

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV-2014-404-2587  
[2015] NZHC 157**

BETWEEN JEB MANAGEMENT LIMITED  
Applicant

AND GRUBZ UNITED WHANAU TRUST  
Respondent

Hearing: 3 November 2014

Appearances: D Mitchell for Applicant  
P Webb for Respondent

Judgment: 12 February 2015

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**JUDGMENT OF TOOGOOD J**

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*This judgment was delivered by me on 12 February 2015 at 4:45 pm  
Pursuant to Rule 11.5 High Court Rules*

*Registrar/Deputy Registrar*

## **Introduction and result**

[1] JEB Management Ltd (“JEB”) has applied under s 143 of the Land Transfer Act 1952 for the removal of a caveat registered against its property at 56 Wymondley Road, Otara, Manukau (“the Otara property”). The question to be determined is whether the caveator, Grubz United Whanau Trust (“the Trust”), the former registered proprietor of the property, has shown it is reasonably arguable that it has a caveatable interest in the property. If that is so, the caveat should be sustained.

[2] For the reasons which follow, I have determined that it is not reasonably arguable that the Trust has a caveatable interest in the property. In summary, the reasons are:

- (a) In order for the Trust to sustain the caveat, it needs to show that it is reasonably arguable that JEB committed fraud to a land transfer standard.
- (b) The evidence does not establish a reasonable argument that JEB committed land transfer fraud.
- (c) A claim of knowing receipt of trust property cannot be brought as an in personam exception to indefeasible title.

[3] The caveat on the Otara property is to be removed.

## **Background facts**

[4] The Trust was established in 1989 by a group of Otara residents who sought to better the lives of young people in the local community by providing recreational facilities and workplace training. Its principal asset was the Otara property.

[5] The original trustees ran the Trust with some success for several years. They passed on the operation of the Trust, although not their trusteeships, to the next generation. The Trust’s activities were effectively abandoned, however, in about

2007. The Otara property fell into disrepair, and the Trust fell into arrears in respect of Council rates.

[6] The sole director of JEB, Mr Darren Wallbank, says that in December 2010 he was approached by Mr Papa Manu who asked if he was interested in buying the Otara property. Mr Manu showed him some documents which indicated to Mr Wallbank that Mr Manu was representing the Trust due to the death of some of the trustees. On 21 December 2010, the parties entered into an agreement for the sale and purchase of the Otara property. The agreed purchase price was \$100,000, with a further \$50,000 to be paid to the Trust when JEB sold the property. The sale and purchase agreement contained a due diligence condition for the benefit of JEB, and it was agreed the transaction would be settled on 20 January 2011. The agreement as to the outstanding \$50,000 was recorded in a deed of acknowledgment of debt, entered into between JEB and the Trust on 19 January 2011.

[7] During the due diligence period, Mr Wallbank viewed the property; considered a valuation report provided by Mr Manu; and consulted a builder about renovation potential.

[8] Both the Trust and JEB were represented by solicitors who handled the sale and purchase transaction. On 20 January 2011, the agreement was confirmed unconditional. Settlement was completed on 21 January and JEB became the registered proprietor on 24 January 2011.

[9] On 25 January 2011, JEB's solicitor wrote to the Trust's solicitor to explain that vacant possession had not been obtained because there were people occupying the property who purported to be trustees of the Trust. The Trust's solicitor provided JEB's solicitor with copies of a trust deed, a certificate of incorporation (confirming the Trust's name had changed from Grubz United Trust to Grubz United Whanau Trust) and a deed of retirement and appointment of new trustees. The latter deed was executed by the original appointor of the Trust, Mr Michael Dowd, who asserted in the recitals that all of the original trustees apart from him had died and recorded that he wished to retire and appoint new trustees, including Mr Manu. The copy of the deed provided to JEB is dated 25 November 2005. I infer that a copy of this

document was what had been shown to Mr Wallbank to establish Mr Manu's credentials.

[10] On 4 June 2014, the Trust registered a caveat over the Otara property. A notice of the caveat was not served on JEB, which had no knowledge of it until August 2014 when Mr Wallbank obtained an updated title search.

