IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-454-109
[2019] NZHC 1374

BETWEEN	EPSOM WOODS LIMITED Plaintiff
AND	WAITAKERE FARMS LIMITED Defendant

Hearing: 17 June 2019

Appearances: D Hayes for the Plaintiff
A A H Low for the Defendant

Judgment: 17 June 2019

ORAL JUDGMENT OF ASSOCIATE JUDGE R M BELL

Solicitors:
Hunwick Law Limited, Hamilton, for the Plaintiff
Alexandra Low, Auckland, for the Defendant
Copy for:
David Hayes, Hamilton, for the Plaintiff

[1] On 14 March 2017, Waitakere Farms Ltd became the registered proprietor of Lot 1 DP 320387, a 51 hectare forestry lot at 131-149 Anzac Valley Road, Waitakere. It took title as nominee under an agreement for sale and purchase between Nags Head Horse Hotel Ltd as vendor and Addam Buttling as purchaser. Nags Head sold the property under its power of sale under a registered first mortgagee.

[2] Epsom Woods Ltd, the plaintiff, says that Waitakere Farms Ltd's interest in the property is subject to interests not registered against the title. It says that it has rights under an agreement to lease dated 15 December 2009, under which it owns the trees on the land, and the property is subject to a residential tenancy agreement that will not expire until 31 July 2040. In this proceeding, Epsom Woods Ltd seeks orders and declarations upholding the interests which it alleges. These interests are said to have arisen years before Waitakere Farms Ltd became the registered proprietor. Epsom Woods Ltd does not say that Waitakere Farms Ltd granted ownership of the trees, or that it entered into a residential tenancy agreement. The agreement as to the trees goes back to December 2009 and the residential tenancy agreement is said to have been made in July 2010.

[3] For reasons I will give, I reject the case for Epsom Woods Ltd. I do so on the application for summary judgment by Waitakere Farms Ltd. The short point is that Waitakere Farms Ltd took title under s 105 of the Land Transfer Act 1952. On becoming registered proprietor from a mortgagee exercising a power of sale, the title was cleared of all interests against the property except those expressly authorised under s 105. Waitakere Farms Ltd has pressed for wider grounds for me to find in its favour. It has applied not only for summary judgment but also for strike-out, alleging that this proceeding is an abuse of process. It has also applied for security for costs. In my view, the case can be determined on the summary judgment application. While orders might be made in its favour on the other matters, they are not essential to my decision.

Background

[4] Waitakere Farms Ltd is a single purpose company. It was incorporated to take title to the property in Anzac Valley Road. The director and shareholder of Waitakere Farms Ltd is Mr Joe Duncan. He says that his business includes operating as a second tier financier. On 14 December 2016, Mr Buttling entered into a written agreement to buy the property from Nags Head Horse Hotel Ltd. A copy of the agreement put in evidence describes the purchaser as "Addam Buttling and/or nominee". The Auckland District Law Society form for an agreement for sale and purchase has been used.[1] The purchase price was $1,650,000. The deposit was 5 per cent. The settlement date was 17 February 2017. Mr Buttling approached Mr Duncan for finance to complete the purchase, but they could not agree on terms. Instead, Mr Duncan agreed to take an assignment of Mr Buttling's interest in the agreement. He has put in evidence a document dated 20 January 2017, under which Mr Buttling's interest was assigned to Mr Duncan or his nominee.

[5] A search copy of the register under the Land Transfer Act 1952 made on 17 September 2018 shows that the Anzac Valley Road property is the dominant tenement for a number of easements, the servient tenement for other easements, and that the property is subject to various land and fencing covenants. No mortgage is registered against the title. There are no caveats lodged against the title. There are no forestry rights registered against the title. By "forestry rights" I mean rights that may be registered under ss 2A and 3 of the Forestry Rights Registration Act 1983.

[6] Epsom Woods Ltd was incorporated in June 2018. Its director and sole shareholder is Mr Andrew Bond. Mr Bond has been adjudicated bankrupt at least once already but is now discharged from bankruptcy. Mr Duncan says that Mr Bond contacted him in July 2018, offering to buy the property for $4m. Mr Duncan counter-offered for $4.5m plus GST and, somewhat to Mr Duncan's surprise, Mr Bond accepted the offer. They made an agreement dated 30 July 2018. It had a due diligence period of 45 days, with the deposit only payable once the agreement became unconditional. The purchaser was Epsom Woods Ltd. Waitakere Farms Ltd was the

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[1] Auckland District Law Society and Real Estate Institute of New Zealand *Agreement for Sale and Purchase of Real Estate* (9th ed, 2012).

vendor. The due diligence condition was not satisfied and Waitakere Farms Ltd cancelled the agreement for non-satisfaction of that condition in September 2018. That agreement is no more than part of the background to this case, apart from some matters arising in it which relate to the argument for Waitakere Farms Ltd that Epsom Woods Ltd is acting as no more than a proxy for Mr Peter Mawhinney. More about him soon.

