

BETWEEN

CASHMERE CAPITAL LIMITED

Appellant

AND CROSSDALE PROPERTIES LIMITED AND OTHERS

Respondents

Hearing: 05 November 2009

Court: Elias CJ
Blanchard J
Tipping J
McGrath J
Wilson J

Appearances: A C Hughes-Johnson QC with G A Hair for the Appellant
N A Till QC for the Third to the Eighth Respondents

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CIVIL APPEAL

MR HUGHES-JOHNSON QC:

As Your Honours please, I appear for the appellant with my learned friend Mr Hair.

ELIAS CJ:

10 Thank you Mr Hughes-Johnson, Mr Hair.

MR TILL QC:

May it please the Court, I appear for the third to the eighth respondents.

ELIAS CJ:

Thank you Mr Till. Yes Mr Hughes-Johnson?

15 **MR HUGHES-JOHNSON QC:**

Your Honour, I have prepared a written account of my oral delivery and I just – it would save I think the note taking, I wonder if I could be –

ELIAS CJ:

Thank you.

MR HUGHES-JOHNSON QC:

– used in handing this to the Court.

5 **ELIAS CJ:**

It's awfully lengthy.

MR HUGHES-JOHNSON QC:

Yes it's, it's really a re-statement of the –

ELIAS CJ:

10 Why does it need re-stating Mr Hughes-Johnson?

MR HUGHES-JOHNSON QC:

Well it's just – there are some aspects of the written submissions which I am –

ELIAS CJ:

15 Well normally we take in only outlines, skeletons which let us see the drift and not get overwhelmed by the text.

MR HUGHES-JOHNSON QC:

Yes, yes.

ELIAS CJ:

And this doesn't really fit that bill.

20 **MR HUGHES-JOHNSON QC:**

It follows very closely the written submissions so if the written submissions, I'm happy for that to be the standard.

ELIAS CJ:

25 Why don't we work off the written submissions then and you can supplement them because most of us have been working off the written submissions and taking those.

MR HUGHES-JOHNSON QC:

Yes, thank you Your Honour.

ELIAS CJ:

Everyone happy with that?

TIPPING J:

Absolutely.

5 **BLANCHARD J:**

On the subject of the written submissions though, they don't comply with the rules either because they don't have a summary at the beginning.

MR HUGHES-JOHNSON QC:

Well Your Honour I –

10 **BLANCHARD J:**

I don't know that it matters particularly in this case but –

MR HUGHES-JOHNSON QC:

Well I apprehended that the summary was the yellow pages.

BLANCHARD J:

15 Oh is that the summary?

ELIAS CJ:

That's the way I was taking them –

BLANCHARD J:

I thought that was an index. I'm sorry in that case I passed over it.

20 **TIPPING J:**

It's a very summary summary which is always splendid.

ELIAS CJ:

Well I found it very useful, so thank you.

MR HUGHES-JOHNSON QC:

25 I wish to commence by first of all dealing with the factual narrative, that's in the blue pages in the written submissions and I'll deal with the salient points there. Crossdale Properties is the registered owner of the properties, known as units 4 to

11 in Curletts Road, Christchurch and has been the owner since 1986. Through the period of ownership by Crossdale, a number of mortgages have been registered against the titles. Paragraph 3, Cashmere advanced loans to Crossdale in September 2006 totalling \$875,000 with a further advance in September 2006.

5 There was a discharge of the existing first mortgage.

ELIAS CJ:

But Mr Hughes-Johnson, you don't – we have read this summary so we've read the whole thing so it really would probably assist us –

MR HUGHES-JOHNSON QC:

10 Oh, you have read it, thank you. I'll go straight to the principal issue then.

ELIAS CJ:

– unless there's anything you want, that you need to correct into it?

MR HUGHES-JOHNSON QC:

15 No, there's nothing that I, no – I just wasn't sure whether or not that had been read, that's the reason why I was mentioning it. As far as the course of the case in the Courts below is concerned, I have – I wonder if I can be forgiven for referring to the yellow pages I've just handed up –

ELIAS CJ:

Yes.

20 **MR HUGHES-JOHNSON QC:**

– in relation to that because I think it is important at least to know – just for that very brief and sole purpose. That's paragraphs 17 to 24 of the yellow pages. The case has had a somewhat discursive history through the Courts. In the High Court Cashmere sought a number of declarations to the general effect that it was entitled
25 to enforce its power of sale and left peer title to an eventual to an eventual purchaser and there was a strike-out application which followed. On the first issue, consent to leases, Justice Fogarty concluded that Cashmere could not succeed as it has had consented.

ELIAS CJ:

How was that fact appropriate for summary judgment, that bothers me that the absence or fact of consent. Because there, I know there was evidence on behalf of Cashmere as to its understanding but of course that's not tested in any way –

5 MR HUGHES-JOHNSON QC:

No.

ELIAS CJ:

– and in particular one would have thought that if the matter had proceeded to trial, the proprietor, who's in Australia, might have been invited to give his version of events.

MR HUGHES-JOHNSON QC:

Well, it can only be on the basis that the case was so overwhelming for strike-out, in other words the facts spoke so boldly in favour of a strike-out that a strike-out inevitably would follow.

15 TIPPING J:

Your client had to show – who had to show what on the consent issue – the way this is – the respondents were trying to strike-out Cashmere's claim –

MR HUGHES-JOHNSON QC:

Yes.

20 TIPPING J:

– to enforce the securities?