[11] The caveat includes a claim by the caveator that the Trust has an interest in the Otara property under a constructive trust, on the basis that the persons who sold the property to JEB were not authorised to do so; that the Otara property was purchased for substantially less than market value; and that "[a]ccordingly JEB Management Limited was not a bona fide purchaser for value" of the property.

[12] It appears that the Crown Law Office began an investigation into the Trust's allegations in November last year. A memorandum of Crown Counsel on behalf of the Attorney-General, filed in advance of the hearing of this proceeding, discloses that that investigation is ongoing. Counsel said it was understood that the Trust intends to commence a separate proceeding addressing the removal of the trustees and the sale of trust property. While the Solicitor-General may seek to participate in that proceeding, the Attorney-General did not wish to be heard regarding the present application.

### **The Trust's assertions**

[13] The Trust alleges that in late 2010 a group of people, including Mr Dowd and Mr Manu, took steps to acquire control of the Trust. It claims that Mr Dowd's assertion that all the other trustees were dead was knowingly fraudulent because, although some of the original trustees had died, two others remained alive and were able to operate the Trust. It submits that the apparent haste with which Mr Manu and the other new trustees took steps to dispose of the Trust property (only three days after their purported appointment) gives rise to a belief that "it is possible" that JEB was involved in or aware of a plan by Mr Dowd and those he "improperly assisted to seize control of the [Trust] to improperly dispose of" the Otara property, and that the sale of the property was planned in advance of the execution of the deed of

retirement. I was told the Trust is bringing a separate proceeding against Mr Dowd, Mr Manu, JEB and others alleging breaches of fiduciary duty and unconscionable actions.

[14] Essentially, the Trust argues that it retains a proprietary interest in the property because JEB was not a purchaser in good faith, and therefore does not get the benefit of indefeasible title. The allegation of lack of good faith rests on proof that Mr Dowd acted fraudulently in appointing new trustees, knowing they intended to sell the property, and that JEB knew or ought to have known of those fraudulent actions.

### **Removal of caveat**

[15] Section 143 of the Land Transfer Act 1952 says:

#### **Procedure for removal of caveat**

- (1) Any such applicant or registered proprietor, or any other person having any registered estate or interest in the estate or interest protected by the caveat, may, if he thinks fit, apply to the High Court for an order that the caveat be removed.
- (2) The court, upon proof that notice of the application has been served on the caveator or the person on whose behalf the caveat has been lodged, may make such order in the premises, either *ex parte* or otherwise, as to the court seems meet.

[16] The parties agree about the proper test for removing a caveat: the onus of proof in a s 143 hearing falls on the Trust, as caveator; it must show there is a reasonably arguable case that it has an interest in the property that entitles it to the protection of the caveat; a caveat will be removed only if it is “patently clear that the caveat cannot be maintained either because there was no valid ground for lodging it or that such valid ground as then existed no longer does so”.<sup>1</sup>

[17] The parties further agree that the Court should not, at this point, attempt to resolve any conflicts in their evidence.<sup>2</sup> Generally, where there is such a conflict on an application to remove a caveat, the Court will accept the evidence advanced on

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<sup>1</sup> *Sims v Lowe* [1988] 1 NZLR 656 (CA) at 659-660.

<sup>2</sup> *Macrae v Rapana* M633/94, 17 June 1994.

behalf of the caveator as correct, unless it is patently lacking in credibility.<sup>3</sup> But that does not prevent the Court from making an assessment of the strength of a party's case. The contest between the parties is about whether the Trust's factual allegations support a reasonably arguable case that it has a caveatable interest in the property.

[18] The applicant argues that, even if the Court finds that Mr Dowd acted dishonestly or otherwise in breach of his obligations as a trustee, the asserted facts do not disclose a reasonably arguable case that JEB should be deprived of clear title to the Otara property. The applicant says that such remedies as may be available to the Trust, if its allegations of trustee misconduct are proved, lie in a claim or claims for damages.