The agreement to lease and the residential tenancy agreement

[7] Now for the transactions which Epsom Woods Ltd relies on. Mr Bond has attached to his evidence a copy of a document headed "Agreement to Lease". The lessor is Richard Gregory Vesey, as trustee of the Doug Vesey Trust. At the time, Mr Vesey was the registered proprietor of the property. The lessee is described as "North Kaipara Nominees Ltd as trustee of the Anzac Valley Forestry Trust". Mr Peter Mawhinney signed for the lessee as a director of North Kaipara Nominees Ltd.

[8] The agreement to lease provides that the lessor agrees to lease, and the lessee agrees to take on the lease of the land, and that the lease will be in the form attached to the agreement - a deed of lease. The term of the lease is 999 years, beginning on 1 November 2008. The rental is $10 per annum, including GST. The rent is payable in arrears only, and only if demanded in writing. For this case, Epsom Woods Ltd relies on these provisions in Schedule C of the Deed of Lease attached to the agreement.

> **4 Ownership of Improvements**
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> Notwithstanding any agreement or rule of law to the contrary, and subject only to the terms of a forestry right granted by the lessor with this lease to the lessee as forestry right holder, the parties agree absolutely that in consideration of the lessee entering into this lease the lessee is and shall forever be the owner of the following:
>
> - Any trees or growing crops presently standing on the land;
> - any trees or growing crops which may at any time during the term of the lease be planted or growing on the land by any person;
> - all buildings, fences and other improvements presently erected on the land; and

- any building, fence or other improvement erected on the land at any time after the date of this lease.

5 Lessee's Rights in Respect of Lessee's Fixtures

The lessee shall be entitled:

- to grant any forestry right under the Forestry Rights Registration Act 1984 in respect of any trees now or any time after growing on the land;

- to form and construct access roads and tracks to and between such trees and any processing sites within the land;

- to remove, replace or sell any building or other improvement erected or placed on the land at any time without liability for reinstatement of the land after such sale, removal or replacement.

[9] The deed of lease also gives the lessee an option to purchase the land. The purchase price is $10.00 inclusive of GST, with a deposit of $1.00, and the option may be exercised at any time up until 5:00 pm on 31 December 3007.

[10] Another document is the residential tenancy agreement. It is dated 21 July 2010. Mr Vesey has entered into it as landlord. Curiously, his address is given as Dalian, China. The tenant is Anthony Milton Mawhinney, the brother of Mr Peter Mawhinney. The term of the tenancy is until 31 July 2040. The form of the agreement is for a standard residential tenancy agreement used by the Real Estate Institute of New Zealand and the Auckland District Law Society. As a special condition the parties have added:

> The parties agree that this agreement is governed by section 8 of the Residential Tenancies Act 1986 (contracting in) except for section 5 of that Act.

I understand that under s 8 of the Residential Tenancies Act 1986 it is possible to contract into the Act when a tenancy might otherwise be outside the Act, for example, when it falls under some of the exclusions under ss 5 to 7.

Peter Mawhinney

[11] It is necessary to bring Mr Peter Mawhinney into the decision. I have already referred to him briefly. He is currently an undischarged bankrupt. He has been bankrupt at least once before. He has been associated with the Anzac Valley Road for many years now although he has never, in his own name, directly owned a 100 per cent freehold interest in the property. Instead, the property has been held by trusts, seemingly for his benefit. Mr Mawhinney has gained some notoriety, at least in the resource management field, for coming up with ingenious plans to subdivide the property, notwithstanding that he has come to grief, first, with the Waitakere City Council and more recently with the Auckland Council. He has managed to offend the Auckland Council so much that it applied for an extended order under s 166 of the Senior Courts Act 2016. On 28 February this year, Hinton J made an order against Mr Mawhinney in these terms:[2]

> Peter Mawhinney, 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 parcels of land contained in the identifiers set out in schedule A to this judgment for a period of five years.

Schedule A to her judgment lists a number of properties in the area of Anzac Valley Road. The first property in the list is Lot 1 DP 320387 at 131-140 Anzac Valley Road. That is the property in this case.

