IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2008 409 000561

BETWEEN	ANZ NATIONAL BANK LIMITED Plaintiff
AND	MACPHERSON PROPERTIES LIMITED First Defendant
AND	GE FINANCE AND INSURANCE Second Defendant
AND	DEREK PAUL POWELL Third Defendant

Hearing: 14 July 2008

Appearances: J V Ormsby and W A Johnson for Plaintiff
S Barker for Defendant

Judgment: 29 August 2008

JUDGMENT OF CHISHOLM J

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[1] The plaintiff (ANZ) held a first mortgage over six titles owned by the first defendant (MacPherson Properties) of which the third defendant (Mr Powell) was a director. Those titles had been caveated by the second defendant (GE) to protect an equitable mortgage. When one of the titles was sold in 2006 ANZ erroneously discharged its mortgage over all six titles rather than partially discharging it over the title being sold. Subsequently GE registered its mortgage over the remaining five titles.

[2] In this proceeding ANZ seeks against MacPherson Properties and GE, first, rectification of the discharge of mortgage so that its mortgage has priority over the GE mortgage and, second, a declaration that its interest has priority over any interest

of GE by virtue of fraud under the Land Transfer Act. GE now seeks summary judgment in relation to both those causes of action or, alternatively, an order striking them out. This judgment relates to that application.

Background

[3] To secure its lending Countrywide Bank Limited (now part of ANZ) took a mortgage in 1997 over six titles in a subdivision created by MacPherson Properties. Mr Powell guaranteed the advances by the bank to MacPherson Properties.

[4] In September 2006 MacPherson Properties sought further funding from the bank as well as a restructuring of the loan facility. It was agreed that ANZ would provide further funds of approximately $239,000 in addition to the $527,000 that was then owed to the bank. Part of the arrangement involved the sale of one of the sections and payment of the net proceeds of sale to the bank, thereby reducing the amount owing to ANZ to around $377,000. The balance owing to ANZ was to remain secured over the other five lots.

[5] Earlier that year GE had caveated the six titles to protect an equitable mortgage which arose from MacPherson Properties' guarantee of a bailment entered into by MacPherson Marine Limited. Under the guarantee MacPherson Properties agreed to grant GE a mortgage over the six titles. MacPherson Marine Limited went into liquidation owing GE in the region of $2 million and the guarantee was called upon by GE.

[6] Because GE held a caveat over the title that was to be sold it was necessary for the caveat to be released in relation to that title. On 27 November 2006 Roderick Hutton, the South Island manager of business and credit management for ANZ, sent the following email to Justin Toebes, the solicitor for GE:

> *"Evening Justin*
>
> *Sorry I did not respond to your phone message left earlier today (a mad Monday).*
>
> *MacPherson Properties debt with the Bank is approx. $766k (Bank's 1st mortgage has a priority figure of $1m).*

I have yet to see a copy of the purchase and sale agreement relating to 6 Penny Lane but believe that the sale price was $395k. I have instructed that a partial discharge be sent to Patrick Costelloe [solicitor for MacPherson Properties] with a request for full net proceeds which will be applied to reduction of the Bank's debt. Copy of settlement statement is to be supplied to the Bank prior to settlement occurring.

Bank retains a mortgage over the 5 remaining sections in Penny Lane. These have a joint valuation of $995k.

Hope this covers off the points you wished to discuss."

Although this email was not mentioned in Mr Toebes' affidavit sworn in support of GE's application for summary judgment or strike out, it is not disputed that it was received by him.

[7] The same day the solicitors acting for MacPherson Properties faxed a letter to Mr Toebes confirming that the sale of the section was to occur on 1 December 2006 and that the withdrawal of the GE caveat would be required for settlement. The letter mentioned that the balance of the funds were to go to ANZ to reduce indebtedness and that the bank's mortgage "*exceeds the net sale proceeds*".

[8] In due course the sale of the section was settled and the net proceeds of about $377,000 were paid to ANZ. Unfortunately, instead of registering a partial release of mortgage over the section being sold, the bank registered a full discharge of mortgage which released its security over all six titles. This mistake was not picked up at the time and ANZ continued to provide banking accommodation to MacPherson Properties in the belief that it was secured.

