Finance Act 2003, unlawful sales by LCIL, unjust enrichment, and conspiracy to injure by unlawful means.[30] Fitzgerald J

[30] *AFI Management Pty Ltd v Lepionka & Co Investments Ltd*, above n 3, at [456].

dismissed all of these, and noted parties are discouraged from advancing "supporting" claims unless they genuinely add to the overall position.[31]

[55] The pleadings in the current mortgagee proceeding are sufficiently similar to the issues determined in the Main Judgment that they are barred by the principles of *res judicata.*

Are the parties in the current mortgagee proceeding the same as those in the current mortgagee proceeding, or their privies?

[56] In determining whether the parties to a subsequent proceeding are the privies of parties in an earlier proceeding, for the purposes of *res judicata*¸ the Court of Appeal has held:[32]

> The next question is whether the present plaintiff …, who was not a party to the first action, is nevertheless estopped from bringing the present action because he was a privy of one or more of the plaintiffs in the first action. Privity in this sense denotes a derivative interest founded on, or flowing from, blood, estate, or contract, or some other sufficient connection, bond, or mutuality of interest. No case has yet sought to define exhaustively the degree or nature of the link necessary to render a person privy in interest. That this is so is not surprising for the necessary connection may arise in a variety of ways and its existence falls to be tested in the light of the object of the rules about estoppel by res judicata and their effect in preventing the party in the subsequent proceeding from putting his case in suit…

[57] In order for a proceeding to be barred by the principles *res judicata*, there must be both a sufficient union of interest in the subject matter of the previous action, and relationship with the party to that previous action, that it is just that the new party should be bound by the outcome of that previous litigation.[33] In examining whether a person is a privy for *res judicata* purposes, the substance of the person's involvement in the earlier litigation is the key;[34] and it is necessary to look to who in reality is behind the proceedings.[35]

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31 At [457].

32 *Shiels v Blakeley* [1986] 2 NZLR 262 (CA) at 268; *McGougan v Depuy International Ltd* [2018] NZCA 91, [2018] 2 NZLR 916 at [74].

33 *McGougan v Depuy International Ltd*, above n 32, at [77].

34 At [92].

35 *Hamed Abdul Khaliq Al Ghandi Co v New Zealand Dairy Board* (1999) 13 PRNZ 102 (CA) at [49].

[58] The plaintiff in the current mortgagee proceeding is Mr Paterson in his capacity as a trustee of the Paterson Family Trust. The plaintiffs in the 2017 proceeding were GLW and Mr Paterson in his personal capacity. Mr Paterson claims that he nominated GLW as purchaser of the land in 2009, as bare trustee for his sons. Mr Paterson also claims that the Paterson Family Trust has had an unregistered interest in the property since September 2009, pursuant to an agreement to mortgage with GLW.

[59] Mr Paterson has not provided any documentary evidence of a mortgage being granted in 2009. He relied on a document dated 9 June 2017, recording an agreement to mortgage the property in 2009. Mr Lepionka's evidence was that this document was not produced in the 2017 trial, and would have been in breach of the Westpac mortgage (assigned to LCIL), which prohibited GLW from creating new interests in the land without the mortgagee's consent.

[60] There was conflicting affidavit evidence before me (from Mr Paterson and Mr Lepionka) about the validity of the Paterson Family Trust and its purported interest in the property. I also note Fitzgerald J has expressed concerns about Mr Paterson's claims that he holds interests on trust for his family, finding them "hollow, unsupported by evidence."[36] Regardless, even assuming the trust held the interest Mr Paterson is arguing for, I consider it to be a privy of the plaintiffs in the 2017 proceeding.

[61] I consider Mr Paterson is the person behind the litigation. In particular, I note Mr Lepionka's evidence that Mr Paterson attended the three week 2017 trial, and appeared actively involved in GLW's case. GLW was incorporated by Mr Paterson, for the benefit of himself and his sons. Mr Paterson now asserts the Paterson Family Trust was established for the benefit of his sons. There appears to be an obvious familial connection between the plaintiffs in the 2017 proceeding and the Paterson Family Trust. I also note that in an affidavit dated 15 June 2020, for a related proceeding in the Court of Appeal, Mr Paterson recorded that he was a plaintiff in the 2017 proceeding in "multiple capacities, – including but not limited to: – as director of GLW, as guarantor of the mortgage, as trustee for [his sons], and as a co-developer

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36 *GLW Group Ltd v Lepionka & Co Investments Ltd* [2018] NZHC 1658 at [68].

of the property." I therefore consider that the Paterson Family Trust is sufficiently connected to the plaintiffs in the 2017 proceeding to be considered their privy.

[62] It does not appear there is any argument relating to the defendants, but I set the details out here for completeness. The defendants in the current mortgagee proceeding are the same as in the 2017 proceeding, with the addition of one additional defendant: the trustees of the Lepionka Business Trust (LBT). Mr Paterson's pleadings and his submissions allege that the LBT is the governing body of LCIL, and is included as a defendant because it controls LCIL. Mr Lepionka is one of the three trustees of LBT, and gave evidence in the 2017 proceeding.

[63] Mr Colson submitted that the present case is similar to one were an entity wholly owned and effectively managed by a different entity was found to be a privy of that entity, and it would be "unreal" to suggest there is not privity between the Lepionka Business Trust and LCIL.[37] Mr Paterson agrees, and this does not appear to be an issue.

[64] I therefore find that the parties in the current mortgagee proceeding are either identical to those in the 2017 proceeding, or are their privies.

[65] In conclusion, there is sufficient union of interest in the subject matter of the 2017 proceeding, and relationship with the parties to that proceeding, that it is just that the Paterson Family Trust should be bound by the outcome in the Main Judgement. The Main Judgment acts as *res judicata* and bars Mr Paterson from pursuing the current mortgagee proceeding.

Does the fraud exception to the principles of res judicata apply?

[66] Mr Paterson seeks to avoid the rules of *res judicata* by relying on the fraud exception in *Shannon v Shannon*.[38] In *Shannon*, in ongoing litigation relating to a relationship property dispute, the appellant filed proceedings alleging a previous judgment had been obtained by fraud as it was based on perjured evidence. Those proceedings were struck out in the High Court, on the basis they disclosed no

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37 *Hamed Abdul Khaliq Al Ghandi Co v New Zealand Dairy Board*, above n 35, at [12].
38 *Shannon v Shannon* [2005] NZCA 83, (2005) 17 PRNZ 587.

reasonable cause of action and were an abuse of process of the Court. The appellant appealed the strike out decision.

[67] The Court of Appeal held that fraud, if proven, displaces the principles of *res judicata*:[39]

> There is no doubt that fraud is an exception to the principle of finality of judgments but, because of the strength of the policy grounds for requiring judgments to be final, there are stringent requirements that must be met before a judgment can be set aside on the basis of fraud…

[68] Before a claim alleging fraud can be allowed to proceed, there must be:[40]

(a) evidence newly discovered since the trial;

(b) evidence that could not have been found by the time of the trial by exercise of reasonable diligence;[41]

(c) evidence so material that its production at the trial would probably have affected the outcome; and

(d) when the fraud charged consists of perjury, then the evidence must be so strong that it would reasonably be expected to be decisive at a rehearing, and if unanswered must have that result. The new evidence must do more than corroborate evidence of a similar type given at the first trial.

