IN THE HIGH COURT OF NEW ZEALAND
GREYMOUTH REGISTRY

CIV-2012-418-000085
[2013] NZHC 386

BETWEEN	RONALD JOHN ZWARST, LISA TRACY ZWARST AND CHRISTOPHER JOHN SAXTON Plaintiffs
AND	DAVID ANTHONY SAXTON Defendant

Hearing: 21 February 2013

Appearances: J P Forsey for Plaintiffs
M Dollimore for Defendant

Judgment: 1 March 2013

JUDGMENT OF ASSOCIATE JUDGE MATTHEWS

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[1] The plaintiffs, Ronald Zwarst and Christopher Saxton, are the trustees of the M D Saxton Family Trust. Lisa Zwarst and Christopher Saxton are the trustees of the L T Saxton Family Trust. The former trust was set up for the family of the late Morgan Saxton, the latter for the family of Lisa Saxton, now Zwarst.

[2] Each trust says that in 2001 it entered an unconditional agreement to purchase a small block of farm land to be subdivided, along with other allotments, from a farm property owned, then and now, by the defendant, David Saxton. In each case the consideration was the sum of $20,000.

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[3] The trustees seek, by way of summary judgment (that is, judgment without trial), an order that David Saxton specifically perform each contract.

[4] David Saxton says that summary judgment should not be entered, for a number of reasons which will be discussed.

[5] Summary judgment may be entered if the plaintiffs can show that the defendant does not have an arguable defence. In *Auckett v Falvey*,[1] Eichelbaum J said:

> ... On a summary judgment application, the onus is on the plaintiff to show that there is no defence. On the present facts, the plaintiffs are able to pass an evidential onus to the defendants by exhibiting the contract which on its face, entitles them to the remedy they now seek. The defendants are then in a position of having to demonstrate a tenable defence. However, the overall position concerning onus on the application is that at the end of the day the question is whether the plaintiffs have satisfied the Court as to the absence of a defence.

[6] In this case, where reliance is placed on two written agreements for sale and purchase of land, the position of the trustees is relatively straight-forward. They say that once title to the land became available, the obligation of David Saxton as vendor in each agreement was to transfer the land to them upon payment by each trust of the sum of $20,000. The principle in *Auckett v Falvey* applies. David Saxton says that he has nine defences to the application.

[7] Before examining these, however, it is necessary to determine the contention of the trusts that the doctrine of *res judicata* applies to some of the defences and, where applicable, findings have already been made in favour of the trusts which are binding. This argument arises from two former judgments, the first by Judge Saunders in the District Court, and the second by Associate Judge Osborne in this court. I will decide this point first, given that a finding for the plaintiff trusts on it would avoid the need to once more consider the relevant defences raised by David Saxton. Context for this point is provided by the following narrative.

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1 *Auckett v Falvey* HC Wellington CP296/86, 20 August 1986.

[8] The agreements in issue are both dated 7 November 2001. A subdivision was required in order to obtain title to each block of land described in the agreements. Titles were issued on 26 May 2004. Shortly after that David Saxton was arrested and charged with theft of pounamu. On 29 October 2004 the Crown registered a restraining order under ss 41 and 42 of the Proceeds of Crimes Act 1991 against the new titles, and the balance of David Saxton's adjacent land. This order prevented David Saxton from transferring the land to the trusts.

[9] David Saxton's son, Morgan, was also arrested and charged. Both were convicted after trial and sentenced to imprisonment. On appeal, David Saxton was sentenced to home detention. Pending the appeal Morgan Saxton was released on bail. He died in a helicopter accident during that period.

[10] Early in 2011 the District Court considered an application by the Crown for a forfeiture order in respect of the farm property of David Saxton of which the titles in issue in this proceeding formed part. The first point for determination by the judge was whether the land was tainted property, by virtue of it having been used to commit or to facilitate the offence of theft. The judge was not satisfied on the balance of probabilities that the farm had been used to facilitate the commission of the offence by David Saxton. However, although the judge was not required to do so, given this determination, he went on to comment on other factors which he would have taken into account in determining whether relief from forfeiture should be given to David Saxton, had he determined that the land had been used as alleged by the Crown. He stated that he did so in case the Crown, having been unsuccessful on the principal ground of its application, decided to take the matter further. The judge considered a number of factors pursuant to s 15 of the Act.

[11] The trustees at that time of the M D Saxton Family Trust, and of the L T Saxton Family Trust, were the first and third third parties on the application respectively. The judge considered the position of the trusts as purchasers of parts of the farm. The judge assessed evidence given by Lisa Zwarst, and found:

> [88] The value was, I believe, a fair one based on the circumstances prevailing at that time. I would have taken the view that despite the fact that the respondent is still shown as the legal owner, that relief should be granted under section 18 of the Act.