[12] While many of Mr Mawhinney's forays into litigation have been in connection with attempts to subdivide the property and involve proceedings in the Environment Court, he has not restricted himself. He has also tangled with the Inland Revenue and with his creditors. One of his creditors was Nags Head Horse Hotel Ltd. It lent the owner of the Anzac Valley Road property $420,000. That was a term loan, secured by a registered first mortgage. Apparently, the purpose of the loan was to allow Mr Mawhinney to refinance other debts and to prevent a mortgagee sale of the property. While other mortgages have been registered against the title, Nags Head has always ranked as first mortgagee. It may be noted that Nags Head took its interest after the agreement to lease in 2009 and before the residential tenancy agreement of

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2 *Auckland Council v Mawhinney* [2019] NZHC 299 at [160].

July 2011. At the time of the mortgage Mr Vesey was the registered proprietor. He was replaced by Forest Trustee Ltd in October 2011.

[13] In 2013, the loan to Nags Head fell due for repayment. The loan was not repaid. Nags Head wished to exercise its rights under the mortgage. It faced obstruction by Mr Mawhinney. In fairly quick order he lodged three caveats against the title. Associate Judge Christiansen ordered them to be removed.[3] He gave his decision on 24 June 2013. Shortly after that decision, Mr Mawhinney lodged a fresh caveat against the title, caveat 9456724.1. The interest claimed under the caveat was:

> An equitable estate and interest arising from an agreement to lease to the caveator dated 15 December 2009, known to, consented to and binding on the lessor and registered proprietor Forest Trustee Ltd.

I note here that the reference to 'Forest Trustee Ltd' as registered proprietor is in error because Forest Trustee Ltd was not the registered proprietor on 15 December 2009.

[14] In May 2014, the property was transferred from Forest Trustee Ltd to Mr Mawhinney and to Waitakere Forest Trust Ltd. A mortgage in favour of Mr Mawhinney and Waitakere Forest Trust Ltd was registered in 2015. At the same time, a mortgage priority instrument confirmed the priority of Nags Head as first mortgagee.

[15] Nags Head applied to the court for orders in the hope that that would clear the way to selling the property. In *Nags Head Horse Hotel Ltd v Mawhinney*, Brewer J held that Nags Head had a valid first registered mortgage over the Anzac Valley Road property, the mortgage secured a current debt, Nags Head had properly served a notice under s 119 of the Property Law Act 2007, and the mortgagor was in default.[4] He made an order that Nags Head was entitled to possession, retrospectively from the date of the application, 5 April 2016. He held that Nags Head was entitled to sell the property and he gave directions for sale.

[16] As I have noted, in December 2016 Nags Head entered into the agreement to sell the property to Mr Buttling. That sale did not run smoothly. It faced further

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3 *Mawhinney v Nags Head Horse Hotel Ltd* [2013] NZHC 1530.
4 *Nags Head Horse Hotel Ltd v Mawhinney* [2016] NZHC 1740.

interference from Mr Mawhinney. Palmer J gave running directions during February 2017. He approved Nags Head's request to accept the offer from Mr Buttling.[5] He allowed Mr Mawhinney time in which to pay off the mortgage in full, but no payment was made. He extended that time and allowed the parties to submit as to the redemption amount.[6] He was required to give a ruling that real estate commission, land rates and legal fees were reasonable and secured by the mortgage.[7] Again, the mortgage remained unpaid.

[17] The caveat which Mr Mawhinney had lodged in July 2013 remained on the title and prevented Nags Head from completing the sale. Nags Head applied to remove the caveat. Moore J heard the application in March 2017.[8] At the same time, he heard an application by Mr Mawhinney to restrain the sale. Mr Mawhinney contended that Nags Head had breached its duty of care under s 176 of the Property Law Act to obtain the best price reasonably obtainable at the time of sale. He alleged that Nags Head had misrepresented the nature of the property to potential purchasers. Moore J dismissed the injunction application by Mr Mawhinney and ordered the caveat to be removed. In his decision, Moore J posed the question: "Does Mr Mawhinney have a caveatable interest?"[9] He reviewed the evidence and said:

> [29] A central theme emerges. Ms Lowndes, as director of Nags Head, took active steps to ensure the indefeasibility of its mortgage could not be prejudiced by other interests in the land. I find it highly improbable that the same director would consent to an agreement to lease providing the lessor with an option to purchase the property for $10.00. Further, if Nags Head did consent to such a lease I would expect there to be documentation recording the giving of that consent given Ms Lowndes's reliance on the solicitors' and trustee's certificates.

He concluded that Mr Mawhinney did not have a caveatable interest, as claimed.

[18] Moore J's decision can be seen as traversing two matters. The first is whether there was a caveatable interest under the agreement to lease of December 2009. But

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5 *Nags Head Horse Hotel Ltd v Mawhinney* HC Auckland CIV-2016-404-653, 17 February 2017 (Minute (No 1) of Palmer J).

6 *Nags Head Horse Hotel Ltd v Mawhinney* HC Auckland CIV-20 16-404-653, 22 February 2017 (Minute (No 2) of Palmer J).