### **Issues**

[19] Two broad issues arise:

- (a) What is the proper test for the fraud exception to indefeasibility, and is it reasonably arguable that the applicant committed fraud when dealing with the Otara property?
- (b) If the applicant's conduct does not amount to land transfer fraud, is it reasonably arguable that his title might nevertheless be defeated under the in personam exception to indefeasibility?

### **JEB's submissions**

[20] JEB directs its submissions in reply to the fraud exception. Mr Mitchell submits that even if Mr Dowd is held to have acted in breach of his duty as a trustee, the Trust has failed to establish a reasonably arguable case that JEB was guilty of land transfer fraud. JEB argues that:

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<sup>3</sup> *Macrae v Rapana* M633/94, above n 2; *Hudson v Robway Farms Ltd* [2012] NZHC 748 at [21].

- (a) Although fraud on the part of the purchaser is an exception to the doctrine of indefeasibility of title, land transfer fraud requires specific elements and it is not enough to show constructive or equitable fraud.
- (b) Instead, fraud which would render a registered title voidable must:
  - (i) involve dishonesty of some sort; and
  - (ii) be brought home to the registered proprietor or to the registered proprietor's agent; and
  - (iii) operate against a prior identifiable interest in the land.

[21] In this case, JEB submits that the Trust is arguing JEB is liable for a kind of constructive fraud which is not enough to affect the indefeasibility of a registered title. JEB says the case stands and falls on whether the Trust can show JEB has committed actual fraud.

### **The Trust's submissions**

[22] Mr Webb says that it is not accepted that the Trust must establish actual fraud. Rather, he argues that JEB is liable in knowing receipt of trust property, an equitable cause of action, which requires a lesser standard of dishonesty than land transfer fraud. The Trust's position is that JEB never obtained good title as a bona fide purchaser for value without notice, because of its failure to make proper enquiry, and that it is not entitled to rely on the law of indefeasibility of title.

[23] The Trust argues that JEB purchased the property when it was impressed with a trust in favour of the Trust's beneficiaries. It says further that JEB purchased the property at a significant undervalue such that, if JEB did not have actual knowledge of the trust, it was:

- (a) wilfully shutting its eyes to the obvious; or

- (b) wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make; or
- (c) in possession of knowledge of circumstances which would indicate the fact of the trust to an honest and reasonable person; or
- (d) in possession of knowledge of circumstances which would put an honest person on inquiry.

[24] The Trust points to cases in which strangers to trusts are held accountable as constructive trustees for support for the proposition that the relevant knowledge required to make a stranger to the trust accountable as a constructive trustee to the beneficiaries under the trust was knowledge of facts which could be actual knowledge or knowledge that the stranger would have obtained but for wilfully and recklessly refraining from making enquiries as a reasonable person in such circumstances would have done.<sup>4</sup>

[25] These submissions by the Trust boil down to an assertion that, where trust property is involved, the equitable principles of knowing receipt can override the normal test of land transfer fraud.

### **What are the exceptions to indefeasibility?**

[26] Sections 62 and 63 of the Land Transfer Act 1952 provide protection to the registered proprietor of land against claims and proceedings. As explained by Lord Wilberforce, delivering the opinion of the Privy Council in *Frazer v Walker*:<sup>5</sup>

... while s. 62 secures that a registered proprietor, and consequently anyone who deals with him, shall hold his estate or interest absolutely free from encumbrances, with three specified exceptions, s 63 protects him against any action for possession or recovery of land, with five specified exceptions. Section 63(2) is a particularly strong provision in his favour: it provides that the register is, in every court of law or equity, to be an absolute bar to any such action against the registered proprietor, any rule of law or equity to the contrary notwithstanding. It is to be noticed that each of these sections

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<sup>4</sup> *Baden v Société Générale pour Favoriser le Développement du Commerce et l'Industrie en France SA* [1993] 1 WLR 509; [1992] 4 All ER 161 (EWHC); *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2000] 4 All ER 221 (EWCA).