[9] On 23 July 2007 GE obtained summary judgment against MacPherson Properties (which was later fixed at $1,680,424.13). The same day Mr Toebes obtained searches of the five titles retained by MacPherson Properties and the next day he reported to GE: "*This is interesting because the mortgage to [ANZ] was discharged in December 2006*". He went on to say that the agreement to mortgage, which "*would hopefully*" become a registered mortgage in due course, would be a first and only mortgage over those properties.

[10] Subsequently efforts were made by Mr Toebes to have MacPherson Properties execute a mortgage in favour of GE. When MacPherson Properties

declined to do so, GE prepared and executed a mortgage (as it was entitled to do) and registered it against the five titles on 13 September 2007.

[11] On 3 October 2007 ANZ received a request from Mr Powell's solicitors for further advances under the existing facility with the bank. Before agreeing to any further drawdown Mr Hutton checked the title and discovered to his horror that the bank's mortgage had erroneously been discharged in full. With a view to resolving the situation with GE Mr Hutton spoke with Mr Toebes at a New Zealand Law Society seminar on 7 November 2007. There was no resolution.

[12] Upon becoming aware on 29 January 2008 that GE had decided to proceed with a mortgagee's sale of the five remaining sections, ANZ caveated those titles. Thereafter ANZ and GE corresponded through their respective solicitors with a view to allowing the sale of the sections to proceed without prejudice to the competing interests of the parties.

[13] Ultimately it was agreed that GE would discharge its mortgage and ANZ would withdraw its caveat on the basis that the rights, titles, interest or claims of the parties were not affected. It was recorded that:

> *"2. No defence will be raised by GE or MP based on the bank withdrawing or partially withdrawing the caveats; or by the bank on the basis of GE discharging or partially discharging its mortgage and allowing any sale, whether by the mortgagor, a mortgagee or otherwise, to proceed."*

From the proceeds of sale the sum of $397,105.68 claimed by ANZ was to be held in Buddle Findlay's trust account pending further agreement or Court order. That has happened.

[14] This proceeding was issued on 26 March 2008. As to rectification, it is pleaded:

> *"29. THERE was an agreement between the Plaintiff and the First Defendant for the discharge of mortgage A298710.3 over CT 133920 only.*
>
> *30. THE registration of the Memorandum of Discharge for Mortgage Number A298710.3 mistakenly discharged the mortgage over all the Properties, and did not conform with the intention of the parties.*

> *31. THE mistake was known to the Second Defendant prior to the registration of their mortgages.*
>
> *32. THE Plaintiff was entitled to rectification of the Titles and to have its interest restored with priority ahead of the Second Defendants interest.*
>
> *33. PURSUANT to the Agreement the Plaintiff is entitled to relief on the basis that rectification is still possible and the sale of the properties had not taken place."*

ANZ seeks a declaration that prior to the agreement and discharge of its caveats it would have been entitled to rectification of the discharge of mortgage so that it had priority ahead of GE's mortgage. The bank also seeks a declaration that it is entitled to the proceeds of sale retained in the Buddle Findlay trust account.

[15] In relation to Land Transfer Act fraud it is pleaded:

> *"34. THE Second Defendant was aware of the precarious financial position of the First Defendant and the Third Defendant.*
>
> *35. THE Second Defendant registered its mortgages with an intention to defeat the prior interest of the Plaintiff, such an action constituting fraud under the Land Transfer Act 1952."*

Again declarations are sought that ANZ's interest has priority ahead of any interest of GE and that ANZ is entitled to the proceeds of sale held in the Buddle Findlay trust account.

Principles

[16] There is no dispute about the relevant principles.

[17] In relation to summary judgment the onus is on GE to satisfy the Court on the balance of probabilities that none of ANZ's causes of action against it could succeed. Summary judgment is inappropriate where disputed issues of material fact need to be ascertained by the Court which could not be confidently concluded from the affidavits. It is not enough that the ANZ causes of action are shown to have weaknesses: *Westpac Banking Corporation v M M Kembla New Zealand Ltd* [2001] 2 NZLR (CA) 298.

[18] Whereas summary judgment requires evidence, an application to strike out is usually determined on the pleadings alone. The Court must assume that facts as pleaded are capable of proof at trial and it must also consider any other basis upon which the claim might be pleaded: *Couch v Attorney-General* [2008] NZSC 45 (SC). Assuming the facts as pleaded are capable of proof at trial the Court must then be satisfied that the cause of action is so untenable that the plaintiff cannot possibly succeed: *Takaro Properties Ltd (In Rec) v Rowling* [1978] 2 NZLR 314.