[69] In relation to the onus of proof, the Court of Appeal held:[42]

> … in order to survive a strike-out application where the action is to set aside a judgment on the basis of fraud, the onus is on the party alleging fraud to show that the case is not frivolous or vexatious or an abuse of process. The plaintiff is required to put sufficient new evidence before the Court to show

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39 At [102].

40 At [104] and [119].

41 At [125]. This rule requiring due diligence is not "immutable"; Courts have a discretion to allow actions to proceed, even if based on evidence that would have been reasonably discoverable at the time of the original hearing. The test is whether it is in the interests of justice to do so and whether the public would consider it an affront to justice not to let the case proceed.

42 At [127].

> that the case has a reasonable prospect of success and, in the case of perjury, that the new evidence would be decisive, if established by proof.

[70] Mr Paterson relied on the 2003 Court of Appeal decision in *Roseneath Holdings Ltd v Grieve*,[43] as new evidence which was not considered in the Main Judgment. Mr Paterson submitted that in *Roseneath*, the Court found Mr Duncan (one of the trustees of LBT) caused an act of land transfer fraud to occur, and if Fitzgerald J had known of this judgment, she would not have made various findings in favour of LCIL.

[71] Not only is this a misunderstanding of the decision in *Roseneath*,[44] it is nonetheless immaterial. Mr Paterson does not establish, for the purposes of the stringent threshold established in *Shannon*, that this is new evidence, which could not have been discovered in the 2017 trial, and which would have affected the outcome. In particular, I note Mr Duncan did not give evidence in the 2017 trial, and I cannot see how the decision in *Roseneath* would have materially swayed Fitzgerald J's reliance on Mr Lepionka's evidence.

[72] For the sake of completeness, I note Mr Paterson also highlighted Fitzgerald J's finding that LCIL exercised its powers of sale for an improper purpose in breach of its duties as mortgagee. He repeatedly referred to this as fraud. I note this allegation would not bring the proceeding within the fraud exception, as it was thoroughly addressed in the Main Judgment.

[73] Mr Paterson also records allegations of fraud in his statement of claim, relating to the date of the s 179 notice. Fitzgerald J accepted the notice was signed on 1 April 2015,[45] and held it took effect as LCIL exercising its power of sale (due to various notice and service requirements) on 7 April 2015.[46] Fitzgerald J held the

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43 *Roseneath Holdings Ltd v Grieve*, above n 12.

44 The case was an appeal against an interim injunction granted against Roseneath Holdings Ltd. Mr Duncan's partner was a director of Roseneath, and he had referred a business associate to the company in the context of a loan required for a property development. The Court of Appeal found there was a serious question to be tried against Roseneath, that it was a party to a fraudulent scheme under the Land Transfer Act, although acknowledged that the events concerned may have been capable of innocent explanation following completion of any further discovery and perhaps additional evidence.

45 *AFI Management Pty Ltd v Lepionka & Co Investments Ltd*, above n 3, at [208].

46 At [247].

evidence did not demonstrate that the s 179 notice was backdated to 1 April 2015.[47] Again, as these issues were addressed in the Main Judgment, Mr Paterson's allegations of fraud in relation to the s 179 notice do not meet the stringent threshold to come within the fraud exception.

Conclusion

[74] I conclude it is appropriate to strike out the current mortgagee proceeding as it is barred by the principles of *res judicata*, and is therefore an abuse of the Court's process.

The current bankruptcy proceeding

[75] Mr Paterson originally pleaded one cause of action of malicious prosecution, alleging that LCIL and Mr Lepionka maliciously brought a bankruptcy application against him. I note the bankruptcy proceeding was brought by LCIL alone.

[76] On 28 July 2020, Mr Paterson filed an amended statement of claim recording two additional causes of action: abuse of process, and dishonest assistance.

The tort of malicious prosecution

[77] Mr Colson submitted that there has been some doubt over whether the tort of malicious prosecution exists in New Zealand in relation to civil proceedings generally. However, there is clear authority that it is available in relation to bankruptcy and liquidation proceedings, in the 1917 case of *Jones v Foreman*.[48] Additionally, I note more recent High Court authority, building on the 1999 decision in *Rawlinson v Purnell Jenkinson & Roscoe*,[49] has favoured the existence of the tort in relation to civil proceedings.[50] I also note that in considering an application for strike out in 2012, the High Court held the plaintiffs were entitled to the benefit of an

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47 At [465].
48 *Jones v Foreman* [1917] NZLR 798 (NZSC); *Deliu v Hong* [2013] NZHC 735 at [76].
49 *Rawlinson v Purnell Jenkinson & Roscoe* [1999] 1 NZLR 479 (HC).
50 *Burgess v Beaven* [2020] NZHC 497 at [20]; *Robinson v Whangarei Heads Enterprises Ltd* [2015] NZHC 1147, [2015] 3 NZLR 734 at [49]; *Deliu v Hong*, above n 48, at [80]-[88].

assumption that the tort may exist.[51] This is consistent with the principle that Courts will be reluctant to strike out claims in new or developing areas of law.

[78] The elements of the tort were established in *Rawlinson v Purnell Jenkinson & Roscoe*:[52]

(a) the defendant must have advanced a civil cause against the plaintiff;

(b) the application must have been ultimately resolved in the plaintiff's favour;

(c) the defendant must have had no reasonable and probable cause for bringing the civil proceeding;

(d) the defendant must have acted maliciously in instituting or continuing the civil proceeding; and

(e) damage of a kind for which the law will allow recompense must have been caused to the plaintiff.

[79] Mr Paterson's case obviously fails on the basis of the second element of the tort: the bankruptcy application proceeding he alleges was a malicious prosecution was not decided in his favour.[53] Additionally, three subsequent attempts by Mr Paterson to challenge that decision have failed.[54] The cause of action is clearly untenable.

[80] I conclude it is appropriate to strike out the malicious prosecution cause of action of the current bankruptcy proceeding, on the basis that Mr Paterson's statement of claim discloses no reasonably arguable cause of action.

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51 *Chesterfields Preschools Ltd v Commissioner of Inland Revenue* [2012] NZHC 394 at [47].

52 *Rawlinson v Purnell Jenkinson & Roscoe*, above n 49, at 484-485; adopted in *Burgess v Beaven*, above n 50, at [20].

53 *Lepionka & Co Investments Ltd v GLW Group Ltd*, above n 8.

54 *Paterson v Lepionka & Co Investments Ltd*, above n 9; *Paterson v Lepionka & Co Investments Ltd*, above n 10; *Paterson v Lepionka & Co Investments Ltd*, above n 7.

The tort of abuse of process

[81] In relation to abuse of process, Mr Paterson alleged that the bankruptcy notice was filed after he and GLW had commenced a separate proceeding against LCIL and Mr Lepionka (CIV-2015-404-2168). He alleged there was enough disclosed in that proceeding for it to be clear to LCIL that there was a genuine and substantial dispute over the monies being claimed.

[82] Mr Paterson submitted it is an abuse of process to use the legal process in its proper form in order to accomplish an ulterior purpose for which it was not designed. He alleged the bankruptcy proceedings were a tactic of oppression against him, to cause harm to him and procure a collateral advantage in existing litigation.

