IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 69/2020
[2020] NZSC 131

BETWEEN	KINARA TRUSTEE LIMITED Applicant
AND	INFINITY ENTERPRISES NZ LIMITED Respondent

Court: Glazebrook, Ellen France and Williams JJ

Counsel: A R B Barker QC and L R Green for Applicant
C L Bryant for Respondent

Judgment: 23 November 2020

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondent costs of $2,500.

REASONS

[1] Kinara Trustee Ltd applies for leave to appeal against a decision of the Court of Appeal.[1]

[2] At issue is the enforceability of an accessway from Redoubt Road, Manukau, across Infinity Enterprises NZ Ltd's property to access Kinara's property. The accessway is not a legal easement; it is not noted on the registered title of either the property of Kinara or Infinity. The accessway has been in use since before both Kinara and Infinity acquired their titles in 2007.[2]

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1 *Infinity Enterprises NZ Ltd v Kinara Trustee Ltd* [2020] NZCA 309 (Cooper, Clifford and Stevens JJ) [CA judgment].

2 Kinara purchased its property in August 2007. Infinity purchased its property in November 2007.

[3] Kinara developed its property in 2010–2011 and said it did so on the basis that it had a right to use the accessway. There is no dispute that there was no communication as between Kinara and Infinity about the use of the accessway until 2017, when Infinity declined Kinara's request to allow the registration of such a right of way. Until 2017, Infinity had taken no steps to deny others, including Kinara, use of the driveway to access Kinara's property.

[4] The Land Transfer Act 1952 applies to this application.[3] The general protection of indefeasibility under the 1952 Act is unavailable in two main circumstances: where the registered proprietor was fraudulent;[4] and where there is an in personam claim against the registered proprietor.[5] Kinara's claim is that the accessway is either an equitable easement created by implied grant and that Infinity acted fraudulently in defeating Kinara's equitable interest (and therefore cannot claim the protection of indefeasibility), or that Infinity's conduct over the past 10 years has given Kinara rights in equity that entitle Kinara to use the accessway and that Infinity is estopped from refusing to recognise those rights.

Decisions below

High Court decision

[5] The High Court held that Kinara had no enforceable easement by implied grant over Infinity's land.[6] Unless the fraud exception was discretely engaged on each occasion of transfer to a new registered proprietor, it was held that the equitable easement by implied grant, even if it had been created, could not survive.[7] The High Court thus did not need to determine whether Infinity acted with fraud when it took title in 2007.[8]

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3 See the transitional provisions in the Land Transfer Act 2017, sch 1 cl 2(1).

4 Land Transfer Act 1952, ss 62 and 182. Note that the timing of fraud is clearer under the new Land Transfer Act 2017, s 6.

5 There was no specific provision in the Land Transfer Act 1952 preserving the in personam jurisdiction but it continued to exist: see *Frazer v Walker* [1967] NZLR 1069 (PC) at 1078; and *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [157]–[161]. Section 51(5) makes this explicit in the new Land Transfer Act.

6 *Kinara Trustee Ltd v Infinity Enterprises NZ Ltd* [2019] NZHC 1526, (2019) 20 NZCPR 318 (Duffy J) [HC judgment] at [264].

7 At [71].

8 This is because it had decided that Infinity had indefeasible title that extinguished the equitable easement: HC judgment, above n 6, at [67]–[69] and [79].

[6] However, it was held by the High Court that Kinara had a claim in proprietary estoppel as Infinity had a duty to speak out but did not do so, even when it was more probable than not that Infinity knew Kinara was mistaken about its rights to use the accessway.[9] The length of time between the completion of Kinara's development in 2011 and the first time Infinity made its position known to Kinara in 2017 only served to affirm Kinara's mistaken belief and engender a continued expectation that it could use the accessway.[10] The High Court therefore ordered Infinity to register the accessway on its title as a legal easement in favour of Kinara.[11]