Rectification Cause Of Action

GE's Argument

[19] It should be recorded at the outset that when Mr Barker attempted to argue that rectification is now impossible because the titles have been transferred to third parties, I stopped him. This was because any such argument breached the agreement between the parties that no defence was to be raised by virtue of the sale having been allowed to proceed (see [13] above) . Nevertheless GE was still able to mount arguments that call for very careful consideration. I now turn to the other arguments in support of GE.

[20] Mr Barker alleged that ANZ's rectification argument could not get off the ground because there was insufficient evidence to support it. He claimed there was no evidence from MacPherson Properties or from Mr Powell indicating a common mistake and at best the evidence suggested a unilateral mistake by ANZ, and that was not enough.

[21] With reference to the Land Transfer Act 1952 Mr Barker submitted that s62 prevents the Court granting any rectification that would have the effect of relegating GE's indefeasible interest as mortgagee. He submitted that GE's indefeasible interest can only be relegated if actual fraud on the part of GE is proved and that there is no evidence to support that allegation. GE had registered its mortgage without notice of ANZ's claimed interest, and even leaving aside indefeasibility issues, rectification cannot be granted if it would affect an innocent third party: *CMG Equity Investments Pty Limited v Australia & New Zealand Banking Group*

Limited [2008] FCA 455. Mr Barker argued that GE could be properly categorised as an innocent third party.

[22] In response to ANZ's argument that *Merbank Corporation Ltd v Cramp* [1980] 1 NZLR 721 and *Doubtless Bay Water Supply Company Ltd v Robinson & Ors* (1997) 3 NZ ConvC 192,579 illustrate that rectification of the register was possible, Mr Barker emphasised that in each of those cases the document to be rectified was already on the register (a mortgage in *Merbank* and a water easement in *Doubtless Bay*). On the other hand, he submitted, the mortgage in this case had been removed from the register and rectification would effectively require registration of a new mortgage with priority over the GE mortgage. There was, however, no provision in the Land Transfer Act or jurisdiction in the Court to achieve that outcome.

[23] Counsel argued that even if the Court found that GE did not have a legal interest under its registered mortgage (which is denied), GE's full equitable interest, which dated back to 1998, would prevail over any equity available to ANZ. Either ANZ had to rely on an equity that was somewhere between a *"mere equity"* and a full equitable interest (in which case GE's full equitable interest would prevail) or GE's equitable interest would be first in time because ANZ's equitable interest only came into existence in December 2006.

[24] Mr Barker also submitted that prejudice to GE counted against rectification. He said that the reality is that there was not enough money to go around and if rectification was granted GE would effectively lose around $400,000. He claimed that situation had arisen because GE had registered its mortgage as a first mortgage in good faith on the strength of the register as it stood at the time and that by discharging its mortgage ANZ had effectively indicated to the world at large that it no longer had any interest in the subject land.

[25] On GE's case rectification is impossible. Under those circumstances GE claims that it should either be granted summary judgment on the rectification cause of action or that cause of action should be struck out.

ANZ's Response

[26] Mr Ormsby argued that the equitable doctrine of rectification allows the Court to alter formal instruments, with retrospective effect, to make sure that the formal instrument reflects the common agreement of the parties. He said that in this case the pleadings and evidence establish an erroneous discharge of the mortgage over five titles, a common intention that is not reflected in that instrument, and the absence of an alternative remedy.

[27] Counsel argued that the fact that the memorandum of discharge was registered under the Land Transfer Act does not prevent rectification of that instrument. In particular, he relies on *Merbank Corporation Ltd v Cramp* and *Doubtless Bay Water Supply Co Ltd v Robinson.* Mr Ormsby argued that the fact that the discharge removed the mortgage from the five titles does not matter because rectification is backdated to the time the discharge was registered. Moreover, GE had notice that the ANZ mortgage was intended to remain over the five titles. At the very least it was obliged to make proper inquiries, or accept the consequences: *Brierley Investments Limited v Shortland Securities Limited* (1994) 5 TCLR 615 at 667. Mr Ormsby also claimed that there will be no prejudice to GE because it did not make any advances in the mistaken belief that the ANZ mortgage had been discharged and will be no worse off if rectification is granted.