MR HUGHES-JOHNSON QC:

Yes. The respondents are saying that there was consent which meant that the mortgagee was then unable, and I cover this later in my submissions obviously, was unable to proceed to sell.

TIPPING J:

So the respondents had to show beyond any possibility of challenge that there was consent?

MR HUGHES-JOHNSON QC:

That there was a consent.

TIPPING J:

Well, that was a pretty –

5 **ELIAS CJ:**

But if they did not succeed – but somehow we've got from the position that that they didn't succeed in that very high thing –

MR HUGHES-JOHNSON QC:

Yes.

10 **ELIAS CJ:**

– to a finding that there was no consent?

MR HUGHES-JOHNSON QC:

Yes but that, that was an essential element as far as the Judge was concerned in getting to the position that there was to be a strike-out.

15 **ELIAS CJ:**

Well.

MR HUGHES-JOHNSON QC:

– so he's saying, what the Judge is saying with respect is, that there can be absolutely no doubt whatsoever on the evidence before me that there was a consent
20 having regard to how that element has been interpreted by the Courts in New Zealand.

ELIAS CJ:

Yes but if he's wrong on that –

MR HUGHES-JOHNSON QC:

25 Well then–

ELIAS CJ:

– assuming he’s wrong on that, the result is not an affirmative determination that there was no consent –

MR HUGHES-JOHNSON QC:

5 No.

ELIAS CJ:

– the matter would have to be determined would it not?

MR HUGHES-JOHNSON QC:

10 In the event that, in the event that the Judge said there was no, he couldn’t say beyond all doubt that there was a consent, I agree.

ELIAS CJ:

Yes, yes. But the Court of Appeal seems to have slipped into actually determining the question of consent –

MR HUGHES-JOHNSON QC:

15 Well I think –

ELIAS CJ:

– maybe I’ve misread –

MR HUGHES-JOHNSON QC:

20 – I think the Court of Appeal has obviously been looking at this on the basis that, on the same basis namely whether or not it is absolutely beyond all question, that there was a consent.

ELIAS CJ:

So you accept that if we, if you succeed on the second or the principal argument, the question of consent is still a live issue and the matter would have to go to trial?

25 **MR HUGHES-JOHNSON QC:**

I’d like to think about that may I?

ELIAS CJ:

Yes, that's fine.

MR HUGHES-JOHNSON QC:

With respect it does, I can understand there having not been any fine –

5 **BLANCHARD J:**

Well we're not determining Cashmere's application.

MR HUGHES-JOHNSON QC:

No.

BLANCHARD J:

10 We'd only be determining the strike-out?

MR HUGHES-JOHNSON QC:

Yes.

ELIAS CJ:

Yes, that's right.

15 **BLANCHARD J:**

So that the matter would have to go back on the question of the declaration. What we might or might not say about the appropriate test for consent, might actually – on one view of things, in practical terms –

MR HUGHES-JOHNSON QC:

20 Yes.

BLANCHARD J:

– determine that issue but we wouldn't be formally determining it.

MR HUGHES-JOHNSON QC:

No, I – that – I accept that –

25 **ELIAS CJ:**

Yes.

MR HUGHES-JOHNSON QC:

– but I just wonder if I could have a little time to reflect on it later, but that would appear to be the inevitable consequence, because of course there would then be no finding on that issue, therefore it's still alive.

5 **ELIAS CJ:**

Yes.

MR HUGHES-JOHNSON QC:

So on the face of it I accept that.

TIPPING J:

10 The second issue that – paragraph 20 of the yellow pages, was whether the Act applied to prohibit as a holder of the security interests from exercising a right to dispose of the retirement village and that centred around, what I apprehend will be an important argument today, as to whether or not Cashmere was an operator or not. If Cashmere was an operator, it was obliged to register the retirement village
15 and was thereby subject to the constraints of section 22 of the Act.

TIPPING J:

If you're saying that it so clearly wasn't an operator –

MR HUGHES-JOHNSON QC:

Yes I am.

20 **TIPPING J:**

That, that point can be determined?

MR HUGHES-JOHNSON QC:

Yes I am. Yes.

25 **TIPPING J:**

But again conceptually, how does that fit with the –

BLANCHARD J:

It's the – I think the situation's the same.

MR HUGHES-JOHNSON QC:

It's the same, it's the same situation. Possibly we've given the, the elements which are necessary before one can said to be at law an operator, one would expect that the guidance of the – this Court might be able to give on that point would – may well
5 resolve the matter one way or the other, notwithstanding that there may be another round, theoretically, if I can put it that way. So given those two bases, Justice Fogarty held Cashmere would not succeed and gave judgment for the respondents. The Court of Appeal over the page 22, the focus of the appeal in the Court of Appeal was whether the High Court was correct in its interpretation of “consent”, and
10 secondly in its interpretation of the definition of “operator”. Now the Court of Appeal found in favour of Cashmere in relation to the consent issue, namely that Cashmere had not consented to the resident's leases in terms of s119 of the Land Transfer Act, did not refer to the High Court's finding that Cashmere fell within the definition of operator, finding against Cashmere on a different basis, namely that upon the
15 making of the Order in Council, the Registrar General was and is required and has a duty to register a memorandum against, a memorial should I say against the titles. So that, what the Court of Appeal was saying is that once contrary to the submissions which are made by Cashmere, that the order made, sorry the Order in Council was not merely declaratory of whether or not this particular property was a
20 retirement village, but it had further consequences, namely the consequence that there was a duty to register that Order in Council, having essentially the same effect as the lodging of a memorial under the relevant section of the Act.

