IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2018-409-143
[2018] NZHC 1055

BETWEEN	JAMES JOHN DUNCAN MACFARLANE Applicant
AND	PERPETUAL TRUST LIMITED Respondent

CIV-2018-409-158

BETWEEN	PERPETUAL TRUST LIMITED Applicant
AND	JAMES JOHN DUNCAN MACFARLANE Defendant

CIV-2018-409-159

BETWEEN	PERPETUAL TRUST LIMITED Plaintiff
AND	JAMES JOHN DUNCAN MACFARLANE Defendant

Hearing:	30 April and 1 May 2018
Appearances:	J J D Macfarlane in person A McDuff and J Edwards for Perpetual Trust Limited
Judgment:	15 May 2018

JUDGMENT OF ASSOCIATE JUDGE JOHNSTON

Introduction

[1] There are three proceedings before the Court, to which I will refer as "the 143 proceeding", "the 158 proceeding" and "the 159 proceeding". The parties in all three proceedings are James John Duncan Macfarlane (Mr Macfarlane) and Perpetual Trust Ltd (Perpetual).

[2] The 143 proceeding was commenced by Mr Macfarlane on 14 March 2018. In this proceeding Mr Macfarlane seeks an order pursuant to s 145A of the Land Transfer Act 1952 that a caveat registered by him over the title to a property registered in Perpetual's name at 31 Linen Road, Waiau, North Canterbury (the Property) not lapse. The 158 proceeding was commenced by Perpetual on 16 March 2018. In this proceeding, Perpetual seeks an order pursuant to s 143 of the Land Transfer Act for the removal of the same caveat. The 159 proceeding was also commenced by Perpetual on 16 March 2018. In this proceeding, Perpetual is seeking vacant possession of the Property, and applying for summary judgment pursuant to pt 12 of the High Court Rules 2016.

[3] Following a case management conference on 20 April 2018, Associate Judge Osborne ordered that all three proceedings, having arisen from the same factual circumstances, should be heard together. His Honour also directed that the litigation be accorded urgency for reasons that will become apparent. Finally, he issued comprehensive pre-hearing directions.

[4] There has been sufficient compliance with those directions to enable the matter to be dealt with in an organised way.

Background

[5] The late Mr James Lyndon Macfarlane (Mr Macfarlane Senior) died on 30 November 1962. He pre-deceased his wife, Mrs Eileen Mary Macfarlane (Mrs Macfarlane), and his children from two marriages, six from his first marriage and two (including Mr Macfarlane) from his second marriage to Mrs Macfarlane.

[6] Mr Macfarlane senior died leaving a will dated 22 October 1952 (the Will). In it he appointed Mrs Macfarlane and Mr Frank Wilding as the executors and trustees of his estate and trust (the Estate). He left a modest legacy to Mrs Macfarlane, and the balance of his estate, which was substantial and included a farm and the Property to his trustees. They were enjoined to discharge his debts and funeral expenses in the usual terms, and then hold the residue of his Estate on trust for Mrs Macfarlane and the children during the former's widowhood. He conferred an unfettered discretion on them to pay the income generated by his Estate to Mrs Macfarlane and the children, in such proportions as they saw fit. Upon Mrs Macfarlane remarrying or dying, subject to a small weekly allowance to be paid to her in the event of her remarriage, the trustees were given an unfettered discretion to wind up the trust and pay the capital to Mrs Macfarlane and the children in such proportions as they should determine. Finally, so long as the family farming business was continued, during Mrs Macfarlane's widowhood, she and the children were given the right to continue to live in the family home.

[7] In codicils dated 7 September 1962 and 29 November 1962, Mr Macfarlane Senior appointed Mr Duncan Fraser as an additional executor and trustee, and revoked an immaterial provision in the Will.