7 *Nags Head Horse Hotel Ltd v Mawhinney* HC Auckland CIV-2016-404-653, 24 February 2017 (Minute (No 3) of Palmer J).

8 *Nags Head Horse Hotel Ltd v Mawhinney* [2017] NZHC 401.

9 At [20]-[31].

there is a second aspect. It is at least implicit in his decision that, even if there were such an interest, it did not bind Nags Head. His decision contains careful findings of fact that Nags Head did not know about the agreement of 2009 and therefore was not bound by it. Moore J gave his decision on 10 March 2017. The caveat was removed from the title on 13 March 2017 and Waitakere Farms Ltd was entered as registered proprietor on 14 March 2017.

[19] During this phase, Mr Mawhinney wrote to the lawyers acting for Mr Buttling. Mr Bond's evidence includes a copy of a letter dated 16 February 2017 by Mr Mawhinney addressed to Mr Buttling. Mr Mawhinney has signed the letter as trustee and says that he has written the letter as mortgagor of the property. The purpose of the letter was to draw the purchaser's attention to certain matters which Mr Mawhinney considered to be detrimental to the purchaser's interests. He included two matters relevant to this case:

> 6 Lot 1 DP320387 is subject to fixed term residential tenancies. The mortgagee is prevented from terminating those tenancies by section 58(1)(d) and (e) of the Residential Tenancies Act 1986. The mortgagee is bound by the tenancies because it had knowledge of them prior to the loan agreement upon which the mortgage is based. Vacant possession cannot be provided by the mortgagee. That is, the land comes with sitting tenants.
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> …
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> 8 The caveat against dealings in memorial 945724.1 on the computer register is in respect of an agreement to lease dated 15 December 2009 (which was prior to the mortgage in memorial 8576760.1). A copy of the caveat is annexed. By that caveat you have been put on notice of the agreement to lease. An agreement to lease is as good as a lease: *Walsh v Lonsdale* (1882) 21 Ch D 9. … The agreed lease makes express provision for the lessee to carry out forestry, and it has been doing so since the agreement. That is, any purchaser will not be entitled to the forestry crops or access to the forestry land the subject of the lease. The agreed lease also contains an option to purchase the fee simple under the lease.

[20] For Waitakere Farms Ltd, Ms Low queries whether that letter was sent. I am required to decide only whether aspects of the case for Epsom Woods Ltd are arguable. The normal assumption is that if a letter has been shown as sent to a party, it can be provisionally treated as having been sent unless there is direct evidence to the contrary. For this case, I assume that Mr Mawhinney did send the letter of 16 February 2017 attached to Mr Bond's affidavit.

[21] I come back to the agreement under which Epsom Woods Ltd was to buy the property from Waitakere Farms Ltd for $4.5m. In August 2018, the lawyers for Epsom Woods Ltd wrote to the lawyers for Waitakere Farms Ltd raising various matters said to amount to defects in title. They made similar points to those made by Mr Mawhinney in his letter of 16 February 2017. It was an unusual letter, in that it tended to query the value of the property being sold and it is ironic, given the willingness of Epsom Woods Ltd to pay $4.5m for the property.

Is Epsom Woods entitled to summary judgment?

[22] The statement of claim has two causes of action. The first cause of action relates to Epsom Woods Ltd's claim that it is entitled to the trees grown on the property. It claims its entitlement through an assignment document dated 29 October 2018 between "Trustee in the Anzac Valley Forestry Trust" and Epsom Woods Ltd. Mr Mawhinney has signed as trustee of the Anzac Valley Forestry Trust and Mr Bond has signed on behalf of Epsom Woods Ltd as assignee. A curious feature of the document is that Mr Paul Graeme Alexander, who describes himself as a "forestry consultant", has witnessed both their signatures. Mr Alexander has made his own contributions to case law on bankrupts and insolvents challenging the rights and powers of secured creditors.[10] He has been bankrupt at least more than once.

[23] In the first cause of action, Epsom Woods Ltd seeks an order that Waitakere Farms Ltd owns the land subject to a constructive trust in favour of Epsom Woods Ltd for the trees on the property. It relies on the caveat lodged in July 2013 and the letter that Mr Mawhinney sent to the lawyers for Mr Buttling in February 2017. It says that that letter of February 2017 was a notice to the purchaser and inferentially also notice to Mr Duncan and Waitakere Farms Ltd.

[24] In the second cause of action, Epsom Woods Ltd seeks a declaration that Anthony Milton Mawhinney, as tenant under the residential tenancy agreement, enjoys occupancy rights over the land until 31 July 2040.