Court of Appeal decision

[7] The Court of Appeal held that no easement was created by implied grant at the relevant time, which was August 1989.[12] The Court concluded that the High Court's inferences on the evidence as a whole went too far. The Court also concluded that, even at its highest, the evidence before the Court leaves Infinity's director aware of the existence and use of the driveway but without a belief that there were any adverse interests.[13] That is not knowledge evidencing Land Transfer Act fraud.[14] The Court held that it was clear on the authorities that actual notice of an unregistered interest alone, or actual notice with mere acquiescence in a use consistent with that interest is insufficient to establish Land Transfer Act fraud.[15]

[8] On the in personam claim, the Court of Appeal held that the High Court was wrong to characterise the claim as an implied representation by acquiescence. Rather, the basis of estoppel by silence is whether there was a duty to speak out. The Court of Appeal held that the critical issue was whether the silent party, here Infinity, had a

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9 At [217]–[218].
10 At [223].
11 At [265]–[266].
12 CA judgment, above n 1, at [51]–[57].
13 At [95].
14 At [96].
15 At [75]. The Court of Appeal at [65]–[84] considered *Waimiha Sawmilling Co Ltd (in liq) v Waione Timber Co Ltd* [1926] AC 101 (PC); *Sutton v O'Kane* [1973] 2 NZLR 304 (CA); *Bunt v Hallinan* [1985] 1 NZLR 450 (CA); and *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2018] NZSC 75, [2019] 1 NZLR 161 at [101].

duty to warn the mistaken party, Kinara, that it was relying on a mistaken assumption.[16]

[9] The crux of the Court of Appeal's reasoning is that, if a person who claims another person (a registered proprietor) has a duty to speak out has themselves got constructive knowledge of the true position, then there is no mistake to correct. The consequence is that the *Willmott v Barber* grounds for estoppel are not satisfied.[17] The Court of Appeal went on to say that imposing a duty to speak out upon a registered proprietor deprives the registered proprietor of the very benefit of the Torrens system of title by registration.[18]

[10] As Kinara had constructive knowledge that there was no legal right of way over Infinity's property because no right of way was registered against Infinity's title or recorded on Kinara's title, Kinara's claim for an estoppel by silence was precluded.[19]

[11] The Court went to on find in the alternative that, even if Kinara had no constructive knowledge of the true position, there was still no unconscionability that would give rise to an estoppel. Kinara says it relied on the access to Redoubt Road in developing its property to access rooftop parking in its new building. But the Court of Appeal found that the rooftop parking was more conveniently accessed by one of the other routes.[20] In those circumstances, a reasonable person would not expect Infinity, acting honestly and reasonably, to bring the fact that the proposed right of way had never been registered to Kinara's attention. Therefore Infinity was not under a duty to speak out and there was no basis for an estoppel as sought by Kinara.[21]

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16 At [99], relying on James Every-Palmer "Equitable Estoppel" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 601 at 631. See also *Burbery Mortgage Finance and Savings Ltd v Hindsbank Holdings Ltd* [1989] 1 NZLR 356 (CA) at 361; and *Gold Star Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80 (CA) at 86.

17 *Willmott v Barber* (1880) 15 Ch D 96 (Ch) at 105–106.

18 CA judgment, above n 1, at [110].

19 At [116]–[117].

20 At [128].

21 At [129].

Application for leave to appeal

[12] Kinara says there are four issues that warrant this Court's review of the decision of the Court of Appeal:

(a) Whether registration of a title that is not vitiated by Land Transfer Act fraud extinguishes all "adverse interests" (those not noted on the title) or whether the registered proprietor is merely immune from any claim on such interests.[22]

(b) If it is necessary to show Land Transfer Act fraud for an adverse interest to survive registration, whether it is sufficient to show that previous owners had recognised the adverse interest or whether it is necessary to show actual dishonesty on the part of previous owners.[23]

(c) Whether a party is guilty of Land Transfer Act fraud if they have actual knowledge of an adverse interest prior to registration but receive legal advice that they would not be required to recognise that interest after registration.[24]

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22 On the evidence, Kinara takes issue with the CA judgment, above n 1, at [53] and [127(a)]. On the law, Kinara points to the CA judgment, above n 1, at [64] and cites, among others, *Dollars & Sense Finance Ltd v Nathan* [2008] NZSC 20, [2008] 2 NZLR 557; *Regal Castings*, above n 5; *Green Growth No 2*, above n 15; *Westpac New Zealand Ltd v Clark* [2009] NZSC 73, [2010] 1 NZLR 82; *Frazer*, above n 5; *Sutton*, above n 15; and Andrew Tipping "Commentary on Sir Anthony Mason's Address" in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 21.