[8] Following Mr Macfarlane Senior's death, Mrs Macfarlane commenced proceedings under the Family Protection Act 1955. This proceeding was ultimately resolved in an order made by this Court on 10 December 1965. Pursuant to this order Mrs Macfarlane was to receive an annuity and a motor car. Also, the provisions of the Will relating to capital were altered. The trustees' unfettered discretion as to the distribution of the capital at the conclusion of Mrs Macfarlane's widowhood was removed. The capital was notionally divided into 40 equal shares and apportioned. Those legacies, however, remained contingent upon the children attaining the age of 21 or earlier marrying. Moreover, the division of the capital of the estate into notional shares did not confer on any of the beneficiaries a gift of any particular property, but rather a fixed proportionate interest in the residue. The quantum of that interest was of course always dependant on how matters developed over the years.

[9] On 15 June 1972, Mrs Macfarlane, Mr Fraser and Mr James Pugh executed a deed recording that Mr Wilding had died, that Mr Fraser wished to retire as an executor and trustee and that Mr Pugh was to be appointed in his stead.

[10] In the early 1990's, differences arose that resulted in further litigation, the details of which it will be necessary to describe later in this judgment. The outcome was a consent order made by this Court on 18 November 1992. One important aspect of this was the appointment of Perpetual.

[11] The first two orders made by the Court were in these terms:

> (a) Eileen Mary Macfarlane and James McKay Pugh shall resign as trustees in the Estate of James Lyndon Macfarlane with effect from the 25th day of November 1992.
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> (b) PGG Trust Limited a trust company empowered by the PGG Trust Limited Act 1989 to act as a trustee company under and within the meaning of the Trustee Companies Act 1967 is appointed sole trustee of the said estate.

[12] On 1 July 1998, pursuant to pt 13 of the Companies Act 1993, the former entity known as Perpetual Trust Ltd and PGG Trust Ltd amalgamated. The amalgamated entity was Perpetual.

[13] Mrs Macfarlane, never remarried. She survived her husband by nearly 54 years. She died on 2 October 2016. Mr Macfarlane continued, and indeed continues, to live in the Property.

[14] On 14 November 2016, the Property suffered severe damage in the Kaikoura earthquake.

[15] Perpetual as the registered owner of the Property lodged a claim with its insurers, IAG, which was ultimately settled for $611,784. This amount was received on 3 July 2017.

[16] Perpetual then resolved to sell the Property in order to realise whatever residual value remained in the land and the damaged homestead. On 4 December 2017,

Perpetual entered into an agreement to sell the Property to a Ms Judith Flintoft for $170,000. That transaction was to settle on 14 March 2018.

[17] On 30 November 2017 Perpetual served on Mr Macfarlane a notice to vacate. He acknowledges having received that notice. In subsequent correspondence, Perpetual reminded him that the notice called upon him to vacate the Property by 22 February 2018. In his response Mr Macfarlane made it clear that he had no intention of leaving.

[18] On 9 February 2018, Mr Macfarlane registered a caveat over the title to the Property, preventing Perpetual from settling the sale and purchase transaction. Furthermore, Mr Macfarlane's continued occupation of the Property is preventing Perpetual from giving the purchaser vacant possession as it is obliged to do under the contract. Thus the need for urgency in resolving this litigation.

The 143 and 158 proceedings

Legal principles

[19] In *Botany Land Development Ltd v Auckland Council* the Court of Appeal summarised the principles that are to be applied when determining whether a caveat should be removed or lapse. The same principles apply irrespective of whether the court is dealing with an application by a registered title holder (or other party) pursuant to s 143 of the Land Transfer Act for the removal of a caveat (such as in the 158 proceeding here) or an application by a caveator pursuant to s 145A for an order that a caveat not lapse (such as in the 143 proceeding). The principles are as follows:[1]

> (1) The onus is on the caveator to demonstrate that it holds an interest in the land which is sufficient to support a caveat.
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> (2) The caveator must put before the court a reasonably arguable case to support the interest it claims.
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> (3) An order for the removal of a caveat will only be made if it is clear that there was either no valid ground for lodging it in the first place or, alternatively, that such ground as then existed has now ceased to exist.