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[10] *Parnell Property Investments Ltd v Bank of New Zealand* [2012] NZHC 12; *Alexander v Bank of New Zealand* [2012] NZHC 3288; *Noyce v Parnell Property Investments Ltd* [2015] NZHC 2037; and *Fifer Residential Ltd v Noyce* [2016] NZCA 88.

[25] I repeat a point I have already made. Neither of the interests claimed in the statement of claim has been registered against the title, except of course for the caveat registered in July 2013 which was removed by Moore J. Epsom Woods Ltd is not relying on its own dealings with Waitakere Farms Ltd as giving it any interest in the land, but instead says that it has the benefit of interests that already existed with the land before Waitakere Farms Ltd took title. That raises questions of indefeasibility. The indefeasibility provisions of the Land Transfer Act are well known. I rely on the Land Transfer Act 1952 because all the transactions in this case took place before the Land Transfer Act 2017 came into force. I refer to these provisions:

> **62 Estate of registered proprietor paramount**
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> Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority but subject to the provisions of Part 1 of the Land Transfer Amendment Act 1963, *the registered proprietor of land* or of any estate or interest in land under the provisions of this Act *shall, except in case of fraud, hold the same subject* to such encumbrances, liens, estates, or interests as may be notified on the folium of the register constituted by the grant or certificate of title of the land, *but absolutely free from all other encumbrances, liens, estates, or interests whatsoever*,—
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> (a) except the estate or interest of a proprietor claiming the same land under a prior certificate of title or under a prior grant registered under the provisions of this Act; and
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> (b) except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and
>
> (c) except so far as regards any portion of land that may be erroneously included in the grant, certificate of title, lease, or other instrument evidencing the title of the registered proprietor by wrong description of parcels or of boundaries.
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> **182 Purchaser from registered proprietor not affected by notice**
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> *Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest* shall be required or in any manner concerned to inquire into or ascertain the circumstances in or the consideration for which that registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase money or of any part thereof, or *shall be affected by notice, direct or constructive, of any trust or unregistered interest*, any rule of law or equity to the contrary notwithstanding, and *the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud*

And importantly for this case:

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

[26] Section 105 provides added protection for purchasers buying from mortgagees. I accept, for the purpose of argument, that while it does not say so, s 105 may be subject to the exception for fraud. In *Halliday v Bank of New Zealand*, Mallon J recognised that s 105 may be subject to the fraud exception.[11] By "fraud" I mean actual dishonesty.[12] Constructive fraud arising from mere notice is not enough. It is important to recognise the purpose served by s 105 within the scheme for mortgagee sales. When a mortgagee exercises a power of sale, the property is sold - typically on the open market - and a prospective purchaser may know little about the property. The purchaser will, of course, inspect the title. The purpose of s 105 is to ensure that the title passes to the purchaser, free of all interests except any estate or interest created by an instrument which has priority over the mortgage, or which by reason of the consent of the mortgagee, is binding on him. Title is transferred clear of all other claims, that is, registered interests subordinate to the interest of the mortgagee selling the property and unregistered interests.

[27] Those claiming interests in the property where the interests have been cleared off on the exercise of the power of sale instead may have, at best, a claim to the fund constituted by the proceeds of sale. The application of that fund is governed by s 185 of the Property Law Act. It is then a normal incident of the exercise of the power of sale that unregistered interests in land are cleared off the title. That is required to ensure that the mortgagee is given the best chance to maximise the price on the sale of the property.

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11 *Halliday v Bank of New Zealand* [2012] NZHC 3099, [2013] 1 NZLR 279 at [60].
12 *Assets Co Ltd v Mere Roihi* [1905] AC 176 (PC).

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

[29] In argument, I was referred to Mallon J's decision in *Halliday v Bank of New Zealand* with facts close to, but not the same as this one. There was a sale and purchase of land, with the vendors reserving the right to carry on a forestry operation on part of the land. The parties intended that that forestry right would be protected by a registered interest under the Forestry Rights Registration Act 1983, but that was not done. Importantly, Mallon J found that the Bank of New Zealand, a registered mortgagee, knew of that arrangement and allowed that state of affairs to continue. When the Bank of New Zealand came to exercise its power of sale, following defaults by the purchasers under their mortgage, equity counted against the Bank of New Zealand exercising its power of sale. That case is distinct from the present one. There is nothing in the conduct of Mr Buttling, Mr Duncan or Waitakere Farms Ltd that generates any equity in favour of Epsom Woods Ltd, or anyone from whom it derives its title, that stands in the way of Waitakere Farms Ltd acquiring a clean title, when it took the transfer in March 2017.