<sup>5</sup> *Frazer v Walker* [1967] NZLR 1069 (PC) at 1075-1076.



excepts the case of fraud, s 62 employing the words “except in case of fraud”, and s 63 using the words “as against the person registered as proprietor of that land through fraud”. The uncertain ambit of these expressions has been limited by judicial decision to actual fraud by the registered proprietor or his agent. (*See Assets Co. Ltd. v Mere Roihi* [1905] A.C. 176, 210; [1905] N.Z.P.C.C. 275, 298.)

It is these sections which, together with those next referred to, confer on the registered proprietor what has come to be called “indefeasibility of title”. The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required; but as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.

[27] Two important exceptions to the doctrine of indefeasibility are the fraud exception and the exception for in personam claims. Commentators have described these two exceptions as having a “complex inter-relationship”.<sup>6</sup>

### **Fraud exception**

[28] By the terms of the Act itself, fraud destroys the quality of indefeasibility in a registered title.<sup>7</sup> However, the precise definition of land transfer fraud is not always easy to discern. There is no statutory definition because the forms of fraud are so various, and whether fraud is present will turn on the particular facts of the case.

[29] The orthodox test for fraud in New Zealand is actual dishonesty by the registered proprietor or his agents. This is not the same as constructive or equitable fraud.<sup>8</sup> However, New Zealand case law also supports the finding of land transfer

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<sup>6</sup> Elizabeth Toomey “The Land Transfer System” in Tom Bennion and others *New Zealand Land Law* (2nd ed, Brookers, Wellington, 2009) 31 at 84.

<sup>7</sup> Land Transfer Act 1952, ss 62, 63, 182 and 183; Jody L Foster “Title by Registration” in G W Hinde and others *Hinde McMorland and Sim Land Law in New Zealand* (online looseleaf ed, LexisNexis) at [9.017].

<sup>8</sup> *Assets Co Ltd v Mere Roihi* [1905] AC 176 (PC) at 210, cited with approval in *Bunt v Hallinan* [1985] 1 NZLR 450 (CA) at 459; *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 (PC) at 106-107; *Dollars & Sense Finance Ltd v Nathan* [2008] NZSC 20, [2008] 2 NZLR 557 at [6].

fraud where the purchaser has cause to suspect a competing claim to the title of the property but deliberately refrains from making further enquires.<sup>9</sup>

[30] But it is well settled in New Zealand that the kind of fraud that will destroy an indefeasible title to land is relatively narrow in its conception. The level of knowledge required is set at a high threshold: the purchaser must have actual knowledge, which itself includes wilful blindness.<sup>10</sup> Accordingly, fraudulent registration occurs where:<sup>11</sup>

- (a) the purchaser has actual knowledge of the vendor's intent to cheat the unregistered party out of its interest in the land; or
- (b) the purchaser suspects at the time of contracting that the vendor was acting in a way which would defeat the unregistered party's interest in the land, and the purchaser intentionally takes advantage of the vendor's conduct.

### **Is it reasonably arguable that JEB committed land transfer fraud?**

[31] In *Efstratiou v Glantschnig*<sup>12</sup> the Court of Appeal upheld a ruling at first instance that a wife was entitled to an order setting aside a memorandum of transfer and subsequent registration on the grounds of fraud. In that case the wife and husband had been separated for some time, the husband having travelled overseas for an indefinite stay. He returned unannounced to find that the wife had begun living as man and wife with a boarder. After a row, the wife departed the house with the children. Within four days the husband and a land agent with whom he was associated had arranged the sale of the matrimonial home for around 60 percent of its value, settled the transaction and registered the transaction at the Land Transfer Office. The transaction passed the property in the matrimonial home to the

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<sup>9</sup> *Waimiha Sawmilling Co Ltd (in Liquidation) v Waione Timber Co Ltd* [1923] NZLR 1922 (CA) at 1175; *Bunt v Hallinan* [1985] 1 NZLR 450 (CA) at 453 and 460 (per Richardson and McMullin JJ); *Jessett Properties Ltd v UDC Finance Ltd* [1992] 1 NZLR 138 (CA) at 142; *Cricklewood Holdings Ltd v C V Quigley & Sons Nominees Ltd* [1992] 1 NZLR 463 (HC) at 480.