[83] In his statement of claim, Mr Paterson appeared to rely entirely on the 23 June 2016 decision of Associate Judge Smith in *GLW Group Ltd v Lepionka & Co Investments Ltd* to support this cause of action.[55] The Judge found LCIL served GLW with a statutory demand, despite other proceedings making it clear there was a genuine and substantial dispute over the amount claimed,[56] and found LCIL's inappropriate use of the statutory demand procedure was sufficient to justify an uplift above scale costs.[57]

[84] In his submissions, Mr Paterson paraphrased a quote from this judgment and incorrectly included reference to a dispute over the amount claimed in the "bankruptcy notice", and then recorded that the disputed debt referred to was "the very same debt I was bankrupted for". This is not quite correct. Associate Judge Smith was dealing with two statutory demands issued by LCIL to GLW: one in September 2015 for $2,712,576.39,[58] and one in November 2015 in respect of the costs awarded against GLW on 1 October 2015 (the sum leading to Mr Paterson's bankruptcy).[59]

[85] GLW applied to set aside the September 2015 statutory demand, and LCIL withdrew it in May 2016. I read the comments of Associate Judge Smith at [27]-[30]

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55 *GLW Group Ltd v Lepionka & Co Investments Ltd* [2016] NZHC 1380.
56 At [27].
57 At [34].
58 At [7].
59 At [24].

of the judgment, which Mr Paterson relied on, as relating to the September 2015 statutory demand (in other words, not the sum for which Mr Paterson was bankrupted). The Judge later records that although GLW had grounds to challenge the September 2015 statutory demand, GLW then failed to pay the October 2015 costs award, and failed to comply with statutory demand for payment of those costs.[60]

[86] The ingredients of the tort of abuse of process are:[61]

(a) the use of a legal process,

(b) in order to accomplish an ulterior process,

(c) which is the predominant purpose, and

(d) which causes damage to the plaintiff.

[87] Gilbert J examined the development of the tort in *Robinson v Whangarei Heads Enterprises Ltd*, and held it is concerned with the improper use of the court's processes to effect an object outside their legitimate scope.[62] Although similar to the tort of malicious prosecution, it differs in two key ways: it is not necessary for the plaintiff to show the relevant proceeding was brought without reasonable and probable cause; and the relevant proceeding need not have been decided in the plaintiff's favour.[63]

[88] Gilbert J referred to the decision in *Grainger v Hill*, where abuse of process had been made out.[64] In *Grainger*, the defendants had obtained a warrant for the plaintiff's arrest, asserting he had failed to pay a debt that was not yet due. Their objective was to force the plaintiff to hand over the register to a ship, which would prevent him from using the ship, and thereby pressure him to make early repayment of the loan. The plaintiff was told he would not be arrested if the register was handed over, and he therefore complied and repaid the loan. The Court held the tort of abuse

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60 At [36].
61 *Deliu v Hong*, above n 48, at [50].
62 *Robinson v Whangarei Heads Enterprises Ltd*, above n 50, at [29]-[47]; see also *Wilding v Te Mania Livestock Ltd* [2017] NZHC 717 at [398]-[409].
63 *Robinson v Whangarei Heads Enterprises Ltd*, above n 50, at [30].
64 *Grainger v Hill* (1838) 4 Bing (NC) 212 ; 132 ER 769 (Comm Pleas).

of process was established because the defendants had sought the warrant not for the purpose of arresting the plaintiff, but to extort the ship's register (which they had no right to) by threat of imprisonment.

[89] Gilbert J rejected the claim of abuse of process in the case before him. The defendants had applied for an order for the arrest of the plaintiff under s 55 of the Judicature Act 1908, after he took possession of equipment belonging to the defendant. Section 55 was concerned with situations where, after civil proceedings had been filed, a defendant threatened to leave New Zealand in circumstances where his or her absence would materially prejudice the plaintiff in prosecuting its claims and obtaining judgment. The plaintiff was arrested as he was about to board an international flight, and held in custody for approximately two days. The plaintiff claimed that there were no reasonable and proper grounds for his arrest and that the application was made to force him to return the contracting equipment, a purpose outside the scope of s 55.

[90] Although accepting the defendant's objective was to secure return of the equipment, Gilbert J held this did not necessarily mean the processes of the courts were abused. He noted the defendant sought recourse to it rights to return of its equipment, not "to extort some benefit to which it was not entitled and which was outside the scope of the Court's process."[65] Gilbert J held the return of the equipment was an "expected consequence" of the arrest order (which the defendant genuinely believed it was entitled to), but that did not mean the defendants were abusing the processes of the Court.[66] He distinguished *Grainger*, holding the immediate object of the defendant's application was to secure the plaintiff's arrest, an outcome "wholly within the purpose of the provision invoked."[67]

[91] It may be true that LCIL procured a collateral advantage in existing litigation by making the bankruptcy application. However, I cannot see how this alone is an abuse of process. As in *Robinson*, LCIL's primary purpose in bringing the application was to bankrupt Mr Paterson – a purpose entirely within the purpose of the legal process it used.

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65 *Robinson v Whangarei Heads Enterprises Ltd*, above n 50, at [46].
66 At [46].
67 At [47].

[92] I conclude it is appropriate to strike out the abuse of process cause of action of the current bankruptcy proceeding, on the basis that Mr Paterson's statement of claim discloses no reasonably arguable cause of action.

[93] I also note that this cause of action could be an abuse of process itself, as it may be barred by the principles of *res judicata*. I acknowledge the cause of action is quite different to that raised in the bankruptcy annulment applications, and relies on different facts (improper purpose, as opposed to disputed factual evidence about the purported payment of the debt by bank cheque, discussed below at [113]).

[94] However, in the first application to annul the bankruptcy in 2016, Associate Judge Osborne found there were three grounds for an annulment under s 309(1)(a) of the Insolvency Act: abuse of process, defect in form or procedure, or where a material fact was not drawn to the Court's attention.[68] The Judge found there was no abuse of process in the bankruptcy application process.[69] I note the decision of Associate Judge Smith which Mr Paterson relies on was delivered a week after Associate Judge Osborne's, but it does not raise any new relevant facts relating to the bankruptcy proceedings, which would be considered new evidence Mr Paterson could not have raised in the application to annul the bankruptcy. Regardless, he could have raised them in his second application to annul the bankruptcy in 2018.

Dishonest assistance

[95] Mr Paterson alleged that, pursuant to the doctrine of conversion, as at 5 April 2016 LCIL was a trustee for surplus funds of at least $4 million, following sales of some of the property. He alleged that in breach of trust, and its duties as a fiduciary, LCIL spent that money for the benefit of itself and related parties. He alleged Mr Lepionka was a participant in LCIL's breaches of trust and fiduciary duties.

[96] These arguments, relating entirely to the mortgagee sales by LCIL, do not relate to Mr Paterson's personal bankruptcy proceedings. This cause of action properly belongs with the current mortgagee proceeding, and is also barred by the

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68 *Paterson v Lepionka & Co Investments Ltd*, above n 9, at [17].
69 At [48].

principles of *res judicata*. While the claim of dishonest assistance was not considered in the Main Judgment, these arguments rely on the same facts and the same allegations of breaches of various duties by LCIL considered in the Main Judgment. Like the causes of action discussed above at [53], this claim should have been raised in the 2017 proceeding.