[30] Under s 105 of the Land Transfer Act, a purchaser may be subject to an interest to which the mortgagee has consented. In *Cashmere Capital Ltd v Carroll*, the Supreme Court made it clear that consent is more than acquiescence and requires some affirmative act by the mortgagee: [13]

> These decisions indicate that a consent which, under ss 105 or 119, binds a mortgagee to the competing estate or interest in another instrument, requires conduct which affirms the lease. A mortgagee who is aware of a third party's interest, and passively stands by, making no objection, has not consented. For there to be a valid consent, the mortgagee must either have been aware of the essential terms of the lease or be shown to have consented to the lease

[13] *Cashmere Capital Ltd v Carroll* [2009] NZSC 123, (2009) 11 NZCPR 98 at [79].

> whatever its terms may be. Only then does the mortgagee consent to the terms of the other instrument, in the sense of agreeing to be bound by it. Making an advance as mortgagee, while being aware of the other instrument and another party's interest in it, of itself, does not amount to consent.

Mallon J's decision in *Halliday v Bank of New Zealand* is to similar effect.[14]

[31] On this point, Moore J's decision to remove the caveat is important. He held that Mr Mawhinney did not have a caveatable interest. He found Nags Head Horse Hotel Ltd did not know about the interest claimed under the caveat and, because it did not know of it, could hardly have consented to it. The question here is whether those findings apply in this case.

[32] There are two points to be made about Moore J's decision:

(a) his decision was only for the removal of the caveat, and

(b) the parties in that proceeding were not the same as the parties here.

[33] As to the first point, Mr Hayes submitted that a decision to remove a caveat is by no means conclusive. While a caveat may be removed, the party claiming the interest for which the caveat was lodged remains free to pursue the matter through to a final hearing on the merits. There is some support for that proposition in the Court of Appeal's decision in *Joseph Lynch Land Co Ltd v Lynch*.[15] In that case, an order had been made for removal of a caveat. In the substantive proceeding, the caveator amended his pleading to include a constructive trust claim. It was held at first instance that the claim to an interest in the property could not be relitigated. The Court of Appeal disagreed. It gave guidance as to issue estoppel after a decision to remove a caveat:[16]

> In principle a sufficiently final and certain conclusion can no doubt be found in what is effectively an interlocutory judgment so as to found a subsequent issue estoppel. We consider, however, that considerable caution is necessary before coming to such a conclusion. If the parties have clearly accepted that an interlocutory ruling on a point shall be finally decisive between them then no doubt an issue estoppel or even a cause of action estoppel may arise.

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14 *Halliday v Bank of New Zealand* [2012] NZHC 3099 at [63]-[64].
15 *Joseph Lynch Land Co v Lynch* [1995] 1 NZLR 37 (CA).
16 At 42.

> Applications to remove or to uphold a caveat will not ordinarily be regarded as finally determining the rights of the parties. Certainly a ruling that the caveat is to remain in the meantime could seldom, if ever, be regarded as demonstrating that the caveator has the rights which are asserted. The position becomes a little more difficult when the ruling goes the other way, ie that the caveator has no arguable case for the interest in land asserted.

And:[17]

> In our judgment the ultimate question is concerned not so much with the character of the earlier decision, ie whether it should be regarded as final or interlocutory. The question is rather whether in these circumstances it is reasonable to regard the earlier decision as a final determination of the issue which one of the parties now wishes to raise. In Halsbury at para 977 it is said that the scope of the doctrine of issue estoppel depends on whether the Court takes a narrow or a wide view of the extent of the issue determined in the earlier case. A number of examples are given either way. If the earlier decision is in substance interlocutory it will usually be reasonable to adopt a narrow view.

The Court declined to apply the finding made on the caveat application because the matter was still open for argument.

[34] In this case, however, Moore J's decision did decide finally whether the interest claimed under the caveat did bind Nags Head. That is because whether the property could be sold turned on whether it was arguable that Nags Head was bound by the interest claimed in the caveat. If the caveat had been upheld, that would have stymied the sale to Mr Buttling. There would instead need to be a trial to decide whether there was any merit in the claim alleged in the caveat. Moore J made his decision in the light of earlier litigation where Brewer J had upheld the right to sell and where Palmer J had been giving running directions on the conduct of the sale. Once Moore J gave his decision, the removal of the caveat and the transfer of the land into the name of Waitakere Farms Ltd followed promptly. Moore J gave his decision knowing that there would be no second chance for Mr Mawhinney to contend that, notwithstanding the removal of the caveat, he would still be able to argue for the agreement to lease as binding the land after the transfer of title. Moore J's ruling gave no opportunity for a second look. It was then a final determination of the interest claimed in the caveat. It is therefore not open to say that his ruling was provisional only.

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[17] At 43.