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[1] *Botany Land Development Ltd v Auckland Council* [2014] NZCA 61 at [24]–[25].

(4) There is a residual discretion, once a reasonably arguable case has been established, as to whether to make an order removing the caveat. This will be exercised only cautiously, for example where the court finds there is no practical advantage to maintaining a caveat and the caveator will not be prejudiced.

(5) Any application to lapse a caveat, and any challenge to that application, does not preclude a claimant from seeking other remedies such as an interim injunction preventing dealing with the land.

[20] Accordingly, insofar as the 143 and 158 proceedings are concerned, the dispositive issue is whether Mr Macfarlane has a reasonably arguable case that he has a proprietary interest in the Property sufficient to support his caveat.

[21] If so then:

(a) Mr Macfarlane is entitled to the order he seeks in the 143 proceeding that his caveat not lapse; and

(b) Perpetual is not entitled to the order its seeks in the 158 proceeding for the removal of Mr Macfarlane's caveat.

[22] If not then:

(a) Mr Macfarlane is not entitled to the order he seeks in the 143 proceeding that his caveat not lapse; and

(b) Perpetual is entitled to the order its seeks in the 158 proceeding for the removal of Mr Macfarlane's caveat.

Validity of Perpetual's appointment

[23] Mr Macfarlane began his submissions by mounting a full-frontal attack on Perpetual's standing, submitting that the company secured its appointment "… by deceit of the Court and deceit of the beneficiary James Macfarlane". Ultimately, this lead him to the contention that Perpetual's appointment was unlawful, that the Court should refuse to recognise it, that all Perpetual's actions since November 1992 have been tainted, and that in particular Perpetual had no authority to sell the Property.

[24] That bold contention was supported by detailed submissions. These covered a good deal of ground. But, in the end, there were two limbs to the argument, as I understood it.

[25] Mr Macfarlane began by referring to two broad principles of trust law:

(a) First, that before accepting appointment as such, a prospective trustee has an obligation to disclose anything known to him, her or it that might impinge upon his, her or its ability fully to discharge the responsibilities of trusteeship as the law requires. In relation to this, Apparently, Mr Macfarlane referred me to *Galmerrow Securities Ltd v National Westminster Bank Plc*,[2] and to various legal texts, all of which I accept support the proposition contended for.

(b) Second, insofar as court-appointed trustees are concerned, a court will not appoint a trustee with a view to the interests of one group of beneficiaries in opposition to any other group of beneficiaries, or, as I would put it, a court will only appoint a trustee if it can be satisfied that the trustee will be in a position fully to discharge the obligations of neutrality that the law imposes as a necessary incident of trusteeship. In this regard, Mr Macfarlane referred me to *Re Tempest*,[3] and various texts.

[26] The first limb of his submission focussed on particular aspects of the factual background against which Perpetual was appointed, and it is necessary to describe these to capture the argument.

[27] Immediately prior to the November 1992 order being made, the administration of the Estate was in the hands of Mrs Macfarlane and Mr Pugh. Apparently, Mrs Macfarlane and Mr Pugh engaged Mr G T Scott of Helmore Bowron & Scott as the Estate solicitor. Mr Macfarlane says that Mr Scott was also Mr Pugh's personal solicitor. For reasons that it is unnecessary to go into, differences arose between

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2 Decision of the Chancery Division, 20 December 1993, reported in *Trust Law International* (2000) 14(3) pg 158 at 173.

3 *Re Tempest* (1865) LR 1 Ch App 485.

Mrs Macfarlane and Mr Pugh. The residuary beneficiaries appeared also to have become factionalised, although, whether those factions corresponded to supporters of Mrs Macfarlane and supporters of Mr Pugh is not clear. In any event, Mr Pugh, possibly supported by one group of residuary beneficiaries, concluded that steps should be taken to remove Mrs Macfarlane, and have her replaced. Mr Pugh consulted Mr Scott in relation to this, and, initially, Mr Scott saw his way clear to act in the matter.