<sup>10</sup> Blanchard J "Indefeasibility under the Torrens System in New Zealand" in D Grinlinton (ed) *Torrens in the Twenty-First Century* (Wellington, LexisNexis, 2003) 29 at 42

<sup>11</sup> At 45-46.

<sup>12</sup> *Efstratiou v Glantschnig* [1972] NZLR 594 (CA).

purchaser and the husband, having received the proceeds of the sale, used them to pay the land agent and to liquidate his debts. The moneys he had received were completely dissipated by the time the wife initiated proceedings for an order setting aside the memorandum of transfer and a declaration that the land would then be held on trust for her by the husband. She sought damages from her husband, the land agent, and the purchaser. The Court of Appeal upheld the order setting aside the transaction.

[32] The evidence in the present case falls far short of establishing fraud of that kind. Even if the Court holds on the respondent's evidence as presently before the Court that Mr Dodd acted in breach of trust by resigning and appointing Mr Manu and others as trustees, knowing they intended to sell the Otara property, the evidence is insufficient to establish that Mr Wallbank knew that the actions of Mr Dodd and Mr Manu were dishonest and fraudulent. The respondent appears to accept that to be the case, alleging only that it believes "it is possible" that the applicant was involved in or actually aware of the breach of trust. The highest at which the respondent can put its case is to argue that Mr Wallbank had information on the basis of which he must have suspected fraudulent activity. I do not think the evidence goes that far, either.

[33] The terms of the sale and purchase agreement were favourable to JEB in that the purchase price was substantially lower than the value of approximately \$300,000 shown in the valuation report provided to Mr Wallbank by Mr Manu. Furthermore, the arrangement to pay the \$150,000 purchase price by an immediate payment of \$100,000 with the balance to be paid upon the sale of the property by JEB without more amounted to an unsecured, interest-free advance of two-thirds of the purchase price to the applicant. But the Trust was in substantial arrears of its obligation to pay rates and, so far as Mr Wallbank knew from the information provided by Mr Manu, it was unable to meet that debt. A sale at less than the estimated value of the property would, at least, provide the Trust with an immediate cash sum of \$100,000 with the promise of a receipt of a further \$50,000 in due course. A decision to dispose of the property on those terms was not so unfavourable to the Trust, in my opinion, as to necessarily give rise to suspicion by Mr Wallbank and put him on inquiry.

[34] Further, there is no evidence that Mr Manu and Mr Wallbank were dealing with each other at anything other than arms length, and since both parties were represented by solicitors, Mr Wallbank had no reason to suspect that the transaction was anything other than a conventional conveyance of land. Moreover, the real issue is whether Mr Wallbank was put on notice that Mr Manu was not authorised to act in the transaction on behalf of the Trust. To the contrary, he had been shown a document which on its face appointed Mr Manu as a trustee.

[35] Even accepting the respondent's evidence at face value, therefore, it does not go nearly far enough to establish fraud or dishonesty which the higher courts have held to be requisite to establish land transfer fraud.

### **In personam exception**

[36] I turn next to consider whether, even if JEB is not guilty of land transfer fraud, it is possible that JEB might be liable under the in personam exception, which can encompass unconscionable behaviour less than actual dishonesty.

[37] The in personam exception to indefeasibility of title is conceptually distinct from the fraud exception.<sup>13</sup> While fraud is a statutory exception (which, if proved, means the applicant is entitled as of right to the appropriate remedy), a claim in personam is made against the registered proprietor personally and the relief granted is equitable.<sup>14</sup> Such a claim can be made by any applicant who can establish that the registered proprietor is liable in a recognised cause of action that involves unconscionable conduct relating to the land.<sup>15</sup>

[38] That the doctrine of indefeasibility does not remove the court's equitable jurisdiction has been confirmed many times in the case law. Lord Wilberforce said in *Frazer v Walker* that indefeasibility "in no way denies the right of a plaintiff to bring against a registered proprietor a claim *in personam* founded in law or in equity, for such relief as a court acting *in personam* may grant".<sup>16</sup> This was affirmed by the

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<sup>13</sup> *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133 (VCA) at 166.