[12] The judge then considered the position of the M D Saxton Family Trust. He said:

> [89] The third third party is the Family Trust of Morgan Saxton. As Morgan is now deceased there can be no personal benefit to him if relief is given under s 18. I note that he personally was an offender and did not meet any share of the reparation order made.
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> [90] In granting relief I have not overlooked that aspect however, I accept that if the land is conveyed to the Family Trust pursuant to the agreement for sale and purchase that there will need to be an injection of cash from other sources to settle the property transaction.

[13] From a consideration of this judgment and, in particular, the aspects of it to which I have referred I am satisfied that:

(a) The reason for the judge declining to make a forfeiture order was that the property was not sufficiently tainted by the offending for a forfeiture order to be made,

(b) the observations he made in respect of each of the trusts were not necessary for his decision, and were only made in order to set out his views, should the Crown have appealed against his finding on the application for a forfeiture order, and

(c) these observations do not found an issue estoppel in the present case.

[14] On 5 May 2009 each of the trusts registered a caveat to protect the interest it had in David Saxton's land. After the release of the judgment of Judge Saunders on the forfeiture application the trusts took steps through their solicitors to settle the agreements. They issued settlement notices. David Saxton requested the District Land Registrar to issue notices that the caveats would lapse unless orders were made by this Court to the contrary. The trustees of each trust applied for such orders. On 15 March 2012 Associate Judge Osborne issued a judgment ordering that the caveats not lapse.

[15] For an issue estoppel to arise, the issue must have been the subject of a final judgment between the same parties litigating in the same capacity and on the same

issue.[2] A final judgment "is one that cannot be varied, reopened or set aside by the Court that delivered it or any other court of coordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction".[3]

[16] The judgment of Judge Saunders was a final judgment on the issue which he was required to determine, namely whether the land of David Saxton was tainted property in terms of the Proceeds of Crimes Act 1991. The judge's findings in relation to all other issues referred to in the judgment are no more than observations for the possible benefit of another court had the principal issue been the subject of an appeal. They are not within the terms of the test enunciated by Lord Diplock. I find that issue estoppel does not arise from the judgment of Judge Saunders on the issues which he discussed, obiter, and which are issues in this case.

[17] The judgment of Associate Judge Osborne was a final judgment of this Court. It was between the same parties or their privies. The fact that there has been a change in the trustees for each trust has no relevance. They were litigating in the same capacity and issues arose in that case which also arise in this case. That judgment meets the criteria for a judgment from which issue estoppel may arise.

[18] In *Joseph Lynch Land Co Ltd v Lynch*[4] the Court of Appeal reversed an order by the High Court striking out a cause of action, on the basis that the cause of action sought determination of an issue which had been finally determined by the High Court when dealing with the sustainability of a caveat. The Court said:

> In principle a sufficiently final and certain conclusion can no doubt be found in what is effectively an interlocutory judgment so as to found a subsequent issue estoppel. We consider, however, that considerable caution is necessary before coming to such a conclusion. If the parties have clearly accepted that an interlocutory ruling on a point shall be finally decisive between them then no doubt an issue estoppel or even a cause of action estoppel may arise. Applications to remove or to hold a caveat will not ordinarily be regarded as finally determining the rights of the parties. Certainly a ruling that the caveat is to remain in the meantime could seldom, if ever, be regarded as demonstrating that the caveator has the rights which are asserted.

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2 *Victoria Street Apartments Ltd (In Liquidation) & Anor v Sharma & Ors* HC Auckland CIV-2009-404-8377, 21 September 2011, per Duffy J.

3 *D S V Silo-Und Verwaltungsgesellschaft mbH v Sennar (Owners); The Sennar* (1985) 1 WLR 490.(HL), per Lord Diplock.

4 *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA), per Tipping J.

[19] The characterisation by the Court of a judgment sustaining a caveat as effectively an interlocutory judgment arises from the nature of a caveat. The judgment itself is not interlocutory in the sense of being a determination of an issue during the course of a proceeding, but before trial, but in the sense of determining only the right of a party claiming an estate in land to keep its notice of that claim on the title to the land and thus derive the benefit of the statutory prohibition on registration of other interests until the claim has been determined. It does not make a finding in relation to the substantive claim beyond deciding whether there is a fairly arguable case that the claim exists, and that in the circumstances of the case the claim should be determined under the umbrella of protection that a caveat gives. The real issue between the parties remains for determination; in that sense the claim to sustain a caveat is interlocutory even though the underlying issue will be determined on a different proceeding.

[20] At page 43 the Court continued:

> In our judgment the ultimate question is concerned not so much with the character of the earlier decision, ie whether it should be regarded as final or interlocutory. The question is rather whether in the circumstances it is reasonable to regard the earlier decision as a final determination of the issue which one of the parties now wishes to raise.