[28] Mr Scott sought to instruct a barrister, presumably having in mind an application for the removal and replacement of Mrs Macfarlane. The barrister who Mr Scott consulted was Mr John Matthews, then in practice in Christchurch, but since appointed as an Associate Judge of this Court. There was an initial consultation between Mr Scott and Mr Matthews, and Mr Scott provided Mr Matthews with a file. The evidence does not reveal what file was handed over, but I am prepared to assume for the purposes of this judgment that it was Mr Scott's file relating to the Estate (which, by this stage, must have been substantial).

[29] Amongst the affidavit evidence there is a letter from Mr Scott to Mr Pugh dated 2 August 1991, written immediately after the former had consulted Mr Matthews. It is revealing. In it Mr Scott informs Mr Pugh that Mr Matthews had pointed out — as should have been obvious to Mr Scott from the outset — that as the solicitor who had been acting for Mrs Macfarlane and Mr Pugh in their capacities as the executors and trustees of the Estate, he — Mr Scott — could not now act in proceedings for one of them against the interests of the other, or for one group of beneficiaries. Mr Scott's letter goes on to indicate that Mr Matthews had suggested that the proper course would be for Mr Scott to relinquish instructions in the proposed litigation and for an independent solicitor to take the matter over. That advice was apparently accepted, and a Mr Paul Straubel of Meares Williams was engaged as the solicitor in the matter.

[30] Instructed by Mr Straubel, Mr Matthews represented the plaintiffs in the litigation that ensued.

[31] Proceedings were commenced in early 1992. The plaintiffs were Mr Macfarlane Senior's children from his first marriage who were seeking to remove

and replace Mrs Macfarlane. The first defendants were Mrs Macfarlane and Mr Pugh as the executors and trustees. The second defendants were Mr Macfarlane and his sister, Ms Catherine Douglass, that is to say Mr Macfarlane Senior's children from his marriage to Mrs Macfarlane.

[32] By late 1992 the parties had reached an agreement as to the appropriate outcome. This was recorded in a consent order, which was ultimately put before the Court and made by Holland J on 18 November 1992. I infer that it was drafted by the parties' solicitors or counsel. The parties agreed, amongst other things, that both Mrs Macfarlane and Mr Pugh would resign from their positions and that Perpetual would be appointed.

[33] Additionally, as there were apparently substantial costs either charged and outstanding, or to be charged, by Mr Scott in his capacity as the solicitor to the Estate, by other solicitors who had been involved and by the trust's accountants, provision was made for the new trustee — Perpetual — to address these costs, if necessary seek review of them by the Law Society or the Society of Chartered Accountants, as appropriate, and ultimately resolve costs issues.

[34] The evidence did not reveal who amongst those involved initially suggested the appointment of Perpetual or when that suggestion was first made. The only observation I will allow myself as to this is that in family estate and trust litigation it is very common for the heat to be taken out of disputes by the appointment of an independent corporate trustee, and Perpetual's appointment may have been the key to the settlement here.

[35] There is only one other aspect of the background to which I need to refer at this stage in order to complete the picture.

[36] Around the time of the settlement of the litigation in November 1992, the Pyne Gould group included the parent company, Pyne Gould Corporation Ltd, and a number of other companies, some wholly owned by Pyne Gould Corporation and some partly owned. As I understand it these included the two companies that were later the subject of the amalgamation, Perpetual Trust Ltd and PGG Trust Ltd. It also

included a company by the name of Amuri Corporation Ltd and another company by the name of Finance and Discounts Ltd. Up until 25 August 1992, when he resigned as such, Mr Matthews was a director of Amuri, and, from 12 March 1993, he was a director of Finance and Discounts. He was clearly closely connected to the group.