[97] I conclude it is appropriate to strike out the dishonest assistance cause of action of the current bankruptcy proceeding, on the basis that it is barred by the principles of *res judicata* and is therefore an abuse of the Court's process.

Application under s 166 of the Senior Courts Act

The law

[98] Section 166 of the Senior Courts Act 2016 (the Act) enables a Judge of the High Court to make an order restricting a person from commencing or continuing a civil proceeding in a senior court, another court, or a tribunal. It replaces s 88B of the Judicature Act 1908, and introduces a new tiered regime for making orders of different strength and duration.

[99] Section 166 sets out the three types of order a Court may make:

(a) a limited order restrains a party from commencing or continuing civil proceedings on a particular matter;

(b) an extended order restrains a party from commencing or continuing any civil proceedings on a particular or related matter; or

(c) a general order restrains a party from commencing or continuing civil proceedings.

[100] Section 167 sets out the grounds for making a s 166 order, the primary requirement being that the party has brought at least two proceedings that were totally without merit:

> **167 Grounds for making section 166 order**
>
> (1) A Judge may make a limited order under section 166 if, in civil proceedings about the same matter in any court or tribunal, the Judge considers that at least 2 or more of the proceedings are or were totally without merit.
>
> (2) A Judge may make an extended order under section 166 if, in at least 2 proceedings about any matter in any court or tribunal, the Judge considers that the proceedings are or were totally without merit.
>
> (3) A Judge may make a general order if, in at least 2 proceedings about any matter in any court or tribunal, the Judge considers that the proceedings are or were totally without merit.
>
> (4) In determining whether proceedings are or were totally without merit, the Judge may take into account the nature of any interlocutory applications, appeals, or criminal prosecutions involving the party to be restrained, but is not limited to those considerations.
>
> (5) The proceedings concerned must be proceedings commenced or continued by the party to be restrained, whether against the same person or different persons.
>
> (6) For the purpose of this section and sections 168 and 169, an appeal in a civil proceeding must be treated as part of that proceeding and not as a distinct proceeding.

[101] The phrase "totally without merit" is not defined in the Act, and the High Court has referred to the following factors as being relevant in determining whether a proceeding is totally without merit:[70]

(a) the proceeding has no prospect for success, whatsoever;

(b) the proceeding exposes the defendants to inconvenience, harassment and expense out of all proportion to the gain the litigant is likely to receive;

(c) the proceeding is brought at the drop of a hat despite the lack of merit;

(d) the litigant has paid no regard to the merits, proportionality, or costs of the proceeding;

(e) the statement of claim or defence discloses no reasonable grounds of bringing or defending the claim;

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[70] *Auckland Council v Mawhinney*, above n 1, at [50]; *Siemer v Attorney-General* [2018] NZHC 3406 at [86].

(f) the statement of claim is an abuse of the Court's process or is otherwise likely to obstruct the just disposal of the proceeding; and

(g) the litigant has failed to comply with a rule, practice direction, or court order.

[102] Under s 88B of the Judicature Act 1908, the predecessor to s 166, the proceedings were required to be vexatious. Although this is no longer a requirement, the test for vexatious proceedings is still relevant when assessing whether an order is necessary.[71] Features of vexatious proceedings can include:[72]

(a) a deeply entrenched pattern of behaviour characterised by a refusal to accept adverse decisions;

(b) extravagant and baseless allegations;

(c) claims against a wide range of people;

(d) failure to comply with the rules of court;

(e) the filing of prolix and confusing pleadings; and

(f) a failure to recognise any distinction between pleadings, evidence and submissions.

[103] Section 168 provides for the terms of an order under s 166:

> **168 Terms of section 166 order**
>
> (1) An order made under section 166 may restrain a party from commencing or continuing any proceeding (whether generally or against any particular person or persons) of any type specified in the order without first obtaining the leave of the High Court.
>
> (2) An order made under section 166, whether limited, extended, or general, has effect for a period of up to 3 years as specified by the Judge, but the Judge making it may specify a longer period (which

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71 *Auckland Council v Mawhinney*, above n 1, at [52]; *Siemer v Attorney-General*, above n 70, at [87].

72 *Attorney-General v Heenan* [2009] NZAR 763 (HC) at [138].

> must not exceed 5 years) if he or she is satisfied that there are exceptional circumstances justifying the longer period.

[104] Section 169 of the Act sets out the procedure for making s 166 orders, applying for leave when subject to a s 166 order, and appealing a s 166 order.

[105] I again note a Court should be cautious in making an order under s 166, as it amounts to a breach of a person's right of access to justice,[73] but acknowledge that caution must also be balanced against the stress and expense that opponents of meritless litigation face, and the limited resources available within the judicial system.[74]

[106] Hinton J in *Auckland Council v Mawhinney* identified a two-step process for deciding an application under s 166:[75]

(a) Are there at least two proceedings that are or were totally without merit?

(b) If so, in exercising its discretion, is it appropriate for the Court to make an order under s 166?

Are there at least two proceedings that are or were totally without merit?

[107] Ms White submitted Mr Paterson has commenced seven proceedings totally without merit:

(a) an application to the Tenancy Tribunal (application number 4057525) in 2015;[76]

(b) the first application for annulment of the bankruptcy, declined by Associate Judge Osborne in 2016;[77]

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73 *Auckland Council v Mawhinney*, above n 1, at [54].
74 At [55].
75 At [115].
76 *Paterson v GLW Group Ltd* Order of the Tenancy Tribunal on Application Number 4057525, Hastings, 19 December 2016.
77 *Paterson v Lepionka & Company Investments Ltd*, above n 9.

(c) the second application for annulment of the bankruptcy, declined by Associate Judge Johnston in 2018 (and upheld by the Court of Appeal in 2019);[78]

(d) the first proceeding against the Registrar-General of Land (the Registrar-General) in 2019 (CIV-2019-441-47), discontinued by Mr Paterson following a minute issued by Churchman J;[79]

(e) the second proceeding against the Registrar-General in 2020 (CIV-2020-441-4), discontinued by Mr Paterson;

(f) the current mortgagee proceeding; and

(g) the current bankruptcy proceeding.

[108] I consider six of these were totally without merit: the Tenancy Tribunal application, the second application for annulment of the bankruptcy, the first and second proceedings against the Registrar-General, the current mortgagee proceeding, and the current bankruptcy proceeding.

Tenancy Tribunal application 4057525

[109] Mr Paterson filed a claim with the Tenancy Tribunal (the Tribunal) in December 2016, alleging he had entered into an unwritten tenancy agreement with GLW in December 2015. On 19 December 2016, the Tribunal found that LCIL had been mortgagee in possession since April 2015, and therefore any tenancy agreement between GLW and Mr Paterson after that date did not confer on him occupation rights as against LCIL.[80] Additionally, the Tribunal decision expressed "real doubts" about whether an enforceable residential tenancy contract had been created, even if GLW were in a position to grant the tenancy.[81]

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78 *Paterson v Lepionka & Company Investments Ltd*, above n 10.
79 *Paterson v Registrar-General of Land* HC Wellington CIV-2019-441-47, 8 August 2019 (Minute of Churchman J).
80 *Paterson v GLW Group Ltd*, above n 76, at [24]-[35].
81 At [40].