<sup>14</sup> *Duncan v McDonald* [1997] 3 NZLR 669 (CA) at 683 (per Blanchard J).

<sup>15</sup> Foster "Title by Registration", above n 7, at [9.046].

<sup>16</sup> *Frazer v Walker*, above n 5, at 1078.

Privy Council in *Oh Hiam v Tham Kong* where Lord Russell of Killowen stated that indefeasibility does not interfere with “the ability of the court, exercising its jurisdiction in personam to insist upon proper conduct in accordance with the conscience which all men should obey”.<sup>17</sup> The point was affirmed by the Supreme Court in *Regal Castings Ltd v Lightbody*.<sup>18</sup>

[39] Rights in personam, therefore, can be enforced against a registered proprietor whose conduct falls short of land transfer fraud.<sup>19</sup> The Court of Appeal has said that, when bringing a claim in personam, what is being challenged is not the validity of the registered title, but the freedom of the registered proprietor to disregard an equity arising out of his or her acts or omissions.<sup>20</sup> So:<sup>21</sup>

A registered proprietor who has entered into a contract for the sale of land, for example, cannot set up the indefeasibility of his or her title as a defence to a proceeding for specific performance. Nor can a registered proprietor who holds the land upon trust rely upon the concept of indefeasibility to defeat the trust. The Courts will intervene to protect the beneficiaries by directing that the trust be executed notwithstanding the doctrine of indefeasibility.

[40] However, an important qualification to recognising an in personam claim is that it must not conflict with or undermine the concept of indefeasibility.<sup>22</sup> Moreover, the Court of Appeal has sounded a note of caution about in personam claims, saying that they should not be used “to consume the indefeasibility rule”.<sup>23</sup> The exception “should be confined to cases that truly engage the conscience of the party whose registered priority is challenged”.<sup>24</sup>

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<sup>17</sup> *Oh Hiam v Tham Kong* (1980) 2 BPR 9451 (PC) at 9454, cited by Thomas J in *C N & N A Davies Ltd v Laughton* [1997] 3 NZLR 705 (CA) at 711.

<sup>18</sup> *Regal Castings Ltd v Lightbody* [2009] 2 NZLR 433 (SC) at [155]-[156] (per Tipping J).

<sup>19</sup> Foster “Title by Registration”, above n 7, at [9.056]; *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd*, above n 13, at 136; *Duncan v McDonald*, above n 14, at 683 (per Blanchard J).

<sup>20</sup> *C N & N A Davies Ltd v Laughton*, above n 17, at 713.

<sup>21</sup> At 711.

<sup>22</sup> *Dollars & Sense Finance Ltd v Nathan*, above n 8, at [29].

<sup>23</sup> *Cashmere Capital Ltd v Crossdale Properties Ltd* [2009] NZCA 185, [2009] 3 NZLR 612, at [18].

<sup>24</sup> At [18].

### **Is it reasonably arguable that JEB is liable in knowing receipt?**

[41] The Trust seeks a declaration of constructive trust over, and the return of, the property but the Court must be cautious about ordering relief which would have the effect of extinguishing JEB's proprietary rights; it would be wrong to impose a constructive trust "on the basis of some vague idea of what might seem fair".<sup>25</sup> The particular question the respondent's submissions pose is whether a claim of knowing receipt of trust property can be brought as an in personam exception to indefeasibility. I am satisfied that it cannot.