[37] It is against that background that Mr Macfarlane submits that Perpetual's appointment was tainted.

[38] He submits first that having initially been consulted by Mr Scott, and provided with Mr Scott's file relating to the Estate, it was inappropriate, or even improper, for Mr Matthews to act for one group of beneficiaries against another.

[39] He then submits that the circumstances of Mr Matthews' engagement as counsel were matters that Perpetual was obliged, before accepting appointment, to disclose to the residuary beneficiaries, and indeed that they effectively precluded Perpetual from accepting appointment because they amounted to circumstances that might inhibit its ability to discharge the obligations of trusteeship as the law requires and, in particular, to act even-handedly between the residuary beneficiaries.

[40] Finally, he submits that, had those circumstances been known to the second defendants in the 1992 proceeding, Mr Macfarlane himself and Ms Douglas, they would not have consented to Perpetual's appointment and there would have been no settlement involving its appointment.

[41] This proceeding is not an appropriate vehicle for determining the propriety of Mr Matthews' acting for the plaintiffs in the litigation, and I am not prepared to reach any conclusions as to that. I would, however, make the obvious point there is no evidence to suggest that, at the time before Mr Scott sought to engage him, Mr Matthews had any prior knowledge of this matter. As soon as he became aware of the circumstances — indeed, the very day he was consulted — he told Mr Scott that he — Mr Scott — could not act and that an independent solicitor would have to be engaged to instruct him as counsel. It is difficult to envisage how Mr Matthews could have addressed the issue any more promptly.

[42] In any event, the issue before the Court is not the propriety of Mr Matthews acting in the litigation, but rather whether Perpetual, at the time that it accepted appointment, was aware of anything that would prevent it from discharging its obligation as a trustee to act even-handedly as between the beneficiaries, and which, in terms of *Galmerrow Securities Ltd v National Westminster Bank Plc*, it was required to disclose.

[43] As Mr McDuff submitted on Perpetual's behalf, there is no evidence that Perpetual was aware that Mr Scott had originally considered acting in the matter or was the solicitor who originally suggested Mr Matthews' appointment as counsel.

[44] Turning to Mr Matthews' directorships, he was never a director of Perpetual Trust Ltd or PGG Trust Ltd, and nor was he a director of either of Amuri or Finance and Discounts at the time of the settlement.

[45] In any event, in my judgement, the suggestion that Perpetual was conscious that one of the issues it would have to deal was outstanding costs; that Mr Matthews might be involved in relation to that issue; that Mr Matthews may in the circumstances be inclined to favour Mr Scott's interests; and that he — Mr Matthews — would be particularly influential because of his connections with the group is so remote as to border on the fanciful.

[46] In my judgement, the challenge to the lawfulness of Perpetual's appointment is without merit.

Perpetual's actions following its appointment

[47] The second limb of Mr Macfarlane's submission as to Perpetual's entitlement to sell the Property concerns its actions after its appointment.

[48] Essentially, he submitted that Perpetual, in its administration of the Estate from November 1992 tended to favour its own interests as against those of the beneficiaries, and failed to act even-handedly as between the beneficiaries.

[49] Insofar as this submission focussed on Perpetual favouring its own interests, the complaint seemed to come down to the proposition that Perpetual has been tardy and charged, and is proposing to charge, too much for its services.

[50] Turning to its dealings with the beneficiaries, Mr Macfarlane levelled criticisms at several aspects of Perpetual's administration of the Trust. It would unnecessarily prolong this judgment to attempt to capture all of these criticisms. Nor am I confident that I could do so. For present purposes, it will suffice to identify three examples upon which Mr Macfarlane placed emphasis:

(a) the first concerned the way in which Perpetual went about dealing with the costs issue that existed at the date of its appointment. His contention in relation to this was that it acted with insufficient vigour and should have scrutinised Mr Scott's costs in particular more carefully;

(b) the second concerned Perpetual's communication with the beneficiaries. As to this, he submitted that it has exhibited bias by favouring certain beneficiaries over others with additional information about the basis for its decisions;

(c) the third concerned the process by which Perpetual has sold the Property. As to this he submitted that he (and possibly his fellow beneficiaries) were not given a real opportunity to purchase it, that a better sale process may have been available and that an inadequate price has been achieved.