[110] Mr Paterson applied for a rehearing on 23 December 2016, on the ground he had written evidence that the tenancy was granted in November 2011, based on a minute dated 7 November 2011. When LCIL sought discovery of the minute book, Mr Paterson advised it was held by a colleague, Mr Tony Kelly, who had prepared the minute. LCIL obtained an affidavit from Mr Kelly, recording he was not employed by Mr Paterson in 2011, had not prepared the minute, and had not spoken to Mr Paterson for several years. Mr Paterson subsequently withdrew his request for a rehearing.

[111] The Tribunal decision records that Mr Paterson appeared to accept that LCIL was mortgagee in position from April 2015 until August 2015, but had submitted evidence GLW re-entered possession of the property in December 2015.[82] Although that evidence was not compelling enough to sway the Tribunal, in fairness to Mr Paterson, I note that the Main Judgment had not yet been issued, meaning the High Court had not yet confirmed when LCIL became mortgagee in possession.

[112] However, the most concerning element of the application to the Tenancy Tribunal is the lack of credible evidence, and particularly the different basis for the tenancy raised in his application for a rehearing. It appears Mr Paterson simply changed the basis of the tenancy, to avoid the adverse finding relating to the timing of LCIL being in possession of the property. When viewed in this light, the application to the Tenancy Tribunal was totally without merit.

First application for annulment of the bankruptcy: *Paterson v Lepionka & Co Investments Ltd* [2016] NZHC 1331

[113] Although the first bankruptcy annulment application failed on multiple grounds, I do not consider it to have been totally without merit. In fairness to Mr Paterson, I note it was his first challenge to the bankruptcy order. The application centred on factual evidence relating to a bank cheque purportedly tendered as payment of the relevant debt. In the course of the hearing, it was accepted that LCIL never received the bank cheque, and there was no conclusive evidence it was posted.

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82 At [33].

However, I do not consider it was totally without merit for Mr Paterson to test that evidence in the proceeding.

[114] In declining the application, Associate Judge Osborne identified two stages to his analysis: first, he must have been satisfied, in terms of s 309(1)(a) of the Insolvency Act, that Mr Paterson should not have been adjudicated bankrupt; and second, whether it would be appropriate to exercise his discretion and grant the annulment. Associate Judge Osborne found Mr Paterson failed at the first stage: there was no procedural defect in the application for bankruptcy;[83] no material fact not drawn to the Court's attention in the adjudication proceeding;[84] and no evidence of an abuse of the process of the Court.[85]

[115] The Judge also noted that had he reached the second stage of the analysis, multiple factors pointed against granting the annulment: interest had accrued on the costs order, meaning the bank cheque would have been insufficient to meet the debt;[86] by reason of summary judgment entered in favour of LCIL on the same day as the bankruptcy (for over $3 million), LCIL likely would have been able to bankrupt Mr Paterson on that basis, even if the costs order had been paid;[87] Mr Paterson had substantial other debts;[88] Mr Paterson took no steps to protest his position;[89] and the Official Assignee had incurred costs which there was no evidence Mr Paterson could pay.[90]

Second application for annulment of the bankruptcy: *Paterson v Lepionka & Co Investments Ltd* [2018] NZHC 3022

[116] The second bankruptcy annulment application, filed two years later, is clearly a proceeding which was totally without merit. It was filed largely on the same grounds

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83 *Paterson v Lepionka & Co Investments Ltd*, above n 9, at [46].
84 At [47].
85 At [48].
86 At [51].
87 At [52]-[53].
88 At [54]-[56].
89 At [57].
90 At [58].

as the first,[91] and Associate Judge Johnston found the application was barred by the principles of *res judicata*.[92]

[117] There was a potential exception to the principle of *res judicata,* as Mr Paterson alleged the bankruptcy order was obtained by fraud. Associate Judge Johnston found that, even accepting there was jurisdiction to make an application on the basis of new evidence that the bankruptcy order was obtained by fraud, there was no new evidence.[93]

[118] Finally, Associate Judge Johnston recorded that even if his analysis were incorrect, he would not have exercised his discretion in Mr Paterson's favour because:[94] Mr Paterson had delayed two years in making his second application; Mr Paterson was bankrupt in Australia; and the application was opposed by the Official Assignee, who indicated Mr Paterson had assets of approximately $9,000 and potential liabilities of over $7,700,000.

[119] Although Mr Paterson's appeal of the second bankruptcy annulment application to the Court of Appeal does not count as a separate proceeding, I note the Court of Appeal upheld Associate Judge Johnston's findings.[95]

[120] For the sake of completeness, I also note that in an affidavit dated 31 January 2020, Mr Paterson continued to assert that LCIL were in possession of the bank cheque, and that he subsequently transferred the sum to them electronically, but he has provided no evidence of this.

First proceeding against the Registrar-General: *Paterson v Registrar-General of Land* CIV-2019-441-47

[121] On 2 August 2019, Mr Paterson filed a statement of claim seeking declarations and other relief against the Registrar-General relating to the property, and an interlocutory application for an interim injunction against the Registrar-General.

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91 *Paterson v Lepionka & Co Investments Ltd*, above n 10, at [4].
92 At [14].
93 At [17].
94 At [18].
95 *Paterson v Lepionka & Co Investments Ltd*, above n 7.

Mr Paterson was seeking to restrain the Registrar-General from processing an e-dealing that LCIL had lodged seeking to subdivide and transfer the property in exercise of its power of sale as mortgagee. Mr Paterson sought orders preventing transfers to or from most of the defendants, but did not name or serve any of the defendants.

[122] A review of those proceedings is instructive. Mr Paterson claimed yet again that the s 179 PLA notice was improperly executed by LCIL's solicitor, and alleged that LCIL colluded with Mr Duncan in a fraudulent scheme under the Land Transfer Act 1952. All the causes of action bear remarkable similarity to causes of action already heard and determined in the Main Judgment.

[123] Mr Paterson discontinued the proceeding after a teleconference before Churchman J on 8 August 2019.[96] Churchman J issued a minute recording concerns raised by the Court during the teleconference about the application, including:[97]

(a) the fact that the relief sought against the Crown was prohibited by s 17(1) of the Crown Proceedings Act 1950;

(b) although Mr Paterson had filed an undertaking as to damages, he was an undischarged bankrupt in New Zealand;

(c) the proceeding appeared to be a collateral attack on a judgment given by Associate Judge Bell on 15 July 2019 (discussed further below at [144]-[149]),[98] judgments given by Fitzgerald J in 2017 and 2018 (including the Main Judgment), and other related decisions; and

(d) the proceeding appeared to be predicated on the basis that Mr Paterson was acting on behalf of a trust, the beneficiaries of which were his two sons – a claim which had been unequivocally rejected by Fitzgerald J.[99]

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96 *Paterson v Registrar-General of Land*, above n 79.
97 At [6]-[7].
98 *Lepionka & Co Investments Ltd v Naldapat Ltd*, above n 29.
99 *GLW Group Ltd v Lepionka & Co Investments Ltd*, above n 36, at [68].

[124] Churchman J also drew to Mr Paterson's attention "the possibility that his actions in commencing these proceedings may ultimately be found to be a contempt of Court".[100]

[125] In a memorandum dated 20 August 2019, Mr Paterson alleged that LCIL's counsel misled Churchman J in a memorandum dated 7 August 2019, which was not provided to Mr Paterson in advance of the teleconference. Mr Paterson recorded that the reason he discontinued the proceeding was because he was understandably anxious about the possibility of being in contempt of court.