BLANCHARD J:

Had that been argued for the other side?

MR HUGHES-JOHNSON QC:

Sorry Sir?

BLANCHARD J:

Had that been argued or was this something the Court of Appeal thought of?

MR HUGHES-JOHNSON QC:

30 It – I wasn't there, I don't understand it was argued – no.

BLANCHARD J:

So this appeared for the first time in the Court of Appeal's judgment?

MR HUGHES-JOHNSON QC:

Yes as I understand so Sir.

5 **TIPPING J:**

You mean without allowing the parties to address the point?

MR HUGHES-JOHNSON QC:

Well, may I just consult – my understanding is that that is the case.

MR TILL QC:

10 May I assist the Court by confirming I accept that the point was not argued in either Court and particularly given your question Justice Tipping –

ELIAS CJ:

So it was not even raised so that counsel could comment on it?

MR TILL QC:

15 No it appeared for the first time in judgment.

ELIAS CJ:

Oh.

McGRATH J:

20 So is it the implicit duty said to arise to register, arises on operators and it is said that Cashmere is an operator, is that how you would get from –

MR HUGHES-JOHNSON QC:

Yes, yes.

McGRATH J:

– section 103, section 22, through to your client?

25 **MR HUGHES-JOHNSON QC:**

That's right –

ELIAS CJ:

Well that's the way it had been argued but that is not –

MR HUGHES-JOHNSON QC:

Well that's not what the Court of Appeal said, that's what the High Court said.

5 **BLANCHARD J:**

It's a stand-alone argument that section 103 has in effect beyond merely declaring –

McGRATH J:

Yes, it's when – it's the implicit duty it said there, I'm just wanting to track down who the duty is on –

10 **ELIAS CJ:**

The duty is on the registrar according to the Court of Appeal.

BLANCHARD J:

Well the duty seems to be on the Registrar General.

ELIAS CJ:

15 Yes, sorry that's what I mean, the Registrar General.

McGRATH J:

But the Registrar has the duty to notify and the –

ELIAS CJ:

20 And that must be an argument, although it's not developed in the reasons of the Court of Appeal that could only be an argument based on the scheme of the legislation.

MR HUGHES-JOHNSON QC:

25 That's precisely right and of course the case for Cashmere is there's absolutely no strategy for that whatsoever. There's nothing in it. Now the question was raised before as to whether it was the Registrar that had the duty. There are two Registrars here, with respect.

ELIAS CJ:

Yes.

MR HUGHES-JOHNSON QC:

5 The first one is the Registrar of Retirement Villages, he's got to look at the file and see that in fact that the Order in Council has been made and then –

ELIAS CJ:

Does he have to do that or is his –

MR HUGHES-JOHNSON QC:

– well there's nothing in the Act about, that's the point.

10 **ELIAS CJ:**

No but doesn't, isn't his role rather superseded by the Order in Council section 103 route?

MR HUGHES-JOHNSON QC:

No, with respect because –

15 **ELIAS CJ:**

It isn't?

MR HUGHES-JOHNSON QC:

– all that is, the section 103 declaratory process is respect – I respectfully submit intended to be there to clarify whether a particular property is or is not a retirement
20 village. Now what the Court of Appeals said.

TIPPING J:

Is the essential issue, sorry, Mr Hughes-Johnson, is the essential issue really whether 103 affects deemed registration?

25

ELIAS CJ:

No, requires registration.

MR HUGHES-JOHNSON QC:

Well, it's slightly different, with respect, Sir, because, if I can just trace back a little, the registration process in normal circumstances involves a lot of documentation, appointing a statutory –

5

TIPPING J:

But the argument against you is, presumably, on some premise or another – and it's not Mr Till's argument, he's got the job of trying to support the Court of Appeal's argument – that somehow or other this section 103 leads to a duty on the Registrar of Villages to require that –

10

MR HUGHES-JOHNSON QC:

The Registrar General of Land.

15 **TIPPING J:**

– the plans to put the memorial on the title.

MR HUGHES-JOHNSON QC:

Now, the points about that are, one, there's absolute –

20

ELIAS CJ:

Before you get into the points about that, is there not, however, an argument that the section 103 route imposes the duty on the Director-General to –

25 **BLANCHARD J:**

The Registrar General.

MR HUGHES-JOHNSON QC:

The Registrar General.

30

ELIAS CJ:

– the Registrar General, sorry, Registrar General, to enter the memorial?

MR HUGHES-JOHNSON QC:

No, with respect.

ELIAS CJ:

5 All right, thank you, sorry, yes.

MR HUGHES-JOHNSON QC:

And the reason is, because there's absolutely nothing in the Act to suggest that at all.

10

ELIAS CJ:

But there's nothing in the Act to suggest anything else.

McGRATH J:

15 Your argument is a certain process has to be gone through –

MR HUGHES-JOHNSON QC:

That's right.

20 **McGRATH J:**

– before you can have registration, and this would bypass it and that would affect a lot of things in the scheme of the Act.

MR HUGHES-JOHNSON QC:

25 That's right.

McGRATH J:

I was just trying to work out what the Court of Appeal was getting at.

30 **MR HUGHES-JOHNSON QC:**

Well, the other thing, the other rather interesting consequence of the Court of Appeal's approach, is what happens when the operator gets the statutory supervisor, gets all the documentation ready, and then says, "Well, now I want to register my village, because of course that process, the way that the Court of

Appeal's dealt with it, the Order in Council has effectively supplanted the registration process, therefore you're getting to the memorial stage without any of the protections or –but that's not going to help you with, say, intending future residents, who want to find out what the record shows and things like that.