[21] This case lights a clear pathway through the claim by the trusts that most of the issues raised by David Saxton by way of defence are the subject of issue estoppel. The judgment of this Court did not finally determine the rights of the parties to this case. The Court determined only that the trusts had an arguable case to their respective claims to the land, which should not be defeated by the registration of any dealing with that land until those cases had been decided. To reach that decision the Court considered a number of the issues arising in this case. In Lynch the Court of Appeal ruled that a court must proceed with considerable caution before deciding that the earlier judgment provides a sufficiently final and certain conclusion to found estoppels on issues arising in this proceeding.

[22] Mr Forsey argued that issue estoppel arises from Associate Judge Osborne's judgment in relation to three of the defences put forward by David Saxton to this claim.

[23] The first is David Saxton's contention that the contracts relied upon by the trusts are unenforceable by virtue of the provisions of the Limitation Act 1950.

[24] Section 4 of the Limitation Act 1950 provides that actions shall not be brought after the expiration of six years from the date on which the cause of action accrues, where those actions are founded, as here, on contract. However, s 4(9) provides:

> 4(9) This section shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any provision thereof may be applied by the Court by analogy in like manner as the corresponding enactment repealed or amended by this Act, or ceasing to have effect by virtue of this Act, has heretofore been applied.

[25] A court of equity applies a limitation statute by analogy on the basis that the equitable relief sought corresponds to relief attainable at common law for which a statute of limitations prescribes a time for bringing a claim.[5]

[26] Where an equitable remedy may be seen to correspond with a legal remedy to which a statutory limitation period applies, that period will apply to the proceeding in which the equitable relief is claimed. As noted in *The Law of Limitation*:[6]

> A court may ... when considering a claim for equitable relief to which no statutory limitation period is applicable apply by analogy any statutory limitation period which governs any corresponding claim in law [authorities follow].
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> The consequence of this principle is that if the delay of the claimant in instituting proceedings is regarded as negligent and/or is unexplained, and it exceeds the analogous statutory limitation period, then the claim for relief will be refused by the court, without further enquiry and without reference to the doctrine of laches. This practice of analogous application of statutory limitation periods to certain claims for equitable relief occurs principally in two areas:
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> (a) where the equitable relief claimed or sought corresponds to a legal remedy to which a statutory limitation period applies ...

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5 *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525, at 542-544.

6 T Prime and G Scanlan *The Law of Limitation* (2nd ed, Oxford University Press, 2001), at 3.1.11.

> (b) cases in which equitable remedies are sought in support of or in connection with legal rights. This will include any case where any equitable relief claimed has no correspondence with or resemblance to any legal remedies that may be simultaneously granted in a claim. Examples of such claim include proceedings for specific performance ...

[27] The remedy of specific performance is sought in this case in conjunction with a legal right to enforce the contracts in question. To determine, therefore, whether the statutory limitation period of six years applying to the legal right should apply also to the equitable remedy, it is necessary for the Court to determine whether the delay may be regarded as negligent or unexplained.

[28] It is necessary to consider this question in two contexts, the present one being whether this point was determined in the judgment of Associate Judge Osborne, thereby giving rise to an issue estoppel. The other, analysis of the evidence on this application, will only arise if I find issue estoppel does not apply.

[29] After referring to ss 4(1) and 4(9) of the Limitation Act 1950 his Honour applied *McLachlan v Meyers*:[7]

> I do not consider that this Court, in its equitable jurisdiction, would find that the six-year limitation period under the Limitation Act automatically applies to an action for specific performance in the present case. I consider that this Court in equity would consider that it has a discretion in the matter.

[30] Generally, this accords with the principle set out in *The Law of Limitation*, above, though the learned authors more specifically referred to whether the delay could be regarded as negligent or unexplained.

[31] Associate Judge Osborne then established the date upon which, in his view, the cause of action accrued, and therefore the limitation period for a claim in contract would have expired, discussed the principle of laches; and examined what he described as the justice of the case. In so doing, it may be taken that he was examining whether this is a case in which equity might exercise a discretion to allow a longer period for the issue of proceedings than would normally apply to enforcement of the legal right underlying the claim to an equitable remedy. The

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7 *McLachlan v Meyers* (2009) 10 NZCPR 625 (HC) at [47].

judge described the lengthy period during which the restraining order was in force (October 2004 to June 2011) as the predominant feature in the case. He noted that David Saxton derived the benefit of the support of the trustees in his opposition to the Crown's case for forfeiture, and that in the evidence he filed in support of that application he recognised the continuing force of the contracts. Although his Honour described the existence of the contracts as being a significant point in support of the application for relief against forfeiture, he could only have been referring to that potentially being the case (as recognised by Judge Saunders) had forfeiture not specifically been declined on another ground. His Honour concluded:

> [34] Bringing all the facts together I find to the extent that there has been delay by these applicants in relation to the agreement for sale and purchase, that it is delay which this Court in its equitable jurisdiction must at least arguably condone. There have been good and very sensible reasons for the applicants' not moving to enforce their contractual rights for the period that they did. The applicants are entitled to the final orders they now seek in relation to the caveats, so as to protect their contractual and trust claims.