[28] As to Mr Barker's argument that ANZ can only rely on a *"mere equity"* Mr Ormsby's response is that *Merbank*, *Doubtless Bay* and *Child v Dynes* [1985] 2 NZLR 554 are authority for the proposition that where there is an application for rectification of a right concerning land, the interest becomes a full equitable interest, not a "mere equity". And a full equitable interest is sufficient to justify restoration to the register either where the third party has notice or where there is no prejudice.

[29] To the extent that GE relied on *CMG Equity Investments v ANZ Bank* Mr Ormsby argued that that case is distinguishable. He said that unlike ANZ in that case, GE is not in the position of a bona fide purchaser for value. GE had notice and should have made inquiries. In any event, he said, the New Zealand cases indicate

that while notice is an important factor, it is not an absolute barrier to rectification. Nor is the effect on a third party.

[30] Mr Ormsby concluded by suggesting that ultimately the case will turn on whether or not the Court is prepared to exercise its discretion in favour of rectification. He said that is an issue for trial, not for summary judgment or strike out.

Discussion

[31] These competing arguments give rise to several issues concerning rectification, some of which are difficult:

- Jurisdiction
- Common intention
- Discretion
- Implications of Land Transfer Act

I will now address each of these matters.

[32] Jurisdiction to grant rectification was discussed in *Crane v Hegeman-Harris Co Inc* [1939] 1 All ER 662. Simonds J said at 664:

> *… in order that this Court may exercise its jurisdiction to rectify a written instrument, it is not necessary to find a concluded and binding contract between the parties antecedent to the agreement which it is sought to rectify … [I]t is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement. If one finds that, in regard to a particular point, parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with that common agreement, then this Court has jurisdiction to rectify, although it may be that there was, until the formal instrument was executed, no concluded and binding contract between the parties".*

That approach was adopted in *Dundee Farm Ltd v Bambury Holdings Limited* [1978] 1 NZLR 647 (CA) at 651 and has been consistently applied in New Zealand

ever since. So I proceed on the basis that a common intention between the parties would be sufficient to found jurisdiction.

[33] The characteristics of a common intention were amplified by Tipping J in *Westland Savings Bank v Hancock* [1987] 2 NZLR 21 at 30. His Honour explained that while there did not need to be formal communication of the common intention by each party to the other or outward expressions, it must be objectively apparent from the words or actions of each party that each party held and continued to hold an intention on the point in question corresponding with the same intention held by each other party.

[34] For the purposes of this summary judgment/strike out application I am satisfied on the evidence currently available that at all relevant times there was a common intention between ANZ, MacPherson Properties and Mr Powell that ANZ would continue to hold mortgage security over the five titles after the first title was sold. There was only to be a partial release of mortgage over the title being sold, and the full discharge was a mistake. The subsequent actions of the bank and borrowers were consistent with this common intention. Evidence from MacPherson Properties and/or Mr Powell was not required to establish this common intention.

[35] The next issue concerns the discretion to grant or refuse rectification. If it is inevitable that the Court will refuse relief then GE's application for summary judgment/strike out should succeed. On the other hand, if the Court's discretion could be exercised in favour of granting relief, the matter should go to trial.

[36] Case law concerning exercise of the Court's discretion in rectification cases is not particularly consistent. For example, in *CMG Equity v ANZ Banking Group* Finkelstein J observed at [26]:

> *"Rectification is a discretionary remedy. Being a discretionary remedy there are certain circumstances in which the remedy will not be granted. Importantly, for present purposes, it has been held that if rectification were to affect an innocent third party (for example a bona fide purchaser for value without notice of the claimant's rights) the remedy will be refused. By way of analogy there are cases which hold that if a third party has acquired rights bona fide and for value in property transferred under a contract, a court will not rescind the contract:* White v Garden *(1851) 10 CB 919 [138 ER 364];* Clough v London and North Western

> Railway Co *(1871) LR 7 Exch 26;* In re L G Clarke; Ex parte the Debtor *[1967] Ch 1121. The cases on rectification are to the same effect: see* Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq) *(1965) 113 CLR 265;* Coolibah Pastoral Co v Commonwealth *(1967) 11 FLR 173."*

Mr Barker placed considerable reliance on this case and, of course, contended that GE was an innocent third party. He claimed that under those circumstances the Court was obliged to refuse relief.