23 On the second issue, Kinara says the High Court, above n 6, was wrong at [62]–[71]. Kinara relies on *Merrie v McKay* (1897) 16 NZLR 124 (SC) at 126 per Prendergast CJ; *Macrae v Wheeler* [1969] 1 NZLR 333 (SC) at 336; *Sutton*, above n 15, at 309; and *Bunt*, above n 15.

24 Kinara claims that the Court of Appeal erred in its judgment, above n 1, at [96], and says that *Bunt*, above n 15, was wrongly decided. Kinara also relies on *Waimiha*, above n 15, at 1174 per Salmond J; and Peter Blanchard "Indefeasibility under the Torrens System in New Zealand" in Grinlinton, above n 22, at 29–49.

(d) Whether an in personam claim for proprietary estoppel by acquiescence is necessarily defeated by constructive notice of an adverse interest, acquired by looking at the Register.[25]

Our assessment

[13] The first three issues Kinara wishes to raise relate to the fraud exception. We accept that some of those issues are unresolved or have not been dealt with by this Court. However, Kinara's proposed appeal does not turn on those issues. Even if Kinara had an equitable easement, all that is alleged is that Infinity knew or should have known of that easement. This does not suffice to constitute Land Transfer Act fraud.[26] In any event, the issue of whether an equitable easement arose in the first place depends on the particular circumstances in this case.[27]

[14] As to the in personam claim, the issues raised largely depend on the particular facts of this case, particularly with regard to the Court of Appeal's alternative finding.[28] Further, nothing raised by Kinara suggests a miscarriage of justice in the sense required in civil cases.[29]

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25 This issue was addressed in the CA judgment, above n 1, at [119]–[129]. Kinara relies among other cases on *Willmott*, above n 17; *Ramsden v Dyson* (1866) LR 1 HL 129 (HL); *Plimmer v Wellington City Council* (1884) 9 App Cas 699 (PC); *Peddle v McDonald* [1924] NZLR 717 (CA); *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* [1996] 1 NZLR 548 (CA) at 549; *Burbery*, above n 16; *Adaras Developments Ltd v Marcona Corp* [1975] 1 NZLR 325 (SC); *Gold Star Insurance*, above n 16; and *Mega Project Holding Ltd v Orewa Developments Ltd* [2020] NZCA 111.

26 Land Transfer Act 1952, s 182. Notice, or knowledge, is an ingredient of fraud but is not itself sufficient to establish Land Transfer Act fraud, which is distinct from other types of fraud including constructive or equitable fraud. See *Assets Co Ltd v Roihi* [1905] AC 176 (PC) at 210 per Lord Lindley; *Waimiha*, above n 15, at 106–107; *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 614 per Mason CJ and Dawson J; and *Secureland Mortgage Investments Nominees Ltd v Harman & Co Solicitor Nominee Co Ltd* [1991] 2 NZLR 399 (HC) at 411 per Williamson J. See also Elizabeth Toomey *New Zealand Land Law* (3rd ed, Thompson Reuters, 2017) at 60, 85 and 89; Neil Campbell and others *Principles of Land Law in New Zealand* (3rd ed, LexisNexis, Wellington, 2020) vol 1 at 421; and G W Hinde and Donald William McMorland *Hinde, McMorland & Sim Land Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2003) at 85.

27 This means it is not a matter of general or public importance, or of general commercial significance: Senior Courts Act 2016, s 74(2)(a) and (c).

28 Thus the appeal raises no issues of general or public importance or general commercial significance: Senior Courts Act, s 74(2)(a) and (c).

29 Section 74(2)(b). See *Junior Farms Ltd v Hampton Securities Ltd* [2006] NZSC 60, (2006) 18 PRNZ 369 at [4]–[5].

Result

[15] The application for leave to appeal is dismissed.

[16] The applicant must pay the respondent costs of $2,500.

Solicitors:
Murdoch Price Ltd, Manukau for Applicant
Hesketh Henry, Auckland for Respondent