[51] I am not prepared to embark upon a minute examination of these points — and the others that were advanced alongside them.

[52] All concern events post-dating Perpetual's appointment, some by 25 years. All they can ever go to is the appropriateness of Perpetual's trusteeship. They might be relevant to an application pursuant to s 51 of the Trustee Act 1956 for removal of Perpetual as trustee, or a claim for damages. There is no such application or claim before the Court.

Caveatable interest

[53] Mr Macfarlane turned next to the question of his standing as a caveator. He accepted the submission made on Perpetual's behalf by Mr McDuff that in the generality of cases the personal representatives of a testator or testatrix stand in the shoes of the deceased vis-vis the deceased's property, and that in the absence of a specific gift by the testator or testatrix to a beneficiary of a particular item of property, the residuary beneficiaries of the estate do not have a proprietary interest in any particular item of property sufficient to support a caveat. Rather, they have a mere right *in personam* to compel the personal representatives to administer the estate in accordance with the terms of the will. This is well settled law. The leading New Zealand authority on this point is *Guardian Trust and Executors Co of New Zealand Ltd v Hall*.[4]

[54] However, Mr Macfarlane submitted that by November 1992, when the order appointing Perpetual was made, the administration of his late father's estate was complete (and had been for almost 30 years), and that Perpetual was appointed not as Mr Macfarlane Senior's personal representative or executor, but as the trustee of the trust established by the Will. In this regard, he pointed in particular to the 1992 order, which makes no reference to executorship and refers only to Perpetual being appointed as a trustee.

[55] On that basis, Mr Macfarlane submitted that the relationship between Perpetual and the residuary beneficiaries under the Will was purely that of trustee and beneficiaries, and that the principle articulated by the Court of Appeal in *Guardian Trust* had no application.

[56] Rather, Mr Macfarlane submitted, the case was governed by elementary principles of trust law, in particular that the trustee is the legal owner of the trust assets and beneficial ownership rests with the beneficiaries, and that a beneficial interest is sufficient to support a caveat over real property pursuant to pt 8 of the Land Transfer Act. He referred to a number of statements of that principle in decided cases and textbooks.

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4 *Guardian Trust and Executors Co of New Zealand Ltd v Hall* [1938] NZLR 1020 (CA).

[57] Having reviewed the affidavit evidence and having had the benefit of submissions from Mr Macfarlane and Mr McDuff, I am not persuaded by this argument. It is true that by the time the parties involved in the litigation came to settle in November 1992, Mr Macfarlane Senior had been dead for almost 30 years. It is true also that his personal representatives had dealt with all the initial aspects of the administration of his estate, and the trust established by the Will had been extant for some years. However, I do not expect that those involved in drafting the order implementing that settlement were focussed on arcane jurisprudence concerning nice distinctions between the roles of personal representatives and trustees. I expect that their view of things was simply that what was important for the parties was how the assets to be placed in Perpetual's control would be administered, in particular during Mrs Macfarlane's lifetime. In those circumstances, it comes as no surprise to me that, when the solicitors involved came to describe the role that Perpetual was being put forward to fulfil, they described it as that of "trustee". Had this issue been examined more closely at the time, those solicitors may well have concluded that there were, or could be. ongoing responsibilities of an executorship nature, and that Perpetual's role might have been better described as "executor and trustee". Nor, at that stage, do I perceive that any of the litigants who were parties to the settlement would have, or could have, had any reason to object. In short it seems to me that it is a matter of pure historical accident that Perpetual's role was described in the order as "trustee".