[126] In a memorandum dated 10 July 2020, in the second proceeding against the Registrar-General, Mr Paterson alleged Churchman J "essentially cut and pasted the LCIL untruthful comments into his minute". Mr Paterson recorded that, after the teleconference but before he had seen the LCIL memorandum, he sought advice from his McKenzie friend, Mr Dewar. He discontinued the proceeding as he did not want to prejudice other proceedings he was pursuing at the time, and says he discontinued it "with great regret".

[127] Mr Paterson has not expanded on these allegations to explain how Churchman J was misled. I have reviewed the memorandum of 7 August 2019, I can find nothing in that I would consider to be misleading.

[128] I consider this proceeding to have been totally without merit.

Second proceeding against the Registrar-General: *Paterson v Registrar-General of Land* CIV-2020-441-4

[129] On 13 March 2020, Mr Paterson filed a statement of claim seeking relief (including declarations, damages, and orders vesting of parts of the property with Mr Paterson) against the Registrar-General, in relation to the property. LCIL, LCL and the SJ Lepionka Family Trust were later joined as defendants to that proceeding, and applied for strike out on the grounds that the statement of claim: disclosed no reasonably arguable cause of action as Mr Paterson lacked standing, was barred from

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100 *Paterson v Registrar-General of Land*, above n 79, at [10].

bringing a claim under s 54 of the LTA 2017 due to the time that had passed, and had no reasonably arguable interest in the land; and was vexatious and an abuse of process, being a collateral attack on previous judgments of the courts. In the alternative, they sought summary judgment or security for costs.

[130] The statement of claim relied on almost identical facts as in the first proceeding against the Registrar-General, and sought similar remedies.

[131] In a memorandum dated 10 July 2020, Mr Paterson recorded that his reason for discontinuing the proceeding was that, following a minute issued by Cull J, he became aware that the proceeding may be unnecessary if he was successful in the current mortgagee proceeding. He recorded that he discontinued the proceeding in good faith, to mitigate the costs to all parties.

[132] I consider on its face this proceeding was totally without merit, and yet another attempt to relitigate matters previously determined.

The current mortgagee proceeding: *Paterson v Lepionka & Co Investments Ltd* CIV-2019-441-78

[133] As I have determined at [48]-[74] and [95]-[97], the current mortgagee proceeding should be struck out as an abuse of process based on the principles of *res judicata*. It is another collateral attack on an issue that has already been decided by the High Court, and is totally without merit.

The current bankruptcy proceeding: *Paterson v Lepionka & Co Investments Ltd* CIV-2020-441-41

[134] As I have determined at [77]-[94], the current bankruptcy proceeding should be struck out on the basis that the statement of claim discloses no reasonably arguable cause of action. Additionally, for the purposes of the s 166 analysis, I note the current bankruptcy proceeding can also be seen as a collateral attack on the bankruptcy adjudication and subsequent challenges outlined above; the issue has now been decided three times by the High Court and once by the Court of Appeal. The malicious prosecution proceeding is totally without merit.

Conclusion

[135] In these six proceedings (the Tenancy Tribunal application, the second application for annulment of the bankruptcy, the first and second proceedings against the Registrar-General, the current mortgagee proceeding, and the current bankruptcy proceeding), Mr Paterson has consistently displayed a willingness to bring proceedings:

(a) that have no prospect for success;

(b) that expose the defendants to inconvenience, harassment and expense out of all proportion to the gain he is likely to receive;

(c) without regard to the merits, proportionality or costs of the proceeding;

(d) disclosing no reasonable grounds of bringing a claim; and

(e) that are an abuse of the Court's process.

Is it appropriate for the Court to make an order under s 166?

[136] In addition to the six proceedings identified above, which were totally without merit, I also note the broader context of the litigation between the parties. I first consider other proceedings commenced or defended by Mr Paterson, appeals by Mr Paterson, and Mr Paterson's general conduct in proceedings, before considering Mr Paterson's submissions.

Other proceedings commenced by LCIL and defended by Mr Paterson

[137] Ms White submitted four further proceedings commenced by LCIL, due to Mr Paterson's actions, are relevant:

(a) removal of a caveat lodged over the property by Horseshoe Bend Hawkes Bay Limited in March 2016 (the Horseshoe Bend caveat);[101]

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[101] *Lepionka & Co Investments Ltd v Horseshoe Bend Hawkes Bay Ltd* [2016] NZHC 2318.

(b) removal of a caveat lodged over the property by Mr Paterson in May 2018 (the Paterson caveat);[102]

(c) removal of two caveats lodged over the property by Naldapat Limited and LW354 Limited in December 2018 and January 2019 (the Naldapat caveat and the LW354 caveat);[103] and

(d) application to set aside a statutory demand issued by Mr Paterson in December 2019.[104]

[138] Ms White submitted these should be considered by the Court as proceedings which have been "continued" by Mr Paterson for the purposes of s 167(5), as his actions (in lodging a caveat or issuing a statutory demand) meant that it was necessary for LCIL to bring the proceedings. As I have found the six proceedings discussed above are sufficient to meet the threshold (of two proceedings that were totally without merit) for making a s 166 order, I do not need to consider these proceedings at the first stage. The appropriate course is to consider them as relevant in this second stage, when I am exercising my discretion.

[139] I first consider the four caveats, which were all removed.

[140] Although the Horseshoe Bend, Naldapat, and LW354 caveats were brought by companies (rather than Mr Paterson personally), those proceedings can be considered when deciding whether to exercise the discretion under s 166.[105] All three companies were, at the relevant times, controlled by associates of Mr Paterson: Ms Elizabeth O'Neil (Mr Paterson's former wife) incorporated Horseshoe Bend Hawkes Bay Limited, and Ms Nadia Dapas (Mr Paterson's current de facto partner) was its sole director at the time;[106] Ms Dapas was the director and shareholder of LW354 Limited and Naldapat Limited.[107] Fitzgerald J later recorded, when dealing

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102 *GLW Group Ltd v Lepionka & Co Investments Ltd*, above n 36.
103 *Lepionka & Co Investments Ltd v Naldapat Ltd*, above n 29.
104 *Lepionka & Co Investments Ltd v Paterson* HC Auckland CIV-2020-404-36, 3 July 2020 (Minute of Associate Judge Bell).
105 *Auckland Council v Mawhinney*, above n 1, at [128].
106 *Lepionka & Co Investments Ltd v Horseshoe Bend Hawkes Bay Ltd*, above n 101, at [17].
107 *Lepionka & Co Investments Ltd v Naldapat Ltd*, above n 29, at [2].

with the Paterson caveat, that Mr Paterson accepted he was responsible for causing Horseshoe Bend to lodge the caveat.[108] Associate Judge Bell found he was behind the lodging of the LW354 caveat.[109]

[141] Associate Judge Sargisson ordered the removal of the Horseshoe Bend caveat, finding there was "no room for the slightest inference that the sales contracts referred to in Horseshoe's caveat afford Horseshoe the interest … that its caveat claims."[110] The Judge made increased costs orders against GLW and Ms O'Neil.[111]