[32] This is a clear finding and led directly to the Court ordering that the caveats not lapse. I am mindful, however, of the direction to proceed with considerable caution when determining whether the decision of the Judge on the caveat proceeding should found a subsequent issue estoppel.[8]

[33] There is force in Mr Forsey's argument that an estoppel arises against Mr David Saxton on this issue by virtue of the judgment. The limitation point squarely arose for decision because if an action to enforce the contracts by way of specific performance were time-barred the caveats could not be sustained. The evidence identified by the judge in reaching his conclusion is the evidence identified on this issue in this case.

[34] Mr Dollimore argues that a decision on this point is for a trial judge, not for decision on a summary judgment. For this proposition Mr Dollimore relies also on *McLachlan v Meyers* where the Court said:

> [50] The Court in equity will examine all the circumstances of the case. The fact that Mr McLachlan has been in possession of the property is likely

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8 *Joseph Lynch Land Co v Lynch*, above n 4.

> to weigh heavily with the Court when considering whether to apply the six-year limitation period by analogy. But ultimately that is a matter for the trial Court. For now, it is sufficient that Mr McLachlan can say that it is at least arguable that in equity he should be able to claim the title.

[35] Mr Dollimore says that in this case, too, a trial court should determine whether or not the time for bringing a proceeding for specific performance in this case should be permitted beyond a period of six years. He suggests that the evidence that may be relevant is not certain at the moment, and the Court would be assisted by seeing and hearing the witnesses, for example in relation to issues raised by his client about the signing of the agreements. He says that notwithstanding the restraining order over the farm nothing prevented the plaintiffs from cancelling the agreements and seeking damages.

[36] The latter point does not assist. The plaintiff trusts are quite entitled to seek specific performance as their remedy and cannot be criticised for seeking this form of equitable relief rather than cancelling the contracts and seeking damages. As to the former point, the factors identified by Associate Judge Osborne as supporting his decision are matters of record. Finally, I do not think that evidence about the signing of the contracts would assist in determining the application of a limitation period to this claim for equitable relief, where the focus of the Court is on whether the plaintiffs were negligent in delaying bringing the proceedings, whether their delay is unexplained (*The Law of Limitation*) or whether the correct approach is to examine the justice of the case, as the judge did in the caveat proceedings. The delay is clearly and satisfactorily explained and the justice of the case favours the applicant trust for the reasons set out by Associate Judge Osborne.

[37] For these reasons I find that issue estoppel applies to the decision of the Court in relation to a limitation period for bringing this proceeding.

[38] Secondly, Mr Forsey argues that issue estoppel also applies to David Saxton's defence that the contracts were not entered into by him. He supports this argument by a passage from *Specialist Group International v Deakin*,[9] where the Court of Appeal said that *res judicata* may also extend to an implicitly necessary

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[9] *Specialist Group International v Deakin* [2001] EWCA Civ 777, at 22-23.

element of the previous determination. Mr Forsey says it is an implicit element of the decision not to allow the caveats to lapse that David Saxton signed the agreements.

[39] This argument has a superficial attraction. However, to accept it would be to open the way to drawing an inference from the judgment sustaining the caveat that all the fundamental elements of the contract which the caveats seek to protect are established. It would not be proceeding with the caution identified as necessary by the Court of Appeal and would fall squarely into unacceptable territory; as the Court noted:

> Certainly a ruling that the caveat is to remain in the meantime could seldom, if ever, be regarded as demonstrating that the caveator has the rights which are asserted.[10]

[40] I therefore find issue estoppel does not apply to this argument.

[41] Mr Forsey next submits that issue estoppel applies in relation to David Saxton's contention that the purchase agreement by the L T Saxton Family Trust is void because at the date of the contract that trust did not exist. Mr Forsey relies on a sentence in the judgment on the caveat proceeding that notes that the composition of the trustees and the trusteeships has slightly altered. However, that is not material.

[42] I am unable to draw any inference that this issue has been determined in the earlier proceeding. I reject Mr Forsey's contention that issue estoppel applies to it.

[43] I will now examine the nine grounds upon which David Saxton says he has a defence to this proceeding.

Ground 1

[44] This ground is that the claim is barred by the Limitation Act 1950. As set out earlier this ground was rejected by the Court in the caveat proceeding and in this proceeding is the subject of issue estoppel.

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[10] *Joseph Lynch Land Co Ltd v Lynch, above n 4.*

Ground 2

[45] David Saxton says that the agreements were not entered into by him. By consent, orders were made that the affidavits filed on the caveat proceedings be read on this application. Documents from the forfeiture proceedings are also in the agreed bundle of documents before the Court. These include evidence given by David Saxton in that case.