[58] In my view, the central issue is not whether the administration of the estate had come to an end, but whether Mr Macfarlane has an equitable interest in this specific piece of property. Although the Court of Appeal phrased its conclusion in *Guardian Trust* in terms of the on-going administration of the estate, the result of the case is in my view best considered a subset of the broader principle that a caveator must have a vested interest in the specific property they seek to caveat. It is obvious that no such interest can arise until the administration of the estate is complete.

[59] Equally, however, the completion of the administration of the estate is not in itself sufficient to create a vested interest, if there remains a trust of a general nature. In *Rutherford v Rutherford*, Woolford J dealt with such a situation.[5] The caveators

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5 *Rutherford v Rutherford* [2015] NZHC 878, [2015] NZAR 1303.

were residuary beneficiaries under a will, which created a trust for the testator's half share of a property. The caveators had fixed interests in that trust, but the executors and trustees had the power to sell the property at the request of the testator's widow, who owned the other half of the property.

[60] Woolford J explained the legal test in the following way:[6]

> If the administration period has ended, the residual interest is being held on trust for the applicants. The standard trust principles relating to beneficiaries of trusts will be determinative of whether the interest is capable of supporting a caveat. It is well established that although a beneficiary of a trust can caveat property held by the trust, they must be a fixed beneficiary, with a right to specific property.
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> There is no question about who the trust is designed to benefit. Evidently, the applicants are fixed, not discretionary, beneficiaries. However, they must also have a sufficiently specific interest in land to be able to caveat the property.

[61] His Honour then reached the following conclusion on the facts of that case:[7]

> Although, generally, the automatic passing of the residual interest would be a specific vested interest capable of supporting a caveat, I am of the view that a remainder reasonably cannot be considered vested if it is capable of being exchanged for other property, or other property and some capital. The proposition in *Guardian* [*Trust*], that the beneficiaries with an interest in the residue of an estate cannot caveat a property that forms part of that estate, demonstrates the same principle that an interest must be a more than a general interest in the proceeds from a property to support a caveat.
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> …
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> The interest in question is not a specific interest in a particular property. It appears to be a vested residual interest in the value of the property, which can be changed into either other property, or to a property and some investment value, which the applicants are unconditionally entitled to at a fixed point (on death or remarriage) in whatever form and combination it appears. The powers given to the respondents to deal with the property suggest that Mr Rutherford did not intend to vest a specific interest in a particular property in his children. It is more similar to the situation in *Williger v McFarlane*, in which an interest in a share in the proceeds of a sale could not support a caveat.

[62] For similar reasons, I consider that, regardless of whether the administration of the Estate in this case is complete, Mr Macfarlane only has an interest in the value of the Property, which is incapable of sustaining a caveat. Although Mr Macfarlane has

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6 At [32]–[33].
7 At [35] and [39].

a fixed interest in the residue of the Estate, and the only remaining property within the Estate is the Property, his interest in not specific to the property because at any time the trustees would be entitled under the powers granted to them by the Will to sell or exchange that property, as in fact they have contracted to do.

[63] Even if that is wrong and the parties consciously agreed to appoint Perpetual only as the trustee of the trust established by the Will, and Mr Macfarlane is correct in submitting that as a beneficiary under that trust he had a sufficient proprietary interest in the Property to sustain his caveat, that still leaves the discretion as to whether or not to order that his caveat not lapse.

[64] The proper exercise of the residual discretion was also discussed by Woolford J in *Rutherford v Rutherford*:[8]

> The case law demonstrates that even if there is an arguable case for supporting a caveat, it will not be sustained if there is no point in doing so. In a recent case, Williams J exercised his discretion to remove the caveat because, even if an arguable case that the plaintiff had contributed to the property could be made out, he would only receive a portion of the value of the land so it would still need to be sold. The plaintiff's interests were adequately protected without the caveat.

[65] Woolford J went on to say that it would have been appropriate to exercise the residual discretion in the case before him, for similar reasons.

