IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 51/2020
[2020] NZSC 99

BETWEEN	EPSOM WOODS LIMITED Applicant
AND	WAITAKERE FARMS LIMITED Respondent

Court:	Glazebrook, O'Regan and Ellen France JJ
Counsel:	D G Hayes for Applicant A A H Low for Respondent
Judgment:	23 September 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

Introduction

[1] The applicant, Epsom Woods Ltd (Epsom), brought proceedings in the High Court seeking orders and declarations upholding interests Epsom says it has in a 51-hectare forestry lot (the property) owned by the respondent, Waitakere Farms Ltd (Waitakere). Waitakere then sought and was granted summary judgment.[1] Epsom's

[1] *Epsom Woods Ltd v Waitakere Farms Ltd* [2019] NZHC 1374 (Associate Judge Bell) [HC judgment].

appeal against that judgment to the Court of Appeal was unsuccessful.[2] Epsom now seeks leave to appeal from that decision to this Court.

Background

[2] The factual history is fairly complicated but for present purposes the background can be summarised as follows. Nags Head Horse Hotel Ltd (Nags Head) sold the property to Addam Buttling, under Nags Head's power of sale as a registered mortgagee. Waitakere subsequently became the registered proprietor in March 2017, taking title as Mr Buttling's nominee.

[3] The interests which Epsom claims are said to stem from an agreement to lease dated 15 December 2009 (the lease agreement) between Richard Vesey as trustee of the Doug Vesey Trust (Mr Vesey was the registered proprietor of the property at the time) and North Kaipara Nominees Ltd (North Kaipara) as trustee of the Anzac Valley Forestry Trust (AVF Trust). Peter Mawhinney, director of North Kaipara, signed that agreement for the lessee. The lease relevantly provides that the lessee "shall forever be the owner of … [a]ny trees or growing crops presently standing on the land … [and] which may at any time during the term of the lease be planted or growing on the land".[3] Epsom took an assignment for $1, dated 29 October 2018, of the lease agreement from the Trustee of the AVF Trust (2018 assignment). Mr Mawhinney signed the assignment as trustee of the AVF Trust.

[4] Any interests arising from the lease agreement were not registered against the title to the property.

The judgments in the courts below

[5] In the High Court, Epsom relevantly pleaded that Waitakere was estopped from denying Epsom's ownership of the trees and sought an order that Waitakere owned the

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2 *Epsom Woods Ltd v Waitakere Farms Ltd* [2020] NZCA 226 (Courtney, Ellis and Brewer JJ) [CA judgment].

3 The relevant provisions of the lease agreement are set out in full in the HC judgment, above n 1, at [8].

property subject to a constructive trust in Epsom's favour for the trees on the property.[4] The main argument was that Waitakere took title with notice of Epsom's rights under the lease agreement.[5] Epsom relied in this respect on interests in the land it said already existed before Waitakere took title.

[6] Given that the interests claimed were not registered and Epsom was not relying on its own dealings with Waitakere, Associate Judge Bell said that questions of indefeasibility arose. The Associate Judge referred to the Land Transfer Act 1952; in particular, s 62 (indefeasibility of title), s 182 (purchaser not affected by notice) and s 105 (protection for purchasers from mortgagees).[6] In concluding Waitakere was entitled to summary judgment, the Associate Judge found there was nothing preventing Waitakere from acquiring a clear title under s 105. The Associate Judge considered that Nags Head's mortgage had priority over any interest arising from the lease agreement; any interests arising from the lease agreement were not interests to which Nags Head (as mortgagee) consented to; and there was no conduct on Waitakere's part suggesting that Epsom had been "lulled into" a sense of assurance that it had an interest in land.[7] The best Epsom could claim was that Waitakere took title where the purchaser (Mr Buttling) knew of the interest, but mere notice did not preclude Waitakere from taking clear title.

[7] On appeal to the Court of Appeal, Epsom argued that an in personam claim should be able to be brought, despite s 105, if a purchaser had knowledge of an unregistered claim or interest in the land.

[8] The Court rejected this submission. It said the law was clear that mere notice of an unregistered interest was insufficient to found an in personam claim, noting that

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4 In its other cause of action, Epsom sought a declaration relating to occupancy rights over the property. The High Court granted summary judgment to Waitakere on this cause of action and that aspect has not been pursued further by Epsom.

5 In terms of notice, Epsom relied on a caveat lodged in July 2013 claiming an equitable estate and interests arising from the lease agreement (subsequently ordered to be removed by the High Court) and a letter dated 16 February 2017 from Mr Mawhinney to Mr Buttling's lawyers noting that the purchaser would not be entitled to any of the forestry crops that were the subject of the lease agreement. It is unclear whether this letter was actually sent, but for the purposes of summary judgment, it was assumed that it was.

6 The Courts below and the parties rely on the Land Transfer Act 1952 because the transactions took place before the Land Transfer Act 2017 came into force.

7 HC judgment, above n 1, at [37].

s 62 was the starting point.[8] Rather, the Court said that an in personam claim requires three elements:[9]

(a) it must not be inconsistent with the objects of the Torrens system;

(b) it must involve unconscionable conduct on the part of the current registered proprietor; and

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

[9] The Court found that Epsom's claim failed because there was no pleaded allegation of unconscionable conduct and no evidential foundation for such a claim. The only pleading was that the person who nominated Waitakere as purchaser had notice of the claimed lease agreement. The evidence did not support anything more than that. Waitakere was accordingly entitled to summary judgment where Epsom's claim could not succeed on the facts or on the law as it applied to those facts.