[46] In his affidavit in opposition to this application David Saxton says that at the time the agreements were signed in 2001 he was leaving all business and legal documentation matters to Lisa Saxton to handle. He says he has no recollection of ever signing the contracts and if he did so it could only have been on the basis that he may have signed the last page without knowing what the documents were. He says it is possible that he never signed them at all. Although he intended to gift the pieces of land to Lisa and Morgan Saxton, he would not have signed contracts that had prices included in them without querying the prices. He would also have required confirmation that the land would never be sold. He refers to his not having initialled the pages or a deletion in the contracts and notes that one of his signatures on a photocopy seems to be darker than the other. He wants to see the original contracts before he can fully defend this case. This is not, however, the only evidence he has given on this issue.

[47] On 13 March 2008 David Saxton swore an affidavit in opposition to the application to forfeit the farm. Although that affidavit is not in evidence on this proceeding, he swore a further affidavit on that proceeding on 17 June 2009 where he sets out and comments on every paragraph in the former affidavit. As the later affidavit is before me I have the full text of the former, together with the benefit of Mr Saxton's comments on it. In his affidavit in opposition to this application he is highly critical of the actions of the solicitor who prepared and presented the affidavit of 13 March 2008 to him to swear, and points out a number of factors which were weighing on him at the time, including the fact that he was in prison. The affidavit of 17 June 2009 was prepared by a Queens Counsel engaged by him and in it he gives detailed comment on his earlier evidence.

[48] In the affidavit of 13 March 2008 David Saxton said:

> 27. In 2001 and 2004 (prior to my arrest) I entered into Agreements for Sale and Purchase to a number of entities such as Heliventures and various Family Trusts.
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> 28. These agreements were entered into prior to my arrest on the matter for which I was convicted. This was done in order to ensure the property which had been used as security for the Westpac Advances was in the correct entities name.

[49] In the affidavit of 17 June 2009 David Saxton says in relation to these two paragraphs:

> The agreements were entered into prior to my arrest on the matter for which I was convicted. Whilst I accepted that the three blocks should be transferred to Heliventures Limited and trusts for my son and daughter at that time, I cannot say that this was done in order to ensure the property which had been used for security for the Westpac advances was in the name of the correct entities. My then partner, Debbie, suggested that it would be good for me to transfer to Morgan and Lisa some shares in my name and Heliventures Limited and also a block of land to each. That led to the agreements for sale and purchase with the trusts in favour of the children.

Notably, David Saxton sought only to amend his statement about the reason for the agreements, and confirmed that there were agreements with "the children".

[50] Further on in the affidavit of 13 March 2008 David Saxton said:

> 30. The titles to the property has (sic) remained in my name because the restaining(sic) orders prevented registration of the transfers, but Heliventures Limited and the trusts have paid the purchase price by paying the mortgage and other debts and all other outgoings on the property.

[51] In the affidavit of 17 June 2009 by way of comment on this paragraph he said:

> Whilst it is true that the titles to the properties have remained in my name there are a number of matters which need to be resolved before the relevant properties can be transferred to Heliventures Limited or the trusts, including payment. There will be an issue as to the extent to which any payments by Heliventures Limited in respect of mortgages and other debts are relevant. To the best of my knowledge the trusts have paid no monies in respect of mortgages or other debts.

David Saxton raised doubt over whether payment of the purchase prices had been made, but not over the existence of the contracts.

[52] It is clear from these passages that not only in March 2009 but also on 17 June 2009, when under advice from a Queens Counsel, David Saxton did not allege that the contracts were not entered into by him. In his affidavit in opposition to this application he says that when he swore that affidavit he was still unwell. His son had died eight months previously, affecting him greatly. Two months before, he had had his medical clearance to fly suspended and could no longer earn his living. He says that parts of the affidavit of 17 June 2009 are incorrect. He says he had significant concerns about contracts at that time and "was far from clear about" the contracts also.

[53] In the forfeiture proceedings David Saxton gave evidence and was cross-examined. He was pressed by counsel about signing contracts for sales to the three entities in November 2001. David Saxton told the Court that his intention was that two blocks of land of two acres each were intended for his family to give them somewhere to live, eventually, by having a block of land and building a home and living there. When asked whether that was the reason the subdivision took place he said that was correct. He said that "from day one" his intention was to have a happy family and the intention was that the two acre blocks was part of this intention. In relation to the contracts he said he did not know what he signed. A lot of papers were "chucked in front of" him. When shown one of the signatures, appearing to be his, on the agreement for sale of one block to Heliventures Limited, he identified his signature. When asked whether he signed agreements for sale and purchase to enable Lisa and Morgan to get two acre blocks he responded "I didn't, I signed that's correct yes". However, he denied the sale prices.

