IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-4048214

IN THE MATTER OF	Section 143 of the Land Transfer Act 1952
BETWEEN	CAPITAL + MERCHANT INVESTMENTS LIMITED (IN RECEIVERSHIP) AND CAPITAL + MERCHANT FINANCE LIMITED (IN RECEIVERSHIP) Applicant
AND	RUSSELL MANAGEMENT LIMITED Respondent

Hearing: 25 February 2009

Appearances: S Barker and B White for Applicant
P Shackleton for Respondent

Judgment: 3 March 2009 at 4:30 pm

JUDGMENT OF ASHER J

This judgment was delivered by me on 3 March 2009 at 4:30 pm pursuant to Rule 11.5 of the High Court Rules

……..
Registrar/Deputy Registrar

……..
Date

Solicitors:
S Barker, Buddle Findlay, PO Box 2694, Wellington
PV Shackleton, Martelli McKegg Walls & Cormack, PO Box 5745, Wellesley Street, Auckland 1141

Introduction

[1] This is the second urgent application by Capital + Merchant Investments Limited (In Receivership) ("CMI") and Capital + Merchant Finance Limited (In Receivership) ("CMF") (together "Capital"), at the behest of the receivers for those companies for the removal of a caveat. The caveat is registered against units over which Capital has a mortgage by a lessee of those units, Russell Management Limited ("Russell Management"). The mortgagor and lessor of those units is Winslow Group Limited ("Winslow"), a company now in liquidation.

[2] The application must be determined urgently. Capital has sold the units under its powers as mortgagee. The sale was due to settle on 5 December 2008. I am informed from the bar that the purchaser will have the opportunity to cancel the agreement unless there is a decision by Friday 6 March 2009.

[3] There has already been one judgment given in relation to this application, being *Capital + Merchant Investments Limited (In Receivership) & Anor v Russell Management Limited* HC AK CIV-2008-404-8214 22 December 2008, Asher J. The first application focused on whether the liquidator of Winslow had validly disclaimed various leases of Winslow to Russell Management. In an interim judgment I determined that the application to remove the caveat should be declined because there was a serious question as to whether the disclaimers had effectively brought the leases to an end. At the request of both counsel made at the end of the last hearing I expressly reserved a second point to possibly be argued later. That issue was whether Capital's mortgage had priority over the leasehold interests of Russell Management, and for that reason the caveat should be removed. It is that second issue which I now consider.

Background

[4] In 2005/2006 Winslow developed 17 units in the Bay of Islands, which are known as Russell Cottages and operate as a boutique hotel. CMF was a major mortgagee of Winslow in respect of the development. Its mortgages were registered

in January 2005. On 16 November 2007 the mortgage was transferred to be held jointly by CMF and CMI ("Capital"). It is now a mortgagee of seven of the units that are still owned by Winslow. Winslow has leased the seven units to Russell Management. The amount of principal owed under the mortgage is approximately $5,500,000.

[5] The sample lease provided in relation to the seven units shows a lease entered into on 1 February 2006 between Russell Management and Winslow for an initial term of ten years, with four further rights of renewal of ten years each, the possible full duration of the lease being, therefore, 50 years. None of the seven leases were registered, although they appear to be in registerable form. Under the leases, Russell Management was to sub-lease the units for the purposes of a hotel, in respect of which it would receive a commission. The net revenue from the sub-leases of the units was payable to Winslow as lessor and owner of the units.

[6] On 17 January 2008 Capital issued and served notices against Winslow under s 119 of the Property Law Act 2007 on the basis that Winslow had gone into receivership. Winslow was placed into liquidation on 2 May 2008. On 29 August 2008 the liquidators of Winslow disclaimed the seven leases. It was that disclaimer which was contested at the first caveat hearing.

[7] On 5 November 2008, Capital arranged for a locksmith to change the locks on four of the seven units. On 12 November 2008, Capital, exercising its power of sale as mortgagee, entered into the agreement to sell the seven units. The agreement was to be settled on 5 December 2008 and vacant possession was to be provided on settlement.

[8] On 2 December 2008, the caveat was lodged by Russell Management against the seven titles. The caveat sets out the claimed interest in the land as follows:

> An interest by virtue of lease instruments dated 1 February 2006 in respect of the land contained in the above certificates of title and made between the caveator as lessee and the registered proprietor as lessor.