[37] That decision can be contrasted with the somewhat broader approach in *Brierley Investments Ltd v Shortland Securities Ltd & Ors* (1994) 5 TCLR 615 in which McGechan J said at 665:

> *"Rectification is an equitable remedy, and as such is to be granted or withheld on general equitable principles. Within that, effects on third parties can be a consideration, along with all others. However, where the situation involves the specialised case of a bona fide third party acquiring for value without notice, as alleged here, matters can go rather beyond mere general discretion. Particularly if the acquirer takes a legal estate (but even if it is merely a matter of competing equities) some general equitable principles, as distinct from discretion, could come to bear.*
>
> …
>
> *It is clear rectification may be refused where remedy would prejudicially affect a third party acquirer for value who was without notice of the defect to be rectified. Sometimes the judicial concentration has been upon existence of notice (for example* ***Polson v Vacation Hotels (Properties) Limited*** *(supra)); and sometimes (as the "rationale") on prejudice (****Merbank Corp Limited v Cramp*** *(supra)). I do not think isolation of those two factors much assists. If there were notice, it is hardly likely rectification would be refused. If there was no prejudice, likewise. One looks at the totality. A third party acquirer can be fixed with constructive notice in appropriate circumstances. The acquirer must make proper inquiries, or accept the consequences".*

Mr Ormsby places considerable reliance on this case. His contention is that GE had notice of the mistake and will not be prejudiced by rectification. Under those circumstances, he argued, it could be anticipated that relief would be granted.

[38] In the context of this summary judgment/strike out application I have not been persuaded that the Court would inevitably withhold relief in this case. Indeed, the converse is much more likely. There are two main reasons.

[39] First, I do not believe that GE qualifies as an innocent third party. Before the mortgages were discharged GE was, or ought to have been, aware from Mr Hutton's email of 27 November 2006 and from the letter from the solicitors acting for MacPherson Properties that ANZ was intending to retain its mortgage over the remaining five titles. There should have been further warning bells that there had been a mistake from searches of the five titles in July 2007 which revealed that the release of the ANZ mortgage was registered only two weeks after settlement on 14 December 2006. Given the information GE already had from the bank this should have indicated that the mortgage over the remaining five titles had not been deliberately discharged. At the very least, there was enough for GE to have made further inquiries.

[40] Second, it is difficult to see how the bank's mistake prejudiced GE in any way. GE had entered into the arrangements giving rise to its equitable mortgage from MacPherson Properties long before. GE did not alter its position, for example by advancing further funds, on the basis that it would obtain a first mortgage over the five titles. To the contrary, when it obtained its equitable mortgage in 1998 it had notice that ANZ held a first mortgage over all the titles. And there is no suggestion that the presence or absence of the ANZ mortgage on the five titles would have made any difference to GE's decision to convert its equitable mortgage into a legal mortgage.

[41] Thus I am satisfied that ANZ can surmount the first three hurdles that I have identified. The final issue is whether, despite that conclusion, the indefeasibility provisions of the Land Transfer Act present an insurmountable hurdle to rectification in this case.

[42] In *Frazer v Walker & Ors* [1967] NZLR 1069 (PC) Lord Wilberforce, who delivered the judgment of their Lordships, said at p1078:

> *"… in following and approving … the two decisions in Assets Co. Ltd v. Mere Roihi, and Boyd v. Mayor, etc., of Wellington, their Lordships have accepted the general principle, that registration under the Land Transfer Act 1952 confers upon a registered proprietor a title to the interest in respect of which he is registered which is (under ss. 62 and 63) immune from adverse claims, other than those specifically excepted. In doing so they wish to make clear that this principle 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. That this is so has frequently, and rightly, been recognised in the Courts of New Zealand and of Australia* …..". (Underlining added).

This theme that the indefeasibility provisions of the Land Transfer Act do not preclude an equitable in personam remedy was endorsed by a Bench of five in *C N and N A Davies Ltd v Laughton* [1997] 3 NZLR 705 (CA).

[43] Application of that principle in the context of rectification of an instrument registered under the Land Transfer Act can be found in numerous cases. In *Merbank Corporation Ltd v Cramp* Barker J rectified a mortgage by inserting a charging clause in the mortgage without loss of priority. Five years later the same Judge rectified a deficient restrictive covenant in a memorandum of transfer in *Child v Dynes*. In *Wellington City Council v New Zealand Law Society* [1988] 2 NZLR 614 Davison CJ rectified a registered lease by removing an option to purchase. A deficient easement was rectified by Salmon J in *Doubtless Bay Water Supply Company Ltd v Robinson & Ors.* And in *Fifty-Seven Willis St Limited v Mortgage Holdings Ltd* (2005) 2 NZCCLR 460 Gendall J deleted a term in a registered mortgage and substituted another, it being contemplated that a variation of mortgage might have to be registered to give effect to the Court's order.