5

MR HUGHES-JOHNSON QC:

No, well, I'll say, well, you know, so therefore, and it's not, with respect, intended, that is not the intention of 103, the intention of 103, with respect, is that when there is a doubt about whether a property is a retirement village – I mean, that can happen in the circumstances where there may be an issue about whether someone should be registering the village or not. Someone's got to – he owns 10 properties and there's an issue as to whether he is an operator of a retirement village and he's not sure whether it's a retirement village, then the Order in Council would make it clear, this is a retirement village. Thereafter, steps would have to be taken in consequence of the declaration that it is a retire –

15

McGRATH J:

Are you really now into your section 103 argument? Are you wanting to run it now? I thought you were just summarising.

20

MR HUGHES-JOHNSON QC:

Well, I'm sorry, I've sort of got side-tracked, but –

ELIAS CJ:

Well, it does seem to me that it's absolutely key, and for my part I'd be glad if you'd start with section 103 –

25

MR HUGHES-JOHNSON QC:

I will then.

30

ELIAS CJ:

– because I'm just thinking really whether even what you've said there about section 103 doesn't propel you to the scheme of the Act being that if it is a retirement village it must be registered and it must have the subsequent consequences.

MR HUGHES-JOHNSON QC:

Yes.

5 **ELIAS CJ:**

Because what else is the point of 103?

MR HUGHES-JOHNSON QC:

Well, just – that the point of 103, with respect, 103 needs to be distinguished from
10 the sections dealing with registration, because the registration process involves the
taking of a number of steps which, consistent with the purpose of the Act, are there
to protect the residents of the retirement village, for example, looking after their
money. The statutory supervisor keeps a check on things like that, so you know if
15 you send your mother to a retirement village that you're not going to be faced with
the possibility, or you've got a reduced risk, of mother's money disappearing,
because there is that. Now, that is the purpose of the registration process and the
scheme of the Act is that once that process has been undergone, the registration
has taken place under the section of the Act, and a memorial has been entered in
20 consequence of that registration, then and only then do the protections in section 22
bite.

ELIAS CJ:

The process for registration does entail judgements which are superseded by the
Order in Council route, however, are they not?

25

MR HUGHES-JOHNSON QC:

Not necessarily, with respect, Ma'am, and the reason for that is that generally
speaking there won't be an issue as to whether a property is or is not a retirement
village. It might, for example, be if you walked – if, for example, Ngaio Marsh, and
30 it's got "Ngaio Marsh Retirement Village" on it, now if it's not a registered retirement
village you wouldn't need to get a declaration to say it's a retirement village, because
it says it is, A, and B, it obviously is. The Order in Council, with respect, is there to
resolve circumstances where there may be a doubt as to whether something is or is

not a retirement village, and that is a route which can be taken by the making of an Order in Council to put that beyond doubt.

ELIAS CJ:

5 Well, why isn't –

McGRATH J:

Mr Hughes-Johnson, could I just suggest to you that the starting point really must be the provisions for documentation, as you call it in section 10 –

10

MR HUGHES-JOHNSON QC:

Yes.

McGRATH J:

15 – because if the argument on section – I'm sorry, if the Court of Appeal's position on section 103 is correct, the retirement village will be registered without any of that record, and the requirements of the schedules in respect of declaration being on the register, if you like, if that's the right term, of the retirement village –

20 **MR HUGHES-JOHNSON QC:**

Yes, yes, well –

McGRATH J:

25 – and so I think if you, one of the, it seems to me, one of the matters you might like to help us with is explaining just what won't be there if we allow section 103 to be interpreted as providing for a deemed registration.

MR HUGHES-JOHNSON QC:

30 Yes, well, that, you see, that begs the question as to what is actually being registered. Is what is being registered the fact that this is a registered retirement village? Obviously not, because it's not a retirement village. So all that really could be registered is the declaration that is a retirement village, but is not a retirement village in respect of which, the steps necessary to registration have yet taken place, because they haven't taken place.

ELIAS CJ:

But do they have to take –

5 **MR HUGHES-JOHNSON QC:**

Yes, because that's the scheme, with respect, Ma'am, that is the scheme of the Act. The scheme of the Act is that there is to be protection for the residents of retirement villages, and the scheme of the Act is enshrined in section 21 and 22, that sets the mechanism for that protection and the protection takes place when the registration
10 process has been undertaken, when the registrar has notified the Registrar General of Land this village has been registered, and at that point, when the Registrar General of Land then enters the memorial, under section 21 –

TIPPING J:

15 Mr Hughes-Johnson, if I may, with respect, make a suggestion, which is not epithetical to your argument, it is that the purpose of section 103 is self-evident from paragraphs (a) and (b) of subsection (2).

MR HUGHES-JOHNSON QC:

20 Yes.

TIPPING J:

And unless it – the Minister can't make an order or recommend an Order in Council unless it is to do one or other of those things. One is an avoidance type of concept,
25 so arranging things so as to avoid the obligations of the Act, and the other is the clarification point –

MR HUGHES-JOHNSON QC:

30 Yes.

TIPPING J:

– and, with respect, I would have thought one hardly needed to go any further than those two to demonstrate why section 103 there. What would the Court of Appeal have done is to have read in more than what the section itself demonstrates.

