

# A timely reminder of the importance of land law principles

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*Jin v Knox Property Investment Ltd*

## INTRODUCTION

As the new Land Transfer Act nears the final stages of Parliament, a recent Court of Appeal case highlights the importance of appropriately framing land law questions by identifying the relevant provisions of the primary statute, and any relevant equitable principles, before undertaking any substantive analysis. In *Jin v Knox Property Investment Ltd* [2015] NZHC 2296, [2016] NZCA 565 both the High Court and the Court of Appeal failed, in deciding whether there were grounds to sustain a caveat, to properly identify and apply the statutory exceptions to indefeasibility and also neglected to consider the court's jurisdiction *in personam*. This reflects a worrying tendency in New Zealand for courts and counsel to overlook land law principles and this article serves as a timely reminder of their importance.

## BACKGROUND TO THE CASE

Mr Jin and Ms Luo were equal shareholders in a real estate investment company, W&L Ltd. Although Ms Luo was the sole registered shareholder of W&L, Mr Jin held an unregistered 50 per cent shareholding in the company. In June 2013 Mr Jin and Ms Luo successfully bid at auction for a property in Hamilton. W&L Ltd, or nominee, was identified as the purchaser. The purchase price was \$700,000. Mr Jin paid \$50,000 towards the deposit. Ms Luo paid the balance of \$20,000 (CA at [6]).

W&L was unable to secure sufficient finance by settlement, at which point Ms Luo introduced Mr Jiang to the transaction. She and Mr Jiang formed Knox Property Investment Ltd (Knox) as the body to complete the purchase. Although Ms Luo was an equal shareholder in Knox, Mr Jiang was the sole director. Knox was nominated by Ms Luo by way of a Deed of Nomination (the Deed) as the purchaser. The Deed recorded that a deposit of \$70,000 had been paid by W&L and the obligation for Knox to repay the deposit on or before settlement date (CA at [9]). Settlement was completed in August 2013 at which point Knox became the new registered proprietor. Although Knox did not repay the deposit before settlement, it had been repaid to W&L by January 2014.

Mr Jin claimed an interest in the property. He claimed that he was told that while Mr Jiang would obtain a 50 per cent interest in the property, the balance would be shared between him and Ms Luo. Moreover, Mr Jin claimed that while he knew of Mr Jiang's involvement he did not know that Jiang and Luo had incorporated Knox Property Investment Ltd as the body to complete the purchase. He also disputed Ms Luo's claim that the \$50,000 paid by Mr Jin was actually in satisfaction of an earlier debt. He accepted that Ms Luo had

placed \$50,000 into his solicitor's account at his request, however, he denied his contribution to the deposit was a repayment of this sum (CA at [7]).

After becoming convinced that his claimed interest was not going to be recognised, Mr Jin caveated the title to the property claiming to be beneficially interested in the property by virtue of an "implied trust" arising out of his contribution of funds towards the purchase (CA at [11]).

## HIGH COURT DECISION

The High Court rejected the application to sustain the caveat. It noted that while the description of Mr Jin's claimed interest was unclear, it appeared to be in the nature of a resulting trust (HC at [9]). However, the Court held that a resulting trust was "not literally applicable" in this case as W&L did not become the purchaser (HC at [10]). That is, although Mr Jin had made a payment to W&L, W&L held no property that would serve as the foundation for the presumption underpinning a resulting trust. The Court also noted that accurate analysis of Mr Jin's claimed interest was not a requirement at the caveat stage of the matter. Nonetheless, any indication of trust involved questions of the good conscience of the parties to the transaction, and in this case, the basis upon which any inference of a resulting trust may be drawn (HC at [10]–[11]). This would not only involve considering the reasonableness of Mr Jin's expectations, but also whether these were known to Knox (as the registered proprietor). In particular, the Court noted that this would involve consideration of whether it was fair and reasonable for Knox to be fixed with knowledge of the events which give rise to Mr Jin's expectation that he would have an interest in the property, the circumstances of his payment of the funds and other matters (HC at [11]).