[9] On 5 December 2008 Capital applied for an order for the removal of the caveat. The originating application sought an order that the caveat bearing the

registration number 8014923.1 ("the caveat"), lodged by Russell Management on 2 December 2008 against the seven relevant certificates of title be removed forthwith "upon the registration of a memorandum of transfer by CMI and CMF as joint mortgagees exercising their power of sale over the property".

[10] It is common ground that Capital's mortgage was first in time in terms of registration. The issue is whether Capital has consented to the leases, and as a consequence lost its priority to them. If it is has not lost that priority by consenting, it is common ground that the order sought for removal of the caveat upon the registration of the transfers to the new purchasers should be made. So equally, it is common ground that if Capital did consent to the seven leases between Winslow and Russell Management, it is not entitled to the orders sought, and the caveats will remain on the title.

Preliminary points

[11] Section 143 of the Land Transfer Act 1952 gives the Court the power to remove a caveat. The onus lies on the caveator to show an arguable case that the interest claimed exists: *Castlehill Run Limited v NZI Finance Limited* [1985] 2 NZLR 104 at 106. Thus the caveator must show that the caveator is entitled to, or beneficially interested in, the estate referred to in the caveat. However, an order for the removal of the caveat will not be made under s 143 unless it is clear that the caveat cannot be maintained, either because there was no valid ground for lodging it or that such a valid ground that then existed no longer exists: *Sims v Lowe* [1988] 1 NZLR 656 at 659-660. Therefore, although the onus is on the caveator, if there are disputed questions of fact which cannot be clearly resolved by the Court on the papers before it, an order will not be made.

The relevant provisions of the Land Transfer Act 1952

[12] Registration under the Land Transfer Act 1952 confers on mortgagees as registered proprietors an indefeasible title to the interest of the proprietor in the fee simple, which under ss 62 and 63 of the Land Transfer Act 1952 (subject to various exceptions) is immune from adverse claims: *Fraser v Walker* [1967] NZLR 1069 at

1075. The starting point is, therefore, that a mortgagee is immune from adverse claims not registered prior to the mortgage, such as claims from a later lessee. This position is specifically reflected in s 119, but with a qualification:

> **119 Lease not binding on mortgagee without consent**
>
> No lease of mortgaged or encumbered land shall be binding upon the mortgagee *except so far as the mortgagee has consented thereto.*
>
> (Emphasis added)

Thus, a lease of mortgaged land can be binding against a registered mortgagee if the mortgagee has consented to the lease.

[13] If a mortgagee has a power of sale, such a sale will vest the estate in the land in the purchaser from that mortgagee free from any other estates or interests except for those which have priority over the mortgage, or which by reason of the mortgagee's consent are binding. Section 105 provides:

> **105 Transfer by mortgagee**
>
> Upon the registration of any transfer executed by a mortgagee for the purpose of [exercising a power of sale over any land], the estate or interest of the mortgagor therein expressed to be transferred shall pass to and vest in the purchaser, freed and discharged from all liability on account of the mortgage, or of any estate or interest *except an estate* or interest created by any instrument which has priority over the mortgage or *which by reason of the consent of the mortgagee is binding on him.*
>
> [Emphasis added]

Thus, any lease created after the registration of the mortgage cannot prevent a transfer of unencumbered title to a purchaser at mortgagee sale unless the lease has priority over the mortgage, or which by reason of the consent of the mortgagee is binding on the purchaser. It can be seen then how the critical issue in this case is whether it is arguable, as Russell Management asserts, that Capital consented to the seven leases.

Was there consent?

[14] I bear in mind that although the onus is on Russell Management to show an arguable case, the Court is not in a position in a caveat hearing to resolve disputed

questions of fact. This does not mean, however, that the Court has to accept bald assertions by deponents on face value: *Macrae v Rapana* HC AK M633/94 17 June 1994, Fisher J. The Court is able to apply its own analysis and judgment to undisputed facts to decide on what inferences, if any, can safely be drawn.

[15] Here the factual affidavits were not provided by the persons working in Capital and Winslow at the time. However, the exchanges of correspondence and relevant documents were produced. The basic facts are clear and indisputable. The mortgages were registered in January 2005. In March or early April 2006 there was some discussion between a Kathy Earby, a legal executive at the law firm Knight Coldicutt acting for Winslow or Russell Management, and Colin Girven of the Auckland law firm Castle Brown, acting for CMF. Ms Earby emailed Mr Girven on 11 April 2006 advising that "as previously discussed" her firm was registering some of the serviced apartment leases. She attached a form of consent for execution together with a copy of the lease, the relevant leases being of units 6, 7, 14 and 17. She stated that the other units would be registered progressively. She asked for signed consents as soon as possible.