The proposed appeal

[10] Epsom says the proposed appeal raises a question of general or public importance, namely:

> … whether indefeasibility prevents a claim to recover losses where the party had notice of another's interests. As it stands the law appears to be there is no civil right to recover losses on land transactions without proving actual dishonesty. The current law would appear to be capable of being used as an instrument of fraud and so allowing in personam claims to be unaffected by indefeasibility would be in the public interest.

[11] In developing the submissions on this point, Epsom says first that the Courts below have erroneously imposed a requirement of actual dishonesty to establish unconscionability. Reference is made in this respect to the conclusion in the Court of Appeal that mere notice was insufficient. Second, Epsom contends that the requirement of unconscionability was met because the purchaser was on notice and/or

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8 CA judgment, above n 2, at [16] and [19], citing *Nathan v Dollars & Sense Finance Ltd* [2007] NZCA 177, [2007] 2 NZLR 747 at [139].

9 At [18], citing *Dollars & Sense*, above n 8, at [137].

made no further inquiry once notified.[10] Third, Epsom seeks to distinguish its claim on the basis that it is simply seeking compensation for the loss of trees, rather than title. Finally, there is also a suggestion in the application for leave that a miscarriage of justice may arise if the proposed appeal is not heard because it is "repugnant to justice that a party … knowingly" deprives another party to its property relying on the indefeasibility provisions in the Land Transfer Act.

[12] In opposing leave, Waitakere says that Epsom's submissions ignore the clear language of ss 62, 105 and 182 of the Land Transfer Act. Waitakere also submits that Epsom misstates the effect of the judgments below as requiring actual dishonesty to found an in personam claim. Rather, Waitakere says the Court of Appeal simply applied the settled three-limb test for an in personam claim to the facts. Finally, in seeking an uplift of costs, Waitakere refers to what it describes as "the note of caution" sounded by the Court of Appeal in relation to costs which Epsom has ignored by filing the present application.[11]

Our assessment

[13] For the reasons that follow, we do not consider the proposed appeal raises any question of general or public importance or of general commercial significance.[12] The first point to note is that Waitakere is right that Epsom's submissions misstate the effect of the Court of Appeal judgment.[13] The Court did not say in personam claims require actual dishonesty. Rather, the Court said that unconscionability was required, as is apparent from the Court's application of the three-limb test for in personam

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10 The submission relating to the need for inquiry is made in reliance on *Efstratiou v Glantschnig* [1972] NZLR 594 (CA).

11 In responding to Waitakere's submission there should be an uplift from scale costs in that Court, the Court of Appeal said that it "under[stood] the reason for the submission but in the circumstances … decided a standard award is best": CA judgment, above n 2, at [25].

12 Senior Courts Act 2016, s 74(2)(a) and (c).

13 As we have noted, the High Court resolved the case on the application of s 105 of the Land Transfer Act.

claims.[14] The way in which that test was applied to this case is a fact-specific exercise.[15]

[14] Nor does anything raised by Epsom suggest an error in approach in the Court of Appeal's conclusion that, on the facts, Epsom could not show unconscionable conduct sufficient to found an in personam claim. The high point of Epsom's case is that the purchaser had notice of Epsom's unregistered interests but ignored them. An argument that mere notice constitutes unconscionability has insufficient prospects of success to justify a grant of leave.[16] As to reliance on a failure to investigate, that too is a question of fact and degree which does not raise any issue of general or public importance.[17]

[15] Epsom's attempt to distinguish its claim on the basis it is simply seeking compensation for the loss of trees, rather than title, also has insufficient prospects of success to warrant an appeal to this Court. Epsom still has to meet the requirements for an in personam claim.

[16] Finally, nothing raised by Epsom gives rise to the appearance of a miscarriage of justice in the Court of Appeal's assessment that there was no evidential basis for any allegation of unconscionability.[18]

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14 The three-limb test was confirmed by this Court in *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [157]–[158] and [160] per Tipping J and [78] per Blanchard and Wilson JJ. Contrary to Epsom's submission on this point, there is no need for the Court to grant leave in order to determine the question, which Tipping J in *Regal Castings* considered a "moot point" (at [147]), of whether an in personam claim is a true exception to indefeasibility or whether it simply describes a situation to which that principle does not reach.

15 Cases such as *Duncan v McDonald* [1997] 3 NZLR 669 (CA) at 683–684 are authority for the proposition that actual dishonesty is not required.

16 *Dollars & Sense*, above n 8, at [139] is clear that mere notice does not constitute unconscionable conduct to found an in personam claim. This was confirmed by this Court in *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2018] NZSC 75, [2019] 1 NZLR 161 at [101] per William Young and O'Regan JJ, [139] per Elias CJ, [151] per Glazebrook J and [162] per Ellen France J.

17 *Duncan*, above n 15, at 683.

18 Senior Courts Act, s 74(2)(b); and *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369.

Result and costs

[17] For these reasons, the application for leave to appeal is dismissed. Epsom has not had any opportunity to respond to Waitakere's submissions as to an uplift in costs and, in the circumstances, we consider the usual award of costs is appropriate. Epsom must pay Waitakere costs of $2,500.

Solicitors:
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Alexandra Low & Associates, Auckland for Respondent