MR HUGHES-JOHNSON QC:

Well, the Court of Appeal has, without any statutory informateur said, “Well, there’s a mechanism for registration.” Well, where is the mechanism for registration? It’s not
5 con –

TIPPING J:

It’s not a mechanism for –

10 **MR HUGHES-JOHNSON QC:**

This is not contemplating registration at all.

TIPPING J:

It’s not a mechanism for registration, it’s a mechanism to prevent avoidance –
15

MR HUGHES-JOHNSON QC:

Yes.

TIPPING J:

20 – and to clarify.

McGRATH J:

Can I suggest it’s not only avoidance, but I think this supports the point that my brother was making to you, that under, for example, section 80, injunctions can be
25 obtained to avoid certain promotional activities and other –

MR HUGHES-JOHNSON QC:

Yes.

30 **McGRATH J:**

– in respect of a retirement village, and question of fact in that regard can be settled, if you like, to facilitate the provisions of section 103 in relation to the factus, put in (2)(a) and (b). So that if, you can get a declaration that a collection of buildings is

used for the purpose of a retirement village, that is a retirement village, and then you can use that to facilitate obtaining the injunctions and matters of that kind –

MR HUGHES-JOHNSON QC:

5 Yes, yes.

McGRATH J:

– including, and in fact obtaining, an enforcement order against a person who truly is an operator, to do things to get the village registered.

10

MR HUGHES-JOHNSON QC:

Well, you prosecute it, under section 79.

McGRATH J:

15 Well, yes, or – and that's maybe something we come back to later – but you have overcome the doubtful question of fact, which is what paragraph (b) is concerned with, and by having a statutory instrument, an executive instrument, saying, “This is a retirement village,” and that will take effect unless it's set aside on judicial review and is a useful weapon if you want to use the enforcement provisions in respect of
20 retirement villages.

MR HUGHES-JOHNSON QC:

Can I, in respect to that, Ma'am, refer to page 10 of my submission, 1.13, where at that point, 1.13, I note what can happen prior to registration. So in other words, once
25 the declaration is made and it's indubitably a retirement village beyond any doubt, then –

McGRATH J:

I'm sorry, which submissions are these? Is this your first or second submissions?
30

MR HUGHES-JOHNSON QC:

Sorry – yes, I – this is the real, the first –

McGRATH J:

The real submissions.

ELIAS CJ:

5 The ones that are here for all purposes.

McGRATH J:

I'm with you – 1.13 was this?

10 **MR HUGHES-JOHNSON QC:**

1.13 of those real submissions, yes.

McGRATH J:

What's the point you're making?

15

MR HUGHES-JOHNSON QC:

Well, the point I'm making is that the utility of the declaration as shown by – under that, at 1.13 it says, "Prior to registration the Act regulates advertising agreements and an offer of occupation, prohibits misleading advertising, imposes penalties and
20 establishes a public register." Now, the point is, if you don't know whether it is or is not a public register, then it would be difficult to take a step, if there was a doubt about it, whether the property was a retirement village, but once it indubitably is a retirement village you look at that and say, well, hang on, you're not meant to be advertising, you can't do that. So that's just really following up, it's supporting that
25 point.

McGRATH J:

You can say, you may not think this is a retirement village, but Cabinet has –

30 **MR HUGHES-JOHNSON QC:**

It is, because it's been said that it is.

McGRATH J:

– got an Order in Council through saying it is, and that's what's going to rule unless you get it set aside.

5 **MR HUGHES-JOHNSON QC:**

That's right.

ELIAS CJ:

10 But an Order in Council is a legislative instrument, not an executive instrument, is it not?

McGRATH J:

That's a question of constitutional theory, isn't it, but –

15 **ELIAS CJ:**

Yes, no, I just want to be accurate here.

McGRATH J:

20 It's Cabinet you have to persuade, this is why people have been queuing up to the politicians in this matter.

MR HUGHES-JOHNSON QC:

Well, on that – sorry –

25 **ELIAS CJ:**

However the Governor-General participates.

TIPPING J:

Can you help us on that interesting point?

30

MR HUGHES-JOHNSON QC:

Well, I can, yes, well I can actually, but whether I'm correct is one matter and, secondly, whether I'm of any help is another matter. The – sorry, may I just – there's a passage here I want to draw your attention to, if I may. Yes, at page 13, on

page 13, which follows on from 2.4, dealing with the Court of Appeal's treatment of section 103(iii) – yes, well, just, perhaps (iii) is less relevant, (v) is relevant – “Has in effect,” – this is the Court of Appeal's judgment – “created a new species of land rights under the Land Transfer Act in respect of unregistered retirement villages,” but importantly (v) on page 13, “For the section to have the effect, contemplated by the Court of Appeal, the plain meaning needs to be violated. The approach which the Court of Appeal has sanctioned is tantamount to sanctioning an Order in Council amending the primary legislation with any statutory basis for that.

10 **ELIAS CJ:**

Well, isn't it rather that they misinterpreted the primary legislation? Isn't there a difference, though, between the effect of the Order in Council and what can legitimately be done to make an Order in Council, what –

15 **MR HUGHES-JOHNSON QC:**

Yes.

ELIAS CJ:

– interests are, and I'm a little concerned that maybe subsection (2), if not complied with, that the correct remedy was to judicially to review the Order in Council. But I'm not sure that that's a total answer, it may be very relevant for the purpose of the provision, I'm not sure that it's a total answer to what is the effect, as I would say, legislative instrument, subordinate legislative instrument.

25 **MR HUGHES-JOHNSON QC:**

With respect, Ma'am, that's correct. There are two different issues. I'm stuck with the position, (a) that we haven't made application, a successful application for judicial review. Justice Fogarty said we wouldn't have a chance.