[42] A person is liable for knowing receipt of trust property where he receives property belonging to a trust knowing that it had been given to him in breach of trust. The level of knowledge required to establish a claim of knowing receipt in New Zealand is a subject of some uncertainty. In *Westpac Banking Corp v Savin* the Court of Appeal expressed the view that there is no reason why actual or constructive knowledge should not be sufficient to found liability for knowing receipt of trust property, although this was not relevant to the ultimate determination of the decision.<sup>26</sup> In *Equiticorp Industries Group v The Crown*, Smellie J also suggested that there is room for the view that constructive knowledge would be sufficient to hold a defendant liable in a knowing receipt case but refrained from reaching a conclusion on this point.<sup>27</sup> I conclude, however, that it is likely that the threshold for establishing constructive knowledge is lower than that for establishing land transfer fraud.

[43] Courts and commentators have articulated certain criteria all of which must be met for a successful in personam claim:<sup>28</sup>

- (a) The remedy cannot be used to undermine the fundamental concepts of the Torrens system.<sup>29</sup>

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<sup>25</sup> *Disher v Farnworth* [1993] 3 NZLR 390 (CA) at 399.

<sup>26</sup> *Westpac Banking Corp v Savin* [1985] 2 NZLR 41 (CA) at 53 (per Richardson J), 60 (per McMullin J) and 70 (per Sir Clifford Richmond).

<sup>27</sup> *Equiticorp Industries Group Ltd v The Crown* [1998] 2 NZLR 481 (HC) at 636.

<sup>28</sup> Toomey "The Land Transfer System", above n 6, at 99-100.

<sup>29</sup> See, for example, *Housing Corp v Maori Trustee* [1988] 2 NZLR 662 (HC) at 671-672.

- (b) There must have been unconscionable conduct on the part of the current registered proprietor.<sup>30</sup>
- (c) Claims in personam must encompass only known legal or equitable causes of action.<sup>31</sup>

[44] A claim for knowing receipt satisfies the last two of these three limbs, but the first limb is problematic. Allowing applicants to attack the indefeasible titles of registered proprietors on the grounds that they had constructive knowledge that the received property was impressed by a trust would undermine the concept of indefeasibility. It would permit a registered interest in land to be set aside on the basis of a lesser extent of knowledge than is required to establish land transfer act fraud. Accepting such a proposition would threaten to create a two-track land transfer system in which land that is held in trust is treated differently to other land.<sup>32</sup>

[45] There is clear authority in Australia that knowing receipt of trust property cannot found an in personam claim that could defeat an indefeasible title. In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, the High Court of Australia cited with approval the decision of the majority of the Victoria Court of Appeal in *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd*. The Court quoted in particular the judgment of Tagdell JA,<sup>33</sup> who declared that to recognise a claim in personam against the holder of a mortgage registered under the Transfer of Land Act 1958 (Vic), dubbing the holder a constructive trustee by application of a doctrine akin to “knowing receipt” when registration of the mortgage was honestly achieved, would introduce by the back door a means of undermining the doctrine of indefeasibility which the Torrens system establishes.

[46] On the strength of this Australian authority and the New Zealand cases, I am persuaded that the position in New Zealand also should be that, in order for the Trust to establish a reasonably arguable case that it has a caveatable interest in the land, it must show that it is reasonably arguable that JEB committed fraud to the land

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<sup>30</sup> See, for example, *Duncan v McDonald*, above n 14, at 683 (per Blanchard J).

<sup>31</sup> See, for example, *C N & NA Davies Ltd v Laughton*, above n 17, at 712.

<sup>32</sup> Toomey “The Land Transfer System”, above n 6, at 116.

<sup>33</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 81 ALJR 1107 at [193], citing *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd*, above n 13, at 156-157.

transfer standard. It is not enough to say that it is liable under the principles of knowing receipt.

**Result and order**

[47] The Trust has failed to satisfy me that it is reasonably arguable that it has a caveatable interest in the property. Accordingly, I order that the caveat registered against the property at 56 Wymondley Road, Otara, Manukau shall be removed from the title.

**Costs**

[48] The applicant is entitled to costs. Unless the parties can resolve the payment of costs without an order of the court, the applicant shall have until 5 March 2015 to apply by memorandum. The respondent shall have until 26 March 2015 to file and serve a memorandum in reply. Costs shall then be determined on the papers, unless the Court directs otherwise.

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**Toogood J**