[44] Against that line of authority is *State Bank of New South Wales v Berowra Waters Holdings Pty Ltd and Ors* [1986] 4 NSWLR 398 which involved the accidental discharge of a bank's mortgages. The plaintiff sought declarations that the purported discharges of the mortgages were invalid and ineffective and that the recording of the purported discharges of mortgage by the Registrar General had been made in error. Needham J concluded that the registration of the dealing destroyed the charges previously binding on the land and that the plaintiff did not come within any of the exceptions to the indefeasibility provisions. He also considered that *"The reasons given in Frazer v Walker show that no action on a personal equity which falls within the prohibitions of ss42 and 124 may be maintained"*. Those sections are the equivalent of our ss62 and 63.

[45] There are several reasons for not following *Berowra.* First, it was not a rectification case. Second, unlike this case there was opposition from the registered

proprietor. Third, to the extent that the Judge relied on *Frazer v Walker* he does not appear to have taken account of the statement earlier in the Privy Council's decision to the effect that indefeasibility does not deprive a plaintiff of the right to bring an in personam claim, founded in law or equity, for such relief as a Court acting in personam may grant. Fourth, in the rectification context it would be contrary to the long line of New Zealand authority mentioned in [43] above.

[46] I do not accept that the principles involved in rectifying the discharge of mortgage in this case would differ from the principles involved in the rectification of the various instruments in the cases discussed above. In particular, I do not accept Mr Barker's proposition that rectification of the discharge would effectively add a new mortgage to the title. To the contrary, the mortgage is still shown on the title. It is the entry of the discharge, which is a separate entry, that would be rectified. Nor do I accept that there is anything in the argument that ANZ had held out to the world that its mortgage had been discharged. In terms of those relying on the register there would appear to be no possibility at all of any prejudice arising. Certainly the prejudice could be no greater than in *Doubtless Bay Water* where the second defendant had purchased without knowledge of the defects in the easement.

[47] Finally, I reject the argument that ANZ only has a "*mere equity*" which cannot compete in terms of equities or time with the GE equitable mortgage. When it comes to land there is a long line of authority that a right to rectification is very close, if not equivalent, to a fully fledged equitable interest: *Child v Dynes* at 560; *Anthony Polson & Co v Vacation Hotels (Properties) Limited* (High Court, Christchurch Registry, A.246/84, 4 November 1985) at p18; and *Doubtless Bay v Robinson* at 192,586.

[48] The application for summary judgment/strike out of the rectification cause of action fails.

Land Transfer Fraud Cause Of Action

[49] Mr Barker responsibly conceded that given paragraphs 34 and 35 of the pleadings (see [15] above), the strike out application cannot succeed. This cause of action stands or falls on the application for summary judgment.

GE's Argument

[50] Mr Barker submitted that there is no basis whatsoever upon which it could be suggested that GE obtained its registered mortgage by way of Land Transfer fraud, especially in view of Mr Toebes' evidence that there was no intention to defeat any prior interest of ANZ. He submitted that that should be the end of the matter, and the fraud allegation should never have been pleaded. He reminded the Court that the Land Transfer Act and relevant authorities are absolutely clear that mere knowledge of an equitable interest, or the possibility of such an interest, is irrelevant. Therefore, he submitted, GE must be viewed as a registered first mortgagee with all the rights that flow from that.

[51] It was emphasised by counsel that fraud involves some type of actual dishonesty: *Waimiha Sawmilling Co Ltd (in liq) v Waione Timber Co Ltd* [1923] NZLR 1137. He said it involves something in the nature of personal dishonesty or moral turpitude, and constructive fraud is not enough: *Bunt v Hallinan* [1985] 1 NZLR 450. He submitted that the holder of a registered interest should only be deprived of the benefits of indefeasibility when his or her behaviour, either directly or through an agent, has the necessary element of dishonesty, conscious moral turpitude or wickedness to justify the Court's intervention: *Russo v Bendigo Bank Ltd* [1999] 3 VR 376 (CA) at [42]. Mr Barker claimed that none of those requirements were satisfied.