[54] Later, when it was put to him that his primary aim was to transfer land to Heliventures and Lisa and Morgan's family trusts, and that he agreed to that, he answered "initially. I agree that at the early stages of this century that was my good intentions yes".

[55] Later David Saxton was cross-examined about the affidavit of 17 June 2009. In response to a question about security to Westpac, he said:

> No the agreement was entered into prior to my arrest on the matter for which I was convicted, was that I accepted that these blocks should be transferred to Heliventures Ltd in trust for my son and daughter at that time. I cannot say that that was done in order to ensure the property which had been used for security in the Westpac advance was in the name of the correct entities. My then partner, Debbie, suggested that it would be good for me to transfer to Morgan and Lisa some shares in my name in Heliventures Ltd and also a block of land in each led to agreement for sale and purchase to the trust in favour of the children.

[56] Later again David Saxton was asked whether the initial agreement was that the purchase price would be gifted. He said:

> No, no, I am not going to use the word gifted no. My intentions, once again, was to give them land to put a house on and to work out if there was to be monies paid at a later date that's how it was going to be. At the time it wasn't a big concern.

[57] Finally, when asked about market price for the blocks, David Saxton said:

> I'm just telling you, I'm just saying if those two blocks are to be finally, Morgan, since his passing has put a different light again on his block of land and I have stated before I will gift that block of land to Lisa if she was to pay the market price.

[58] Although weight must be given to the affidavit sworn by Mr Saxton in opposition to this application, the Court is not bound to accept uncritically every statement made in an affidavit.[11] This is not a case where there is a conflict between evidence for the plaintiffs and evidence for the defendant; rather, it is a case where the evidence now given by David Saxton must be considered in light of his previous evidence and actions. The factors I take into account are these:

(a) David Saxton presented his case on the forfeiture application on the basis that two blocks of land had been sold to Lisa and Morgan Saxton Trusts, called evidence from Lisa Saxton to support that, filed the original contracts with the Court (I have been informed they remain on the District Court file) and answered questions in cross-examination on them.

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[11] *Eng Mee Yong v Letchumanan* [1980] AC 331, (PC).

(b) Although some of those answers suggest that David Saxton may have had a less than clear understanding of the way his intended transfers of land to the trusts were documented, his intention to transfer land to the trusts was confirmed. Although he referred as well to gifts, he also confirmed that he would transfer the land at least to the Lisa Saxton Trust when it paid the purchase price.

(c) There is evidence from Lisa Saxton before me that the given purchase prices of $20,000 for each block were assessed as a pro rata apportionment of the value of the farm and were approved by the accountants for David Saxton.

(d) In a letter from David Saxton's Queens Counsel to the solicitor then representing the trusts, counsel said:

> (iv) **The agreements for sale and purchase with the trusts and Heliventures Limited**
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> In Mr Saxton's second affidavit, he attached copies of agreements for sale and purchase with family trusts and Heliventures Limited. The status of these agreements is of particular importance. They appear on the face of them to be unconditional agreements which means that they are enforceable by the trusts and Heliventures Limited. The existence of these agreements is critically important to the fate of the application for forfeiture because ...

Counsel then set out his reasons. For present purposes, the important points are that David Saxton annexed the agreements to his own affidavit, and relied on them in the forfeiture application.

(e) Counsel then went on to note that when speaking to a Mr Hill (whom I was told was an adviser to David Saxton) he had been informed that David Saxton wanted the agreements to proceed, though the transfer in relation to Morgan's trust was in doubt because of Morgan's death, and the position with Heliventures Limited had changed so there were doubts about whether that agreement should proceed. Counsel then went on to note that as it appears that the agreements are unconditional it would be for the trustees and Heliventures Limited to decide whether

to enforce them and the fact that David Saxton may not want the agreements to proceed in any particular case was unlikely to be determinative of the matter. Counsel for David Saxton then noted that consideration needs to be given to the making of an application by the trusts and Heliventures Limited for relief under s 17 of the Proceeds of Crimes Act 1991. He expressed the view that the making of such an application would greatly strengthen the defence to the application for forfeiture.

(f) The explanatory affidavit of 17 June 2009: the comments I have made in [47] and [49] above.

(g) Although David Saxton says there were issues that he and his counsel could not agree upon in relation to the contents of the affidavit of 17 June 2009, and that he recalled being stressed and having to leave the meeting for an hour or so to calm himself down, he did return to the meeting and swear the affidavit. It is important to consider exactly what he now says:

> In 2001 I was not aware of the contracts for sale and purchase, or of the purchase price or of the purchasers being trusts. It follows that in 2001 I did not accept that the three blocks should be transferred to the company or the trusts.