The Court noted that W&L did not actually have the funds to complete the purchase. An alternative company did which was used to carry out the purchase. Even though funds provided by Mr Jin and Ms Luo were used to complete the purchase, Mr Jin could not have had a reasonable and legitimate expectation of a beneficial interest in the property. Moreover, there was no basis on which Mr Jin's expectation of a 25 per cent interest in the property could be put forward. Indeed, the amount he had contributed did not amount to 25 per cent of the purchase price (HC at [16]). As a result, the Court concluded that Mr Jin did not have an equitable interest in the property. Moreover, the Court held that knowledge of Mr Jin's claimed interest could not be attributed to Knox through Ms Luo as she was not a director of Knox (HC at [19]).

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## COURT OF APPEAL

The Court of Appeal noted the parties' agreement that the two key issues in the case were whether the payment of \$50,000 by Mr Jin resulted in a trust in his favour regarding the right to acquire the property, and, if so, whether Knox knew about Mr Jin's interest. The Court concluded that, on the available evidence, there was a reasonably arguable case for a type A resulting trust. In other words, it was arguable that Mr Jin invested in the acquisition of the property assuming that he and Ms Luo would jointly acquire the right to purchase it. In support of this the Court noted: the prior dealings between Mr Jin and Ms Luo; that Mr Jin could document a 50 per cent shareholding in W&L; that Mr Jin had attended the auction; that he had provided funds in his personal capacity (by way of personal cheque to the vendor's solicitor); and the reference to "or nominee" in the sale and purchase agreement (suggesting the vehicle for purchase was a secondary consideration only) (CA at [19]).

The Court then noted (citing *Foskett v McKeown* [2001] AC 102 (HL) at 180–109) that "it is necessary for Mr Jin to show that [Knox] knew about his interest in order to be able to maintain any form of equitable interest in the ... property" (CA at [22]). The Court then diverts into an analysis of what Knox knew about Mr Jin's interest. It notes that it was unlikely that Ms Luo did not tell Mr Jiang about Mr Jin's deposit, that there is evidence that a solicitor engaged by both W&L and Knox in relation to the Deed may have had a duty to disclose any information giving rise to any conflict of interest, that in the Deed itself Knox affirms it has understood the implications of the transaction and also makes it clear that the deposit was to be repaid to W&L. It concludes this is an issue that could only be resolved at a substantive hearing. It also noted that it is reasonably arguable that as Ms Luo was in de facto control of Knox, her knowledge may be attributed to it, but that whether the knowledge *could* be attributed to Knox was an issue unsuitable to summary disposition (CA at [25]–[26]).

Before allowing the appeal and sustaining the caveat the Court of Appeal noted that "[i]n this case, as the argument has been presented to us, the substantive rule is that a bona fide purchaser for value without notice (of unregistered interests) acquires indefeasible title" (CA at [27]). It suggested that whether attribution of knowledge to Knox arose in respect of this rule depended on a number of factors, including what Ms Luo knew about Mr Jin's interest, her role in the establishment of Knox, what Mr Jiang was told, and what he otherwise knew.

## ANALYSIS

The Court of Appeal's reasoning must be seen as weak. Knox is the registered proprietor of the property in question. The only way its title can be impeached is if one of the statutory exceptions to indefeasibility apply, or if the court is prepared to exercise its jurisdiction to set aside the title on equitable grounds. In this case there are only two options. Knox's title can only be set aside if it acted fraudulently within the meaning of the Land Transfer Act 1952 or, if it assumed some sort of obligation *in personam*. It is a great pity that the Court of Appeal did not address either of these arguments. Whether Mr Jin has an arguable case is entirely dependent on whether fraud or an *in personam* claim can be made out. Indeed, it is very surprising that no mention was made of s 182 of the Land Transfer Act which, among other things, states:

Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest ... shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.