[16] The documents produced do not show any response to that email. However, on 16 May 2006 a partner at Knight Coldicutt, Brett Cran, wrote again to Castle Brown. The letter indicates that there had been a negative response to the request for consents. It recorded that Castle Brown had been previously dealing with Ms Earby in relation to a request to provide consent. I will set out the relevant parts of that letter:

> We would be grateful if you could reconsider this matter as we do not see any detriment to your client in allowing the leases to be registered. We understand that our client has recently agreed to roll-over your client's facility and that all impediments to providing mortgagee's consent have now been cleared.
>
> We would also point out that your client's consent will of course be provided without prejudice to their rights and remedies under their mortgage and although you do not like the form of lease that we are endeavouring to register, it is an industry standard form of serviced apartment lease. If you still have an issue that the mortgagee would be bound by the lease in a default situation, then we are happy to have the lessee provide an acknowledgement that in a default situation your client may terminate the lease on written notice.

> The reality of the situation is that the units will now just sell down and settle with your client and all other mortgagees being repaid in the normal course.
>
> We trust that you now see it this way and you can let us have the consents as our client is anxious to get the leases registered. Things become very messy as settlements occur and we have to ask each individual purchaser's solicitor to attend to registration on our behalf. We thank you in anticipation of your co-operation and look forward to receiving the consents back by return.

[17] Castle Brown responded in a letter of 18 May 2006, which stated in part as follows:

> We refer to your letter of 16 May 2006.
>
> We advise that our client does require a term of the lease to provide that our client can terminate the lease at any time during whilst its mortgage is registered against the title. Please prepare and forward a draft for our client's approval.

[18] Knight Coldicutt responded on 19 May 2006 as follows:

> We refer to Colin Girven's fax of 18 May 2006 (copy enclosed). Our client does not wish to include a clause in the leases to allow your client to terminate the leases. We have prepared and enclose a draft deed to cover your client's request.
>
> Please review and confirm this will meet your client's requirements, following which we will obtain execution by the parties.

A form of consent was provided which did not meet the requirement set out in the Castle Brown letter. A consent was never signed.

[19] There is, thus, no doubt that there was never any express consent. CMF declined to consent to the leases, unless Winslow and Russell Management accepted a term that CMF could terminate the leases at any time. Winslow and Russell Management did not accept such a term.

[20] Mr Shackleton for Russell Management did not seek to argue that this exchange constituted a consent. However, he submitted that consent could be inferred from CMF's other conduct through 2007, where payments for rental due under the Russell Management leases to Winslow were paid to CMF directly. Mr Ronnie Ronalde, the director of Russell Management and its sole shareholder, Tourism Flair Limited, has sworn an affidavit which gives evidence in relation to

these payments. Although Mr Ronalde does not depose to this, it is clear that he had an association not only with Russell Management but also with the mortgagor, Winslow. A Mr Kevin Anderson had been the sole director of Winslow. He was also originally the sole director and shareholder of Russell Management. He transferred his shares in Russell Management to Tourism Flair Limited, but Mr Anderson and other members of his family are the major shareholders of that company. Mr Anderson is also a guarantor of the Capital mortgages. Despite his central involvement in Winslow and Russell Management, Mr Anderson has not sworn an affidavit.

[21] Mr Ronalde makes some broad assertions in his affidavit. He says that CMF must have always been aware that the units were to be leased. He provides no factual material to support this assertion, although I accept given the nature of the correspondence that has been produced, that CMF in early 2006 must have become aware of the prospect of the leases. Mr Ronalde also asserts without any references to documents that in about December 2006 Winslow instructed Russell Management to pay all profits in their leases directly to CMF. He asserts without elaboration that this must have been at the request of CMF. CMF has not responded to this assertion, and I will accept it for the purposes of this hearing.

[22] It is clear that the following payments were made by Russell Management directly to CMF, rather than to Winslow:

30 January 2007	$17,000.00
6 March 2007	$17,701.00
8 May 2007	$10,297.00
8 June 2007	$5,510.00

[23] While no direct evidence is before the Court as to any specific events that led to these payments, there is some correspondence that has been produced. First, there is an email of 19 October 2006 from CMF to Mr Kevin Anderson asking him to get his solicitor to undertake that surplus net rental funds from Tourism Flair (presumably some or all of the units) will be credited to CMF monthly. There is no

evidence that such an undertaking was provided. On Monday 20 November 2006, CMF sent another email to Mr Anderson which referred to CMF getting further security, and asking when CMF would receive the income from Russell Cottages for the months of October and November. There was reference to a revised variation of mortgage in that email.