[142] The Paterson caveat was originally lodged based on GLW's claimed interest in the land, but Mr Paterson later claimed he had a caveatable interest under a trust for his sons. Fitzgerald J ordered the removal of the caveat, and made an order restraining Mr Paterson from lodging any further caveats, noting:[112] Mr Paterson's "concerning" conduct, in taking differing positions as to the basis of the caveat without proper evidence; concerns about Mr Paterson's actions as an undischarged bankrupt and his involvement in GLW; the Horseshoe Bend caveat; and the loss caused to LCIL. The Judge made increased costs orders against Mr Paterson.[113]

[143] Naldapat Limited removed its caveat following agreement with Lepionka, and Associate Judge Bell ordered the removal of the LW354 caveat.[114] The Judge held:[115]

> … the breaches of the order and the undertaking mean that the caveat should not have been lodged at all. I am satisfied that LW354 Ltd's caveat was vexatious and an abuse of the caveat process. Mr Paterson was clearly behind lodging the caveat. He and his associates should understand that the litigation cannot be re-opened and that the Lepionka mortgagee can complete the sales of the lots in the Kahuranaki Road property. This attempt to block the transfers of title has been pointless.

[144] Perhaps the best example of Mr Paterson's approach to this litigation and relitigation is the LW354 caveat. On 27 June 2019, Associate Judge Bell heard the

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108 *GLW Group Ltd v Lepionka & Co Investments Ltd*, above n 36, at [69].
109 *Lepionka & Co Investments Ltd v Naldapat Ltd*, above n 29, at [85].
110 *Lepionka & Co Investments Ltd v Horseshoe Bend Hawkes Bay Ltd*, above n 101, at [35].
111 *Lepionka & Co Investments Ltd v Horseshoe Bend Hawkes Bay Ltd* [2017] NZHC 1482.
112 *GLW Group Ltd v Lepionka & Co Investments Ltd*, above n 36, at [66]-[73].
113 *GLW Group Ltd v Lepionka & Co Investments Ltd* [2018] NZHC 2445.
114 *Lepionka & Co Investments Ltd v Naldapat Ltd*, above n 29.
115 At [85].

application by LCIL to set aside a caveat lodged against the property by LW354 Limited.

[145] The interest claimed under that caveat was:[116]

> The abovenamed caveator claims an interest in the land contained in the above certificate of title 716,653 as beneficial and/or equitable owner of the freehold estate and the fee simple, pursuant to a cestui que trust agreement as per the deed of appointment and retirement of trustee dated 13 November 2018 as successor pursuant to a deed of appointment of trustee dated 20 July 2017 between the registered owner GLW Group Limited and Naldapat Limited.

[146] At the end of the hearing on the same day, the Judge announced that the LW354 caveat should be removed. The Judge did not deliver his reasons in writing until 15 July 2019.

[147] In response to the oral decision delivered on 27 June 2019, a new caveat was lodged against the property on 28 June 2019. The caveator was 47 Fairfax Road Pty Limited, a company registered in New South Wales, Australia. Company records show that Ms Dapas is a director of the company, and Mr Paterson was formerly a director. The interest claimed was "pursuant to agreements to mortgage between the registered owner of the above named caveator, dated 15 September 2009, (prior to the registration of the first mortgage), and 9 June 2017."

[148] Additionally, Ms Dapas filed a notice of claim dated 5 July 2019, seeking to register a relationship property interest under the Property (Relationships) Act 1974, by virtue of her 12-year de facto relationship with Mr Paterson. This is wholly inconsistent with Mr Paterson's claim in the LW354 caveat that GLW owned the property as a trustee for his sons under a trust established in 2009.

[149] I also note that Mr Paterson unsuccessfully sought to challenge this decision of Associate Judge Bell in the Court of Appeal.[117]

[150] I turn now to the statutory demand. Mr Paterson issued a statutory demand to LCIL on 31 December 2019, claiming payment for chattels LCIL had allegedly

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116 At [1].
117 *LW354 Ltd v Lepionka & Co Investments Ltd* [2020] NZCA 137.

converted from his family. Associate Judge Bell set aside the demand on 20 March 2020,[118] and held in a minute awarding increased costs against Mr Paterson:[119]

> [12] Mr Paterson's actions were reckless at the least. They were also calculated to cause embarrassment and inconvenience to [LCIL] in serving a statutory demand on New Year's Eve.
>
> …
>
> [14] The service of a statutory demand is relatively simple, compared with the steps that a company must take to have the statutory demand set aside. It must have been clear to Mr Paterson that he was deliberately vexing [LCIL] and putting it to needless expense and extra work and stress over the holiday period when he must have known there was no proper basis for the statutory demand.

Appeals by Mr Paterson

[151] Ms White submitted that Mr Paterson's unsuccessful attempts to appeal the judgments detailed above are relevant to the making of a s 166 order:

(a) Mr Paterson has twice attempted to challenge the Main Judgment in the Court of Appeal, and leave to appeal has been declined each time;[120]

(b) the Court of Appeal declined Mr Paterson's appeal of Associate Judge Johnston's decision in the second bankruptcy annulment application;[121] and

(c) the Court of Appeal declined Mr Paterson's appeal of Associate Judge Bell's removal of the LW354 caveat, and the Court ordered the Registry not to accept any documents for filing from Mr Paterson in relation to the appeal.[122]

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118 *Lepionka & Co Investments Ltd v Paterson* [2020] NZHC 831.
119 *Lepionka & Co Investments Ltd v Paterson*, above n 104.
120 *GLW Group Ltd (in liq) v Lepionka & Co Investments Ltd* [2019] NZCA 24; *Paterson v Lepionka & Co Investments Ltd*, above n 6.
121 *Paterson v Lepionka & Co Investments Ltd*, above n 7.
122 *LW354 Ltd v Lepionka & Co Investments Ltd*, above n 117.

Conduct of proceedings by Mr Paterson

[152] Ms White submitted that Mr Paterson's general conduct in various proceedings is relevant to the making of a s 166 order, which can be summarised as Mr Paterson:

(a) continuing to file documents himself in proceedings, despite having no formal role in the relevant company that is a party to the proceeding;

(b) failing to comply with timetabling orders;

(c) adopting contradictory positions about the basis of his claims (for example, who held a caveatable interest in the property in relation to the Paterson caveat discussed at [142] above);

(d) breaching procedural rules;

(e) filing generally ill-advised applications (for example, seeking a jury trial in the current proceedings);

(f) taking actions calculated to cause inconvenience (particularly, the statutory demand discussed at [150] above); and

(g) generally causing increased costs to the defendants and the Courts.

Mr Paterson's submissions

[153] Mr Paterson submitted LCIL has brought a number of proceedings against him and entities associated with him without merit, and there have been multiple costs awards against LCIL. He drew particular attention to the 2016 decision in *GLW Group Ltd v Lepionka & Co Investments Ltd* (also relied on at [83] above in relation to the tort claim of abuse of process), where Associate Judge Smith found: LCIL served GLW with a statutory demand, despite other proceedings making it clear there was a genuine and substantial dispute over the amount claimed; [123] and LCIL's

[123] *GLW Group Ltd v Lepionka & Co Investments Ltd*, above n 55, at [27].

inappropriate use of the statutory demand procedure was sufficient to justify an uplift above scale costs.[124]

[154] Mr Paterson also highlighted the 2016 decision of Associate Judge Smith in *Lepionka & Co Investments Ltd v GLW Group Ltd* (where Mr Paterson personally was the second defendant) awarding costs against LCIL, where LCIL discontinued a proceeding alleging trespass and seeking vacant possession, shortly before the hearing.[125] Mr Paterson submitted he had spent a substantial amount of money travelling from Australia to attend the proceedings.