30 **TIPPING J:**

Well, it depends how you interpret the effect.

MR HUGHES-JOHNSON QC:

It depends, yes.

TIPPING J:

As to whether it's circular.

5 **MR HUGHES-JOHNSON QC:**

Yes. But the point is, I'm standing here in the face of an Order of Council having been made –

ELIAS CJ:

10 Yes, yes. What's its effect?

MR HUGHES-JOHNSON QC:

And for the purposes of this Court, indubitably, this property is a retirement village whether we like it or not.

15

ELIAS CJ:

Yes, yes.

MR HUGHES-JOHNSON QC:

20 Now, the question, as you correctly point out, is, well, what is the effect of that? And that is where the Court of Appeal, in my respectful submission, has gone wrong. It's saying the effect of this is that akin to registration under section, under the Act. Registration of a retirement village. And I've tried to indicate why that can't possibly be right, because of all the steps which need to be taken, consistent with the
25 purpose of the Act, to protect retirement village personnel.

TIPPING J:

Would it be a little odd if the effect went substantially beyond the purpose?

30 **MR HUGHES-JOHNSON QC:**

Well, 2(a), Sir.

TIPPING J:

What I'm saying is, while there are two discrete steps, purpose and effect, or title to make it and effect, but to interpret it as having an effect substantially beyond its purpose would be a rather adventurous interpretation.

5

ELIAS CJ:

I'd accept that, which is why I said it's relevant to. But it is a distinct point, and you do need to look at that purpose in the overall scheme of the legislation.

10 **BLANCHARD J:**

If the effect was intended to be a deemed registration, you would surely see a set of provisions giving power to the registrar of the villages to take certain steps. And there's nothing. It seems to be assumed, perhaps a little naively, that once an operator is told you are operating a retirement village, that the operator will then
15 comply with section 10. And oddly enough, there doesn't even appear to be an offence section related to section 10, although I may have overlooked it.

MR HUGHES-JOHNSON QC:

I thought there was. I might be wrong. Section 79, is it?

20

BLANCHARD J:

It does refer to section 12. But oddly enough, not section 10. Section 12 may have applied here, but I'm interested in the more theoretical question where section 10 alone would be the trigger.

25

TIPPING J:

It's a very odd dichotomy to apparently distinguish between 10 and 12. It's got no apparent logic. Why should you be prosecuted for failing to register an existing village, but not be liable for prosecution for failing to register a new village?

30

MR HUGHES-JOHNSON QC:

Well, section 12 –

ELIAS CJ:

It's a transitional incentive, perhaps.

TIPPING J:

5 Well, I don't know. This Act, I have to say, is a bit mysterious.

ELIAS CJ:

In terms of the purpose of what the effect of section 103 is, it must be that it triggers the obligation in section 10. You'd accept that, wouldn't you?

10

MR HUGHES-JOHNSON QC:

Not necessarily, because there's still a question as to whether someone is or is not an operator, and therefore is bound to –

15 **ELIAS CJ:**

But that's a different point. The operator must register.

MR HUGHES-JOHNSON QC:

Yes, I accept that.

20

ELIAS CJ:

So, I mean, 103 just doesn't hang there, it does fit into the scheme of the Act.

MR HUGHES-JOHNSON QC:

25 It does, and that's 2(a), I think, 103(2)(a), where it talks about preventing the avoidance of –

BLANCHARD J:

30 That does raise a question about which I'm curious, although you may not know the answer. Why didn't the Official Assignee, as liquidator, take steps under section 10?

MR HUGHES-JOHNSON QC:

I don't know, Sir, I'm sorry.

BLANCHARD J:

It seems to be quite extraordinary that they'd proceed to dissolve the company without complying with a legal requirement on the company.

5 **MR HUGHES-JOHNSON QC:**

May I just confer with my friend? No, no steps were taken, and I wonder if it's something to do with a judgment about how onerous that process would have been, because of course –

10 **BLANCHARD J:**

Well, never mind how onerous it is. Surely, you can't go and dissolve a company if that has the effect of defeating a legal obligation on the company.

MR HUGHES-JOHNSON QC:

15 To be frank, Sir, I haven't considered the question of whether he would have been an operator.

BLANCHARD J:

20 Even now, the Crossdale could be restored to the register in order that an application could be made.

WILSON J:

Was the Official Assignee the liquidator?

25 **BLANCHARD J:**

That's what the submissions say.

MR HUGHES-JOHNSON QC:

30 Yes, I understand so. Mr McDuff, I think, is the one who –

WILSON J:

Are you aware whether any consideration was given via the Official Assignee to make an application for registration?

MR HUGHES-JOHNSON QC:

No, I'm not aware of that.

TIPPING J:

5 And we know the company has been dissolved, do we?

MR HUGHES-JOHNSON QC:

I think it's common ground, as I understand it, that it has been dissolved.

10 **ELIAS CJ:**

Is that still the term? Oh, it doesn't matter.

MR HUGHES-JOHNSON QC:

Well, it's been removed from the register.

15

BLANCHARD J:

Is it normal to remove a company from the register when it's still the owner of some land?

20 **MR HUGHES-JOHNSON QC:**

No, not normally, because, of course, the land would have to be transferred to another party.

BLANCHARD J:

25 It seems quite extraordinary by the liquidator.

MR HUGHES-JOHNSON QC:

It may be to do with a judgment, and I don't know this, as to the overall financial position, in other words, the value of the land given, of course, that these long-term agreements with the residents impinges –

30

TIPPING J:

Was he surrendering it to the mortgagee, in effect? No, not disclaiming. Surrendering.