[24] On 5 January 2007 CMF emailed Mr Ronalde at Tourism Flair, copying the email to Mr Anderson, advising that they were expecting, on 20 December, the surplus income for November from Russell Cottages, and asking if payment had been made and, if not, when it would be made. It is also stated that the income for December was expected.

[25] Finally, a deed of variation of loan contract between CMF and Winslow has been produced, which shows an extension of the date of repayment of the capital sum to 2 May 2007. It is stated that:

> The borrower is to make monthly payments to this facility from the income generated from Russell Cottages through Tourism Flair rentals.

[26] Mr Shackleton for Russell Management submits further that between March 2007 and November 2007 regular emails were received from CMF chasing up payment of the rental income from Russell Cottages. He submits that CMF's conduct in receiving and accepting the rent from Russell Management amounted to "consent by conduct" for the purposes of s 119 of the Land Transfer Act.

[27] These emails and the affidavit statements of Mr Ronalde establish that CMF sought and accepted the surplus income from Russell Management's management of the Russell Cottages units. It received some modest payments, but these must be seen in context. The amount of the loan was $5,500,000.00, which meant that the annual interest payable at the ordinary rate of 13 per cent was $715,000.00, and that the penalty rate was an annual sum approaching $1,000,000.00. Therefore, the monthly interest was of the order of at least $60,000.00. The payments actually shown to have been made from the income of Russell Cottages were therefore only a small proportion of the interest owed.

[28] The email exchanges seeking the surplus funds must also be seen in the context of CMF's express refusal to consent to the lease. Such a refusal is exactly what could have been expected commercially from CMF, particularly in light of the evidence of a registered valuer, Allen Beagley. He deposed that the automatic renewal rights which give the leases a term of up to 50 years created leases that were onerous from a lessor's perspective. Mr Beagley was of the view that the existence of the leases in effect diminish the value of the units by between 38 and 40 per cent. This evidence, which was not presented before the Court at the last hearing, makes it easy to understand CMF's refusal to consent. It would be surprising if it had done so, at least without taking further security or getting some further protection.

[29] CMF's refusal to consent and the commercial disadvantage it was likely to suffer from any such consent, has to be considered against the acceptance of some of the Russell Management rental being paid direct to it. The facts show undoubtedly an awareness on the part of CMF of the leases by Winslow to Russell Management, and a wish on its part to obtain the benefit of the surplus rental flows on those leases. It told Winslow to pay the rental to it (although the amounts actually paid were modest). Such conduct might well be said to fall within the concept of acquiescence to the leases, in the sense of it being an acceptance of their existence and a wish to take advantage of the rental payments. It is easy to see why a mortgagee in the position of CMF would have sought the surplus rental flows or indeed any of Winslow's income flows to help meet the interest commitments. However, it is clear that there was no formal agreement reached as to the Russell Management leases. There was no assignment or other such document. CMF was just trying to get as much of Winslow's surplus income as it could.

[30] It is necessary to turn to the authorities which consider what constitutes consent for the purposes of ss 105 and 119. There does not appear to be a case where the issue of whether requests for rental and the receipt of rental can constitute consent by a mortgagee has been directly considered.

[31] The Land Transfer Act does not give any indication as to what constitutes consent. The general statement of the English Court of Appeal in *Bell v Alfred*

Franks & Bartlett Co Limited [1980] 1 All ER 356, at 362-363 in an English landlord and tenant context is relevant:

> … whatever consent or acquiescence may mean in different contexts, in that context 'consent' is put in plain antithesis to 'acquiescence'; and that, therefore, if something falls within the description 'acquiescence', it is not consent. The difference which is pointed out between the two in this context is that 'consent' involves some affirmative acceptance, not merely a standing by and absence of objection. The affirmative acceptance may be in writing, which is the clearest obviously; it may be oral; it may conceivably even be by conduct, such as nodding the head in a specific way in response to an express request for consent. But it must be something more than merely standing by and not objecting.

Although that statement was made in the context of specific English legislation, it was referred to with approval in *NZ Fisheries Limited v Napier City Council* (1990) 1 NZ ConvC 190,342 (CA) where consent under ss 105 and 119 of the Land Transfer Act 1952 was in issue. In that case Casey J observed that consent should not be too readily assumed or spelt out from the course of dealing between the parties, and said at 190,344 that:

> … acquiescence involves no more than the passive standing by without objection, whereas consent requires a positive affirmative act such as written or oral acceptance or even an implied acceptance of conduct.