[66] I would also have been willing to exercise that discretion in this case because Mr Macfarlane's legitimate interests would not be prejudiced by removing the caveat. Assuming he had a vested interest in the property, his legitimate interests would only have related to a share of the Property. As it would appear that all the other beneficiaries support the sale of the Property, Mr Macfarlane's legitimate interests would have been limited to making an application under pt 6, sub-pt 5 of the Property Law Act for division of the property, which would likely have resulted in the sale of the property in any case.

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8 At [45], referring to *Blumenthal v Stewart* [2014] NZHC 1924.

The 159 proceeding

[67] As already said, in the 159 proceeding Perpetual seeks an order compelling Mr Macfarlane to vacate the property. It seeks summary judgment. The law is well settled that a plaintiff seeking summary judgment pursuant to pt 12 of the High Court Rules must establish that the defendant has no arguable defence.[9] Although the onus remains throughout on the plaintiff, a defendant seeking to put forward an arguable defence has an evidential onus in the sense that he, she or it must be able to point to a legal and factual foundation for the claimed defence.[10]

[68] The first issue that must be confronted in this case is whether Mr Macfarlane has any legal entitlement to occupy the property.

[69] It seems clear enough that, whilst his mother was alive, the trustees were obliged to permit him to occupy the property.

[70] After Mrs Macfarlane's death, it might be argued that, even although Mr Macfarlane has paid no rent or licence fee, there was some sort of implied right as between Perpetual and Mr Macfarlane which at least gave him a possessory entitlement to remain on the property.

[71] However, it seems clear, and Mr Macfarlane did not attempt to advance an argument to the contrary, that Perpetual was entitled to give him notice to vacate and that after it did so on 30 November 2017, and the notice period of 90 days expired on 22 February 2018, Mr Macfarlane continued to occupy the premises unlawfully.

[72] That may be as far as it is necessary to go in order to conclude that Perpetual is entitled to the judgment it seeks on a summary basis.

[73] But even if Mr Macfarlane enjoyed a superior interest than I have described — perhaps something akin to an implied lease — once Perpetual gave notice to vacate, Mr Macfarlane's remedy would be to seek relief against forfeiture pursuant to sub-pt 6 of pt 4 of the Property Law Act 2007. He has not done so.

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9 High Court Rules 2016, r 12.2(1); *Pemberton v Chappell* [1987] 1 NZLRI at 3.

10 *Auckett v Falvey* HC Wellington CP 296/86, 20 August 1986.

[74] For those reasons, in my judgement, Perpetual is entitled to the summary order its seeks.

Summary of conclusions

[75] I have concluded:

(a) no reasonably arguable basis has been made out for the contention that Perpetual was not lawfully appointed to replace the former executors and trustees;

(b) pursuant to its appointment by the Court on 18 November 1992, Perpetual is the legal owner and legitimate registered proprietor of the Property, and is entitled to sell it;

(c) Mr Macfarlane has not made out an arguable case that he has a proprietary interest in the property sufficient to support his caveat;

(d) even if he were able to make out such a case, I would not be prepared to exercise my discretion in favour of making the order he seeks in the 143 proceeding that his caveat not lapse (and refuse Perpetual's application in the 158 proceeding for its removal);

(e) I am satisfied that Perpetual has established that it is entitled to summary judgment for an order for vacant possession of the Property so that the sale and purchase transaction can be settled.

Costs

[76] I did not hear the parties on costs. My preliminary view is that Perpetual as the successful party in the litigation is entitled to its costs, and those should be on a 2B basis. But that preliminary conclusion is reached without the benefit of having heard from either party.

[77] Costs are reserved. My expectation is that the parties will discuss costs and agree on them. However, in the absence of agreement, either party can come back to

me by memorandum within 15 working days. If necessary I will deal with costs on the papers.

Associate Judge Johnston

Solicitors:
Russell McVeagh, Auckland for respondent