MR HUGHES-JOHNSON QC:

Yes, that's the point. It may have well have been a judgment of that.

5 **ELIAS CJ:**

We might need to know.

WILSON J:

But aren't the provisions in the Act saying that dangerous property in relation to
10 these agreements cannot –

TIPPING J:

I don't mean it formally. I mean letting the mortgagee do its thing.

15 **MR HUGHES-JOHNSON QC:**

You mean in the Retirement Villages Act?

WILSON J:

Yes.

20

MR HUGHES-JOHNSON QC:

I'm not aware of those provisions.

BLANCHARD J:

25 If there were a disclaimer, and I'm not sure if that's the correct term in relation to
land, then that would impinge on the question of operatorship.

ELIAS CJ:

That would, might make the mortgagee the operator?

30

BLANCHARD J:

Well, I'm not saying that that is the position, but it's certainly something that should
be looked at.

MR HUGHES-JOHNSON QC:

Well, of course, I have an argument about, you know, as to whether the mortgagee –

BLANCHARD J:

5 I mean, these are really things for Mr Till.

TIPPING J:

Yes. You're not wanting to go here, I don't imagine, Mr Hughes-Johnson. You're just responding as to what you know.

10

MR HUGHES-JOHNSON QC:

All I know is the company, as I understand, has been removed from the register.

BLANCHARD J:

15 Well, I just find it extraordinary that this has been allowed to happen without some action being taken to try to protect the position of the residents.

MR HUGHES-JOHNSON QC:

20 But I wonder, Sir, with respect, whether the assignee would have a duty to the residents, as opposed to the –

BLANCHARD J:

Crossdale does.

25 **MR HUGHES-JOHNSON QC:**

Yes, Crossdale, as opposed to – yes.

TIPPING J:

Well, the liquidator would inherit that deal.

30

MR HUGHES-JOHNSON QC:

Yes, but the question then becomes whether there is a concept of disowning, so to speak, an onerous obligation. I think that may have been the situation, that because

of the impact of these leases on the property and the amount that was owing, it just wasn't worth, there was nothing that could be done. But I'm not sure of that.

TIPPING J:

5 Well, of course, the liquidator would have conflicting duties, if you like, to the residents, as against the secured creditor. It wouldn't be in the secured creditor's interests to take these steps.

MR HUGHES-JOHNSON QC:

10 No, well, it's certainly not, and that's my argument, really.

ELIAS CJ:

In the chronology you've given us, it doesn't indicate when the company was removed from the register. But it must be after these proceedings were well
15 underway.

TIPPING J:

If you succeed on your main point as it stands at the moment, this simply means that your claim for whatever it is you're claiming in the High Court is not struck out.
20

MR HUGHES-JOHNSON QC:

Yes.

TIPPING J:

25 Therefore, the matter will have to go to trial, for whatever – your declaration and presumably ancillary orders as well. Then all this will, presumably, will be capable of coming out in the wash, if you like, under amended pleadings or rejoinder of parties, or whatever. At the moment, all we're concerned with is, you don't want your claim for whatever it is you're claiming struck out.
30

MR HUGHES-JOHNSON QC:

Not at the moment, no.

TIPPING J:

And speaking for myself, on the essential issue, the immediate issue, if you like, I would have thought you've got at least some sort of wind behind you, subject to hearing Mr Till. But that's by no means the end of the matter. You may be facing all
5 sorts of further impediments to what you're seeking.

MR HUGHES-JOHNSON QC:

Well, the fundamental point that I'm putting forward and submitting is that until such time as the memorial is entered, we're in a position to proceed. So the question
10 would be whether or not –

TIPPING J:

But by the time you get to trial, by one means or another, the memorial may have been entered, properly. And then you'll be in bother.
15

MR HUGHES-JOHNSON QC:

Yes, that is correct. But, with respect, Sir, that is, of course, subject to the ability to make application to the High Court.

20 TIPPING J:

Of course.

MR HUGHES-JOHNSON QC:

So that's the critical point there.
25

TIPPING J:

But you'll be in presumption bother.

MR HUGHES-JOHNSON QC:

30 Yes.

TIPPING J:

You'll need relief.

ELIAS CJ:

Well, you'll be in bother, may you may –

TIPPING J:

5 Get out of it?

ELIAS CJ:

Yes. It's not presumptive bother. You'll just be in bother.

10 **TIPPING J:**

Unadorned bother.

MR HUGHES-JOHNSON QC:

15 But the other, there's the application to the High Court aspect of this. But the other aspect of this is, of course, it's not a cakewalk to get registration.

TIPPING J:

No, no.

20 **MR HUGHES-JOHNSON QC:**

And unless someone actually has the legal responsibility to register, then in the particular case, in the case of this retirement village, I doubt whether anyone's going to try and register it. Why would they?

25 **TIPPING J:**

Well, the best you can hope for from us is your claim being reinstated. And who knows what will happen following that event, if it occurs?

MR HUGHES-JOHNSON QC:

30 Yes. Coupled, of course, with the pronouncements of this Court on the legal aspects of it.

TIPPING J:

Well, that's if we decide to go there.

MR HUGHES-JOHNSON QC:

Yes, if you decide to go there.

5 **McGRATH J:**

When you say that you doubt if anyone's going to have the interest, I mean, obviously the residents will have the interests in obtaining registration by some means or other.