That statement is made notwithstanding the fact that he has identified his signature on one of the agreements, all of which appear to bear the same signature and bear the same date, has acknowledged the purchasers were trusts, has acknowledged that he will transfer the land to Lisa Zwarst on payment of the purchase monies, and has relied on the validity of the agreements in court proceedings.

[59] Taking into account all the evidence, it is my view that the position taken by David Saxton on this application in relation to whether or not he signed the agreements is unreliable. I find that David Saxton has not established an evidentiary basis for his contention that he did not sign the agreements, and that the trusts have established that this does not amount to a defence to this application.

Ground 3

[60] David Saxton says that if he entered the contracts the doctrine of *non est factum* applies. This defence is made out when the party raising it has signed a document believing it to have a particular character or effect, but in reality it has a different character or effect. It is for the party seeking to rely on this doctrine to show that his mistaken belief resulted from an erroneous explanation or description of the document to him by someone else, and that he acted with all reasonable care in the circumstances. Mr Dollimore says that David Saxton's evidence is that at all times he thought he was gifting the land to Lisa and Morgan. Certainly he says that in his affidavit in opposition to this application, and has referred to giving the blocks to Lisa and Morgan in other documents. He has referred to the suggestion that he do so as coming from his partner, Debbie. However, he said also that her suggestion "led to the agreements for sale and purchase with the trusts in favour of the children".[12] Although David Saxton has been consistent in saying that he intended to give land to Lisa and Morgan, or to their trusts, he has also said that this will occur only when the purchase price is paid.[13]

[61] The evidence from David Saxton is not sufficient to raise an arguable defence that the documents he signed were not agreements for the sale of his land.

Ground 4

[62] David Saxton says that events subsequent to the contracts have resulted in frustration of the contracts. He says that in relation to Lisa Zwarst, his relationship with her has broken down and she no longer lives on the farm. Morgan has died. Mr Dollimore relies on *Oggi Advertising Ltd v Harrington & Anor*.[14]

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12 Affidavit of 17 June 2009, under heading "Paragraph 28".

13 Affidavit of 17 June 2009, under heading "Paragraph 30"; transcript of evidence on forfeiture proceeding pp 89 and 90.

14 *Oggi Advertising Ltd v Harrington & Anor* [2010] NZAR 577, per Asher J.

[63] Section 3 of the Frustrated Contracts Act 1944 provides:

> **3. Adjustments of rights and liabilities of parties to frustrated contracts -**
>
> (1) Where a contract governed by the law of New Zealand has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from further performance of the contract, the following provisions of this section shall, subject to the provisions of s 4 of this Act, have effect in relation thereto.

[64] The section then contains detailed provisions setting out the consequences where frustration is established. It may be noted, however, that s 3(1) does not limit frustration merely to impossibility of performance, or give guidance on what may constitute frustration outside that ambit. This is a matter of fact; the effect of it is a matter of law.[15]

[65] Both contracts remain capable of performance. The issue therefore is whether either or both have become frustrated for other reasons. In *Davis Contractors Ltd v Fareham UDC,*[16] Lord Radcliffe said:

> It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be, as well, such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

[66] David Saxton says that his intention to have his daughter Lisa working in the business (Heliventures) and living on the land in question is no longer capable of attainment due to a breakdown in their relationship. He asserts that this is a frustrating event discharging him from an obligation to perform the contract. He expresses concern that Lisa Zwarst will simply sell the land. He says it was always his wish that the land not be resold during his lifetime. He says there is now a risk that will occur.

[67] In my opinion the consequences of the breakdown in relationship with Lisa Zwarst come into the category of a change of circumstance, but fall a long way short of amounting to a circumstance which would make performance of the contract different from that which was contracted for. David Saxton agreed to sell the land to

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15 *Denny, Mott and Dickson Ltd v James Fraser and Co Ltd* [1944] AC 265 at 274-276.

16 *Davis Contractors Ltd v Fareham UDC* [1956] AC 696.

Lisa's trust. The trust has the benefit of that contract. In due course the beneficiaries of the trust may well wish to build and live on the land. It is not shown in evidence, apart from David Saxton's opinion, that the land will be sold by the trust, nor even that Lisa Zwarst will not return to use it, in due course. Certainly the Heliventures business is no more and Lisa Zwarst no longer lives in the area. However, a sale of land to a family member of this kind inevitably carries with it the risk that the transferor's initial intentions will not ultimately come to pass, because circumstances in life change. Unhappily the principal change of circumstance with Lisa Zwarst is a falling out between daughter and father but that is not such an unusual circumstance, or one of such effect that requiring performance of the contract would amount to requiring an outcome different from that which was contracted for.

[68] The position is slightly different in relation to Morgan's trust, as he has died. However, apart from that, the circumstances are much the same as for Lisa's trust. The beneficiaries in the trust have the benefit of using the land and again there is no evidence that the land will inevitably be sold. Whilst things have not turned out the way David Saxton would have wished, the contract has not been frustrated by his death.