Thus, unless Knox acted fraudulently under the Land Transfer Act, it has an indefeasible title. What will constitute fraud against an unregistered interest can be a tricky issue to determine involving the relationship between s 182 and concepts of knowledge. However, there are a number of well-known cases that could assist in determining whether Knox acted fraudulently or not, including: *Efstratiou v Glantschling* [1972] NZLR 594; *NZ Meat Nominees Ltd v Sim* (1990) 1 NZ ConvC 190,478; and, *Tuscany v Gill* (2001) 4 NZ ConvC 193,446. Knowledge remains important in this context to the extent it assists in determining whether the registered proprietor has formed a dishonest intent to defeat the unregistered interest. However, the key question in this case should have been whether it was reasonably arguable that Knox (or possibly just Ms Luo if her actions could be attributed) acted deliberately, dishonestly and with an intent to cheat Mr Jin of a known existing right (*Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101). Moreover, as noted by Buckmaster LJ in *Waimiha* "[t]he act must be dishonest and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest" (at 107). On the recorded evidence it appears that it may have been very difficult for Mr Jin to establish fraud and it is extremely disappointing that the Court of Appeal did not appropriately frame the question or reference the relevant authorities.

Mr Jin may have been on stronger ground with a claim *in personam*, but again there is no reference to the principle in the case. It is a basic proposition of land law that this option was left open by the Privy Council in *Frazer v Walker* [1967] NZLR 1069 in recognition that actions of a personal character against the registered proprietor may be admitted (at 1079). No longer restricted to trust or contract cases, an *in personam* claim may be recognised where it is not inconsistent with the objectives of the Torrens system, it involves unconscionable conduct on the part of the current registered proprietor, and it involves a recognised cause of action (*Dollars & Sense Finance Ltd v Nathan* [2007] NZCA 177, [2007] 2 NZLR 747 at [137]). Of course, if Knox was the trustee of a type A resulting trust, and denied this, all three elements of a successful *in personam* claim could probably be made out. It appears from the Court of Appeal's discussion that they considered it was reasonably arguable that there was a resulting trust, although it notes that this would involve an assessment of any agreements reached and representations made by Ms Luo to Mr Jin as to the precise nature of his interest and the function served by W&L in the purchase (CA at [20]). Given the presence of the different corporate bodies involved, the repayment of the deposit and the importance of the intentions of all parties in establishing a resulting trust (see *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 at [60]) some further analysis here would have been desirable. Regardless, it is accepted that the knowledge Knox had of Mr Jin's interest would be crucial to determining whether it had acted unconscionably and whether there was a recognised

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cause of action. However, the analysis could, and should, have been put within the context of land transfer principles; the question being was it reasonably arguable that Mr Jin had an *in personam* claim against Knox. Certainly, framing the question in terms of a substantive rule stating that “a bona fide purchaser for value without notice (of unregistered interests) acquires indefeasible title” (CA at [27]) is to state the wrong rule. While knowledge may be a necessary element of a claim of fraud or *in personam* under the land transfer system it is not, on its own, sufficient. The Torrens system of land transfer abolishes the *nemo dat* rule, abolishes the bona fide purchaser without notice rule and substitutes its own rules (now supplemented by the *in personam* exception). The old law ought never to be talked about as the rules have now changed.

**CONCLUSION**

Although this was simply an application that a caveat not lapse it is disappointing that an Associate Judge of the High Court, two High Court Judges and one permanent member of the Court of Appeal can deliver two judgments and not discuss the basic land law principles, and relevant sections of

the Act, that may have determined the case. While the Courts were undoubtedly correct to focus to some extent on the knowledge that could be attributed to Knox (and given this was an application for a caveat, this is a substantive issue that could not be resolved), their failure to consider this issue within the framework set out by the Land Transfer Act and equity was an unfortunate oversight. The decision may well have had the effect of giving Mr Jin a stronger bargaining position than he would have otherwise had. Unfortunately, this is not an isolated case and many land law sagas in New Zealand may have been avoided if land law principles had been brought to the fore (see for example, the original High Court decision in *MacDonald v Duncan* HC Auckland CP1387/92, 22 July 1994 where the focus was on the Illegal Contracts Act 1970 and the issue of indefeasibility of title was not raised (indeed, it was not until the Court of Appeal's finding that the Illegal Contracts Act was subject to the application of the Land Transfer Act in *Duncan v McDonald* [1997] 3 NZLR 669 that land law principles were applied to the case)). It is to be hoped that the passage of the new Land Transfer Act goes some way towards refreshing the understanding of basic land law principles of both courts and counsel, and reminding us all of the appropriate context in which to frame arguments. □