[35] The other point is that there are different parties. Epsom Woods Ltd and Waitakere Farms Ltd are bound by Moore J's decision, if they are privies. The Court of Appeal dealt with the question of privity for the purpose of res judicata in *Shiels v Blakeley*:[18]

> 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 an 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. …

And:

> We conclude that there must be shown such a union or nexus, such a community of mutuality of interest, such an identity between a party to the first proceeding and the party claiming to be estopped in the subsequent proceeding, that to estop the latter will produce a fair and just result having regard to the purposes of the doctrine of estoppel and its effect on the party estopped.

[36] I am satisfied that Epsom Woods Ltd is bound as a privy. It has taken an assignment of the interest under the agreement of 2009. It cannot assert any greater interest than Mr Mawhinney could as caveator. Moore J's decision is just as binding on Epsom Woods Ltd as on Mr Mawhinney. Equally, as purchaser from Nags Head, Waitakere Farms Ltd can claim the benefit of the decision. It is just as much entitled to the benefit of Moore J's decision as Nags Head.

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

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[18] *Shiels v Blakeley* [1986] 2 NZLC 262 (CA) at 268.

the agreement for sale and purchase. For reasons I have explained, being informed of that interest does not stand in the way of Waitakere Farms Ltd taking a clear title.

[38] For Waitakere Farms Ltd, Ms Low submitted that Nags Head had taken special care in carrying out its sale as mortgagee to ensure that it could pass clear title. That is evident from the many decisions and directions from the court. But I want to make it clear that while that bolsters the case for Nags Head and Waitakere Farms Ltd, that point is not decisive for this case. Many mortgagees are able to pass clean title to purchasers, without going to all the trouble which Nags Head was put to in this case.

[39] Next is the residential tenancy cause of action. As I have already noted, the residential tenancy agreement was between Mr Vesey, the registered proprietor, as landlord and Anthony Milton Mawhinney as tenant. Epsom Woods Ltd is not a party to the agreement and there is no evidence that Mr Anthony Mawhinney has assigned his interest as tenant to Epsom Woods Ltd. There is no provision in the residential tenancy agreement conferring benefits on third parties.

[40] The status of the residential tenancy agreement is curious. The property is a forestry lot and apparently has nowhere for residential accommodation. It may be asked how a forestry lot of 51 hectares could come under the Residential Tenancies Act. It is possible to contract into the Act, but I query whether it is possible to contract into the act when no residential accommodation is provided at all. The point has been resolved by a Tenancy Tribunal decision of 30 November 2016.

[41] The background is that Nags Head and purported to give 90 days' notice to Mr Mawhinney terminating the residential tenancies agreement. This was done under s 58 of the Residential Tenancies Act. It had been assumed up that a residential tenancy could survive a mortgagee exercising its rights under a mortgage. That, however, is subject to the proviso that where there is a fixed term tenancy the mortgagee is entitled to give notice as for a periodic tenancy, unless the mortgagee has consented to a fixed term tenancy.[19]

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[19] See Residential Tenancies Act s 58 and *Ziki Investments (Properties) Ltd v McDonald* [2008] 3 NZLR 417 (HC).

[42] Mr Anthony Mawhinney contended that the 90-day notice given by Nags Head was invalid. The Tenancy Tribunal adjudicator dismissed his application. His reasoning was that the property was not set up for residential accommodation. The adjudicator found there were some converted containers on the site, but they were used only for storage of equipment and as a site office and could not lawfully be used for residential accommodation. Any attempt to use them for residential accommodation would make it an unlawful residential tenancy. Under the Residential Tenancies Act, he held that this was a prohibited transaction and he declined to give effect to it.

[43] I was advised by counsel that there were appeals and applications for a rehearing but they were not successful. I take the decision of the Tenancy Tribunal as holding that the residential tenancy agreement in this case is outside the Residential Tenancies Act. It may be possible for Mr Anthony Mawhinney to contend that the tenancy agreement still gave him the right to occupy the land under an agreement, although not a residential tenancy agreement. The court might, for example, exercise its power to give relief under the illegal contracts provisions of the Contract and Commercial Law Act 2017.[20] But once it is determined that the agreement does not come within the Residential Tenancies Act, Mr Anthony Mawhinney can no longer claim the benefit of s 58 of the Residential Tenancies Act. The tenancy cannot survive the mortgagee's exercise of its powers under its mortgage. It is in the same position as with the agreement to lease of December 2009: it is an unregistered interest in the land and cannot survive under s 105 of the Land Transfer Act 1952.

[44] There is also the problem for Epsom Woods Ltd that it is not a party to the residential tenancy agreement. Mr Hayes submitted that his client had standing under s 3 of the Declaratory Judgments Act 1908 to seek declaratory relief. I reject that. Only parties to the agreement can seek determinations as to their rights and liabilities under an agreement. Those who are not parties to the agreement do not have any relevant interest or standing to apply.