[52] In this case, submitted Mr Barker, there was only one email from ANZ dating back seven months (email of 27 November 2006) and in only one line was there reference to the ANZ mortgage. He said that that passing reference cannot put GE on notice seven months later that ANZ had unilaterally and by mistake discharged its mortgage and thus require GE to cease its efforts to register the mortgage and check

with ANZ as to whether ANZ had made a mistake. His submission was that such a proposition defies logic and reality.

[53] Mr Barker also submitted that there was no possibility of supervening fraud in this case. From December 2006 the position in law and equity was that ANZ had no legal interest in the five properties as a result of the discharge of its mortgage and GE retained its equitable mortgage which had been granted in 1998. Under those circumstances it was impossible for any actions on the part of GE to constitute an intention to defeat ANZ's interest because such interest did not exist. Furthermore, GE had no knowledge of any ongoing interest in the five properties following ANZ's discharge of mortgage. GE simply converted its equitable mortgage to a legal mortgage and there was no wilful blindness on the part of GE.

[54] The fact that there was no ongoing dialogue between the two financiers was also emphasised by Mr Barker. He questioned how, given the absence of any dialogue, GE was supposed to have come to know in July 2007 that ANZ had made an error seven months earlier. There were a range of possibilities, and error was only one possibility. For example, Mr Powell may have come to a separate arrangement with ANZ to repay MacPherson Properties indebtedness or an alternative security might have been offered. Error by ANZ was not the most obvious explanation, and even if inquiry had been made and ANZ had advised that it had made a mistake, GE could still, without fraud, have registered its mortgage and become a first mortgagee.

ANZ's Response

[55] Unlike the cases relied on by GE this is not a case where the defendant had *"mere knowledge alone"* of ANZ's interest. Rather GE:

- Was familiar with the financial situation of MacPherson Properties and that ANZ had a first mortgage over the sections.

- Knew the extent of MacPherson Properties' indebtedness to ANZ.

- Knew when the mortgage was discharged that ANZ only intended to discharge the mortgage over one section, not all five.

- Knew at the time the discharge was discovered that MacPherson Properties and Mr Powell were in a dire financial position (and the evidence may well reveal that GE was aware that they had no other property interests).

- Knew that the discharge of the mortgage had occurred at about the same time as it had been told that ANZ was only discharging the mortgage over one title.

Moreover, submitted Mr Ormsby, GE had failed to make any further inquiries notwithstanding that, through Mr Toebes, it had found the discharges to be *"interesting"*.

[56] Mr Ormsby claimed that those facts show a clear foundation for allegations of fraud which could only be properly determined at trial. He argued that on the facts GE knew enough to be obliged to make further inquiries and that this amounted to wilful blindness. He also submitted that because discovery had not been completed the Court could not be sure that all available evidence was before it, and under those circumstances the only proper course was for the matter to proceed to trial.

Discussion

[57] While there are undoubtedly weaknesses in the ANZ case in relation to this cause of action, this is not a situation where I can confidently predict at this pre-trial stage that the Land Transfer fraud cause of action must fail.

[58] When he swore his affidavit Mr Toebes obviously overlooked the email of 27 November 2006. Clearly it is an important document which will need to be taken into account, along with all the other relevant evidence. Moreover, the fact that Mr Toebes has deposed that there was no intent to defeat any interest of ANZ is not

necessarily conclusive. It will be for the Court to assess that evidence along with all other relevant evidence. I cannot see how that can be done without the testing of all relevant evidence by way of cross-examination.

[59] Another factor that rules out summary judgment at this stage is the possibility that discovery will reveal further evidence. While I accept that there is merit in Mr Barker's assertion that there is no evidence to justify the inference that GE knew that MacPherson and Mr Powell were in a dire financial position, I cannot exclude the possibility that further evidence in that regard will emerge from discovery. Such evidence might be relevant to the Land Transfer fraud issue.

[60] Before leaving this topic I should respond to the suggestion that it was improper for this cause of action to be pleaded. While that might have been the case if the email of 27 November 2006 had not existed, it is certainly not the case when that document is taken into account.

Outcome

[61] GE's application for summary judgment/strike out of the plaintiff's causes of action is dismissed. If agreement cannot be reached as to costs, counsel should submit memoranda so that that issue can be determined by the Court.

Solicitors: Wynn Williams, Christchurch for Plaintiff
Buddle Findlay, Wellington for Defendants