[155] At the hearing before me, Mr Paterson's submissions consisted of repetition of the arguments outlined at [35] above. In addition to those submissions, he made two highly inflammatory and irrelevant claims, unsubstantiated by any evidence, which do not warrant examination. For completeness, I simply refer to those claims as the breast cancer and Black Power claims. The importance of these claims is to demonstrate Mr Paterson's obsession with this litigation and his belief system, which appears to be increasing in its intensity rather than abating.

Analysis

[156] The six proceedings I have referred to at [109]-[135] are by themselves enough to justify my making an order under s 166. In relation to the other cases referred to by Ms White at [137]-[151], I consider them to be relevant to deciding whether to exercise my discretion.

[157] The proceedings discussed above display various features of vexatious proceedings, which support the making of a s 166 order: a deeply entrenched pattern of behaviour characterised by Mr Paterson's refusal to accept adverse decisions; claims against a wide range of people and entities, including the Registrar-General; and failure to comply with rules of the courts. The manner in which Mr Paterson conducts litigation – personally – is vexatious. Constant case management is needed by the defendants to consolidate proceedings, strike out new proceedings, obtain and

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124 At [34].
125 *Lepionka & Co Investments Ltd v GLW Group Ltd* [2016] NZHC 1337.

enforce costs orders, and respond to "thinly disguised old arguments masquerading as new ones". Documents are frequently filed late, and submissions filed on the morning of the hearing. This was true of the proceedings before me.

[158] The repetitive nature of Mr Paterson's proceedings, most of which are collateral attacks on matters which have clearly been determined by the courts multiple times, also supports the making of a s 166 order. Any question of law in relation to the dispute about LCIL's statutory and equitable duties as mortgagee underlying the Main Judgment has been tried and resolved.

[159] The usual deterrents to unmeritorious litigation (most notably, the cost) do not appear to deter Mr Paterson. He is impecunious and is unrepresented in almost all of his litigation. Although applications for strike out and security for costs are available to dismiss unmeritorious claims, I note this still causes considerable cost and inconvenience to the defendants, and uses court resources.

[160] A compounding feature of this case is the intensity of proceedings brought within a limited timeframe. Rather than slowing down, if anything, the filing of claims appears to have accelerated. In addition, the grandiosity of some of the later claims is concerning.

[161] In fairness to Mr Paterson, I acknowledge the fact that the defendants in the two current proceedings, as applicants for the s 166 order, are not without fault themselves. The Main Judgment made findings against LCIL, and the increased costs awards noted above show they have also commenced or continued questionable proceedings. However, I note the two judgments Mr Paterson refers to are from 2016, and predate the substantive decision of this Court on these matters in the Main Judgment. He has not pointed to any more recent complaints about the conduct of the defendants, other than the breast cancer and Black Power allegations referred to at [155] above. The evidence he purported to produce in support of this allegation is inadmissible in any event.

[162] I think it is highly likely that Mr Paterson's conduct would continue if an order were not made in the defendant's favour. An order under s 166 is necessary.

The terms of a s 166 order

[163] Having decided an order under s 166 is appropriate, I must now consider the terms of the order.

[164] Ms White submitted an extended order for a period of five years is appropriate, restraining Mr Paterson from commencing or continuing proceedings relating to any of the matters arising out of the dispute between the parties over the development of the property. Ms White submitted a limited order would be insufficient, given the broad range of claims Mr Paterson has brought.

[165] Section 168 of the Act provides that an order has effect for a period of up to three years. and that a Judge may make an order for up to five years if satisfied there are "exceptional circumstances justifying the longer period." I note the courts have recorded that the intent of the Act was not to give Judges a "blank cheque", and the default limit of three years was set, being sensitive to the impairment of the right of access to justice.[126] Hinton J found there were exceptional circumstances justifying a five year term in *Mawhinney,* noting litigation between the parties had been ongoing for 25 years, and the meritless proceedings for the purposes of the s 166 order went back 13 years.[127]

[166] I consider an extended order restraining Mr Paterson from commencing or continuing any civil proceedings in relation to the dispute between the parties stemming from the property development (including any matters relating to the mortgagee proceedings and the bankruptcy proceedings) is appropriate. However, I do not consider there are exceptional circumstances warranting an order for a period of more than three years.

[167] I note that although four years of litigation creates a burden for the defendants, it falls well short of the 13-25 years justifying a five year order in *Mawhinney*. I accept that in *Mawhinney*, the remedy was not available until very late in the piece, and the

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126 *Judicature Modernisation Bill: Report of the Ministry of Justice to the Justice and Electoral Committee* (Ministry of Justice, Departmental Report CRT-09-04-07, April 2014) at [298]-[300] as cited in *Auckland Council v Mawhinney*, above n 1, at [158].

127 *Auckland Council v Mawhinney*, above n 1, at [159].

13-25 year time span is therefore not the benchmark for cases that follow. However, I am not persuaded that an order for five years is appropriate in the present case, given the caution the courts need to exercise when restricting a person's access to justice.

Orders

[168] The current mortgagee proceeding (CIV-2019-441-78) is struck out, on the basis that it is barred by the principles of *res judicata* and is therefore an abuse of the Court's process.

[169] The current bankruptcy proceeding (CIV-2020-441-41) is struck out, on the basis that Mr Paterson's statement of claim discloses no reasonably arguable cause of action.

[170] An order under s 166 is made on the following terms:

> Garth Bowkett Paterson, in any capacity, including but not limited to as a trustee of any trust, is restrained from commencing or continuing any civil proceeding (or matter arising out of a civil proceeding) that relates in any way to the matters listed below, for a period of three years:
>
> (a) Any interest in any of, or part of, land at 354 Kahuranaki Road, Hawke's Bay, including the parcels of land having the following unique identifiers:
>
> (i) 716653;
>
> (ii) 716652;
>
> (iii) 716651;
>
> (iv) 822870;
>
> (v) 822871;
>
> (vi) 868572;
>
> (vii) 868573;

(viii) 868574;

(ix) 868575;

(x) 868576;

(xi) 868577.

(b) Any caveat lodged on any of the parcels of land identified at (a) or their predecessors or successors in title.

(c) Any sale or proposed sale of any of the parcels of land identified at (a).

(d) The development by GLW Limited (in liquidation), and/or Lepionka and Company Investments Limited as mortgagee, at 354 Kahuranaki Road, Hawkes Bay and which resulted in the parcels of land identified at (a).

(e) The borrowing or lending arrangements involving two or more of: GLW Limited (in liquidation), Lepionka and Company Investments Limited, AFI Management Pty Limited, K R Mortgage Company Limited, and Garth Bowkett Paterson (in any capacity whatsoever).

(f) Any actions of any of the defendants in this proceeding, or any of their family members, or KR Mortgage Company Limited, which in any way relates to any of the above matters.

Doogue J