[45] For those reasons, I hold that the residential tenancies agreement cannot be litigated by Epsom Woods Ltd and, if it could, it would be stuck with the difficulty

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[20] Contract and Commercial Law Act 2017, s 76.

that any interest under the agreement did not last longer than the transfer of title to Waitakere Farms Ltd on 14 March 2017.

[46] The point reached now is that I have considered whether Epsom Woods Ltd has an arguable case for the interest claimed under the agreement of December 2009 and the residential tenancy agreement of 2011. Under the test in *Westpac Banking Corporation v M M Kembla Ltd*,[21] Waitakere Farms Ltd has satisfied me that the two causes of action in Epsom Woods Ltd's statement of claim cannot succeed. On that basis, Waitakere Farms Ltd is entitled to summary judgment.

Strike out application

[47] Waitakere Farms Ltd provided further arguments why Epsom Woods Ltd should not succeed. I have assumed for this judgment that the agreement to lease of December 2009 and the residential tenancy agreement of 2011 were actual and genuine transactions. Waitakere Farms Ltd argued that I should not make that assumption. It said that these transactions lacked all commercial reality. That can be seen in the nominal consideration given for the very substantial benefits conferred. I express some wariness about dismissing transactions on the basis of lack of commercial reality, because in an earlier caveat case my findings as to lack of commercial reality were set aside on appeal.[22] While I see the strength of the arguments for treating the transactions as lacking all commercial reality and as not to be taken seriously, it is safer to decide the matter on the basis of priority rather than dismissing the transactions out of hand.

[48] In support of its strike-out application Waitakere Farms Ltd submitted that this proceeding was an abuse of process. If Mr Mawhinney had brought this proceeding, it would be counter to Hinton J's prohibition in her decision earlier this year. Mr Mawhinney is barred from commencing the proceeding and continuing it. It was submitted that this proceeding is litigation by Mr Mawhinney with Epsom Woods Ltd as proxy.

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21 *Westpac Banking Corporation v MM Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) at [58]-[64].

22 *Mahon v Station at Waitiri Ltd* [2017] NZCA 387.

[49] Mr Bond deposed that he was independent of Mr Mawhinney. He said he had never met Mr Mawhinney and had had barely any contact with him. There is good reason to be suspicious about that. There is a link between Mr Bond and Mr Mawhinney - the questionable Paul Graeme Alexander. But while I am suspicious, I am wary of finding against Mr Bond's assertions that he is acting independently and is not suing on behalf of Mr Mawhinney. The point is not critical for my decision because, as I have said, the matter can be resolved on substantive grounds - the priority point.

Security for costs

[50] The final matter is the application for security for costs. As I have found in favour of Waitakere Farms Ltd on the summary judgment application, the security for costs matter does not require decision. But I wish to make some comments, in case the issue does arise. In my judgment there is reason to believe that if this case were to go to trial and Waitakere Farms Ltd were to obtain judgment, it may obtain no more than a barren order for costs. The prospects of Epsom Woods Ltd meeting any order for costs do not look good. It has only recently been incorporated. Its director is a former bankrupt. There is nothing to suggest that the company has any assets except possibly a claim against Mr Bond for breach of director's duty in exposing it to unnecessary costs and liabilities it is going to incur in this litigation, when it does not have the means to pay.

[51] In opposition, Epsom Woods Ltd claims impecuniosity caused by Waitakere Farms Ltd. It alleges that Waitakere Farms Ltd has prevented it from enjoying the rights claimed in the proceeding. That is a far-fetched claim that Waitakere Farms Ltd caused its impecuniosity. The short point is that on the merits Waitakere Farms Ltd has a very strong case. The defendant's opposition is not a ground for saying that it has caused the plaintiff's the impecuniosity. That was already the state of affairs when the proceeding started.

[52] This is an appropriate case to order security. Ms Low tendered a schedule of likely costs. It came to about $60,000. Mr Hayes pointed to some matters which

might be attacked. If required, I would make a reasonably stiff order for security. I have in mind a sum of about $50,000.

Costs

[53] Waitakere Farms Ltd is entitled to costs on a 2B basis. Ms Low has provided a calculation in her schedule of proposed costs. I disallow her claim for 2.5 days for preparing the affidavit on the transfer application, but I allow the application for transfer. She is entitled to three-quarters of a day for the hearing today. She is also entitled to the costs of sealing judgment and the disbursements on that. Other than that, her claim for costs for the application heard today seems to be in order. Because she has obtained summary judgment, she is entitled to the costs of taking the initial instructions and preparing the defence.

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Associate Judge R M Bell