[69] This ground of defence is not arguable.

Ground 5

[70] Mr Dollimore submits that the L T Saxton Family Trust agreement is void, as at the time of the contract the trust did not exist. He says that there is contradictory evidence before the Court concerning whether or not the trust was in existence.

[71] The agreement bears a date several months before the date on the L T Saxton Family Trust deed. Lisa Zwarst, however, says that she recalls that the trust deed for her family and the trust deed for Morgan's family, were executed "at around about the same time in 2001". She says that the date on her family trust deed, 1 April 2002, is incorrect. She says that the agreements for sale and purchase were

completed on the basis that the trust deeds were formed. In cross-examination in the forfeiture case she expresses that view with certainty.

[72] This defence cannot succeed for two reasons. First, the only evidence in relation to the signing of the documents is that given by Lisa Zwarst. There is no contrary evidence, nor reason to disbelieve or doubt it. The evidence is admissible to prove that the document was executed on a date different from that which it bears.

[73] Even if that is not so, and the agreement for sale and purchase was executed before the trust was formed, the trust may resolve to ratify and adopt the agreement.

[74] For these reasons the agreement for sale to Lisa Zwarst's trust is not void. This ground of defence is not arguable.

Ground 6

[75] The sixth ground is that the agreements are uncompleted gifts from which David Saxton can withdraw. This claim is brought on the basis of written agreements for sale and purchase. I have discussed and made findings in relation to the evidence on these agreements. The agreements had their origin in an intention to make gifts but I am satisfied that this evolved into binding agreements to sell at stated prices. It is not arguable that the defendant agreed to transfer the land to Lisa and Morgan as gifts. In evidence on the forfeiture case he specifically referred to payment of the purchase price.

Ground 7

[76] The seventh ground is that not all the trustees of the M D Saxton Family Trust have consented to this proceeding and/or that not all the trustees have consented to previous steps that are prerequisites for this proceeding.

[77] Mr Dollimore identifies the prerequisite steps as the issuing of a settlement notice. Settlement notices were issued, but Mr Dollimore argues that the trustees of Morgan's trust at the time the notices were issued were not unanimous, and in any

event the instructions to issue the notices came from Lisa Zwarst who was not a trustee.

[78] Clause 9 of each agreement for sale and purchase sets out the basis upon which settlement notices are to be given, when a default has occurred. However, clause 9.7 provides that nothing in the clause shall preclude a party from suing for specific performance without giving a settlement notice. Therefore, even if a settlement notice was not validly given in the case of the M D Saxton Family Trust, as David Saxton maintains, there is no evidence or suggestion that the trustees current at the time the proceedings were issued did not authorise this to occur.

[79] Accordingly this ground of defence is not arguable.

Ground 8

[80] The eighth ground of defence is that summary judgment is not appropriate as the issues in dispute and the defences raised require disclosure of documents from files of solicitors who acted at the time the contracts were entered, and subsequently. It is also said that the status of the trustees of the M D Saxton Family Trust, and Lisa Zwarst's role with that trust, need to be the subject of evidence, and finally that the original sale agreements need to be produced for this proceeding.

[81] The original agreements are on the District Court file on the forfeiture proceedings, having been produced to the Court by a witness for David Saxton. They could have been recovered or, at the very least, inspected, by making appropriate arrangements with the Registrar of that court.

[82] There are no issues concerning the status of the trustees of the M D Saxton Family Trust. There is no reason to suspect that the trustees are other than united in this application.

[83] As to the availability of the solicitors' files, it seems that enquiries have been made and the files from the solicitors who acted at the time the contracts were entered have been passed to subsequent firms who have acted for David Saxton.

Whether those files may yet become available is unclear; counsel mentioned the possibility that they may have been lost as a result of the Canterbury earthquakes, but this point was not established. When pressed on the reason the files were needed, counsel referred to evidence being needed to clarify the date the deed of trust for Lisa Saxton's trust was signed, and the date the contract was signed. For the reasons given earlier in relation to the defence raised specifically on this point, no further evidence is required.

[84] I find that no ground of defence has been established as alleged.

Outcome

[85] I am satisfied the defendant does not have any arguable defence. The plaintiffs are entitled to summary judgment by way of an order that David Saxton specifically perform:

(a) The agreement dated 7 November 2011 between himself as vendor and the M D Saxton Family Trust as purchaser for the land in Certificate of Title WS8C/1369, on payment of the consideration of $20,000.

(b) The agreement dated 7 November 2011 between himself as vendor and the L T Saxton Family Trust as purchaser for the land in Certificate of Title WS8C/1370, on payment of the consideration of $20,000.

[86] David Saxton will pay to the plaintiffs costs on a 2B basis plus disbursements fixed by the Registrar.

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J G Matthews
Associate Judge