[32] This approach to the meaning of 'consent' in a s 105 and s 119 situation was adopted in *Harman & Co Solicitor Nominee Company v Secureland Mortgage Investments Nominees Limited* [1992] 2 NZLR 416 (CA), where the statement in *NZ Fisheries Limited v Napier City Council* was quoted. It was observed that if a mortgagee produced a title for the express purpose of enabling a lease to be registered, it would be difficult to see how this was not a consent to registration, (at 421).

[33] It is clear then that mere knowledge by the mortgagee of the existence of the lease is not enough to constitute consent: *Registered Securities Ltd v Christensen Potato Co Ltd* (1991) ANZ ConvR 57. But at a certain point of co-operation and involvement the mortgagee's actions can become consent. Mr Shackleton emphasised the fact situation in the *Registered Securities Ltd v Christensen Potato Co Ltd* case. The trial Judge there found that the lessor had at a meeting encouraged the planting of a crop of potatoes. These were to be planted as a consequence of a

lease of the land. It was accepted that this was enough to be a consent to a lease for the purpose of growing potatoes.

[34] These are practical reasons why mere acquiescence should not be sufficient to constitute consent for the purposes of ss 105 and 119. The reality is that mortgagees are often faced with the fait accompli of a mortgagor granting third parties interests in the land. While the mortgagees may not wish to consent to the granting of such interests, practicalities may demand that they do not take steps hostile to the new interest. They will rather co-operate in some limited way with the mortgagor to ensure the best practical return and to avoid having to call up the mortgage. On the other hand, such steps may amount to consent if they involve a positive act which affirms the lease, such as the production of title for registration of the lease.

[35] It is a practical reality, as was recognised in *Harman & Co Solicitor Nominee Company v Secureland Mortgage Investments Nominees Limited* at 420, that a long term lease will diminish the value of the mortgage security, unless security is taken over the new leasehold interest. A prior mortgagee can be expected to be reluctant to consent.

[36] The warning given by Casey J that consent should not be too readily assumed as spelt out from a course of dealings, must be borne in mind. Here the email and letter exchanges show no affirmative acceptance either in writing or orally. It cannot be said that there was any consent by conduct, such as the nodding of a head in a meeting, or production of title. Nor can it be said that there was an implicit consent arising from correspondence. To the contrary, there was a refusal to consent. Of course, CMF's actions went a little further than merely passively standing by without objection. There were requests for the rent. But there has been nothing produced to indicate that Capital encouraged Winslow to grant leases to Russell Management. The fact that when CMF became aware of the leases it sought the surplus income flows, shows no more than a predictable commercial reaction to a situation already in existence. The seeking out and receipt of some of the rent may have been a positive acquiescence, but not an act positively affirming the leases, such as a production of the title for registration would have been. A demand for income that

flows from a contract cannot be seen as either an approval or disapproval of the contract. It is no more than a commercial reaction to its existence. It is not consent.

Conclusion

[37] I conclude that Russell Management has not shown that it is arguable that Capital consented to the Russell Management leases. In doing so I have not found it necessary to determine issues of credibility or indeed any disputed issues of primary fact. The primary facts are not in dispute. The inferences that can be drawn from the facts have been in contention, but I conclude that the correct inference is that Capital did not consent to the leases. Therefore, the leases were not binding on Capital in terms of s 119 of the Land Transfer Act 1952, and in terms of s 105 of that Act the estate or interest of Winslow in the land must pass to and vest in the purchasers free of the Russell Management leasehold interests. Thus, in terms of s 143 of the Land Transfer Act 1952 the caveat must be removed for the purposes of registering Capital's transfer as mortgagee.

Result

[38] The caveat bearing Registration No. 8014923.1 lodged by Russell Management Limited on 2 December 2008 against certificates of title 168836, 168837, 168839, 168840, 168844, 168846 and 168847 (North Auckland Land Registry) shall be removed forthwith upon the registration of a memorandum of transfer by Capital + Merchant Investments Limited (In receivership) and Capital + Merchant Finance Limited (In receivership) as joint mortgagees exercising their power of sale over the properties.

Costs

[39] If costs are pursued, short submissions should be filed. Capital is to file submissions within seven days of the date of this judgment. Russell Management is to respond within a further seven days.

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Asher J