10 **MR HUGHES-JOHNSON QC:**

Well, they haven't registered yet.

McGRATH J:

No, but they would have that interest, wouldn't they?

15

MR HUGHES-JOHNSON QC:

Yes, of course.

McGRATH J:

20 It's not a vacuum, there. They believe they've obtained it, with some encouragement from the High Court and the Court of Appeal in a particular way, which you're challenging. But whatever the outcome of these proceedings, they will continue to have an interest in obtaining registration if they haven't got it as a result of these proceedings.

25

MR HUGHES-JOHNSON QC:

That's right, but that begs the question as to whether they are going to be in a position to register –

30 **McGRATH J:**

It does, but that's not for us today, perhaps.

MR HUGHES-JOHNSON QC:

Yes, I accept that.

McGRATH J:

But nevertheless, that's what you face in the future, if you succeed today.

5 **MR HUGHES-JOHNSON QC:**

Yes, I accept that point.

McGRATH J:

Can I just ask you this. It's going back to something I touched on a moment ago.

10 But I'm just interested in the scheme of the Act, and testing what would be the position if registration can be obtained under section 103 without compliance with section 10. I wonder if you could just help me by explaining to me the extents of the, what is provided by way of a record or other information, perhaps for intending purchasers of units, who want to buy from Mr Till's clients, for example. They, 15 presumably, are entitled to something out of registration, and so I'm interested to know what gap there is going to be in the statutory, the implementation of the statutory scheme, if section 10 is not complied with.

MR HUGHES-JOHNSON QC:

20 Can I draw your attention, Sir, to page 7, paragraph 1.8 of my real submissions, where I deal with the statutory scheme, and I think that was leapfrogged, because we got into section 103. But the statutory scheme is at the top of page 8. First of all, obviously, there's got to be a qualification that the property has to have the characteristics of a retirement village. Secondly, there are a number of documents 25 which I've identified as A, B, down that list. The full disclosure statement or statements in the schedule of the Act also deals with that, and the regulations of a retirement village, generally regulations, at the extent of the disclosure. There's quite substantial disclosure requirements, encompassing ownership, management, and supervision of the village. So there's got to be – the residents, if they were 30 going to register, would have to have a statutory supervisor, unless they got exemption from that. Occupation rights agreements have to be in a standardised form, and that has to be, that's one of the other things. In other words, the protection there is, of course, that if the form is totally unfriendly to the residents, then it's not going to be acceptable, I take it, to the registrar.

McGRATH J:

5 So if you have a person who's dealing with someone who holds an interest under an occupation agreement in a registered retirement village, you have the expectation it will comply with standard form requirements in the Act if section 10 is complied with.

MR HUGHES-JOHNSON QC:

10 That's right. And, of course, one of the critical points about registration is there is a register. In other words, it's a public register. People can go and have a look at it. And that's really quite a critical element of the protection. And when you look at the purpose of the Act, one of the purposes of the Act being, obviously, the welfare of residents of retirement villages when, of course, that's quite a substantial protection.

TIPPING J:

15 I would have thought your little b in the middle of page 8 was one of the crucial things, that if you get registration below 103, you don't have a statutory supervisor.

MR HUGHES-JOHNSON QC:

20 That's right.

TIPPING J:

And that's absolutely fundamental to the structure of the whole Act.

MR HUGHES-JOHNSON QC:

25 And, of course, as I submitted before, if you did have a statutory supervisor appointed and went through the registration process again, there'd be two memorials on the title. When you got registered the second time around, there'd be another –

McGRATH J:

30 Well, that might be a sort of a technical issue. But are there any other substantive ones, such as the form of the occupation agreement, that guarantee, and the statutory supervisor appointment that you'd be missing.

MR HUGHES-JOHNSON QC:

Those are the main ones that I've identified.

McGRATH J:

5 Anything else that would be missing, if you didn't have the process undertaken before getting registration?

MR HUGHES-JOHNSON QC:

10 Well, at (iii), the certification of documents, certify each document as correct, and, of course, that can be quite important when people gild the lily a bit, saying, well, this is the most wonderful retirement home, come in. So there's that disincentive to mislead or deceive, and –

McGRATH J:

15 And that includes not only current residents, but the public and intending residents, doesn't it?

MR HUGHES-JOHNSON QC:

Yes.

20

TIPPING J:

I don't want to keep interrupting my brother McGrath. But the whole thing is you'd have a registration without any documents. I mean, that's a bizarre concept.

25 **McGRATH J:**

Without a protective record which enables regulation to operate.

TIPPING J:

Precisely.

30

McGRATH J:

It does seem to me that the possibility of registration is not unhelpful to you on the main issue, because it does mean that even if you succeed on that issue, the residents aren't necessarily left without remedy.

MR HUGHES-JOHNSON QC:

No. And I have to accept, I think, I don't want to put it in too colourful language, but there's the question of Damoclean sword. I have to accept, for the purposes of my
5 argument, that once a memorial is entered, then that immediately affects the integrity of the mortgage. That must be the case.

TIPPING J:

It limits the powers of the mortgagee.
10

MR HUGHES-JOHNSON QC:

Yes. But up until that, the terms of the statutory scheme, and if you look at the purpose of the Act, it doesn't just talk about protecting residents. It talks about a system of regulation. A system of regulation. And the regulation is prescribed here.
15 And in that system of regulation, the central pivot is that you don't get the protections of section 22 unless a memorial is entered, because it says that. "If a memorial is entered." So central to the statutory scheme, which is being discussed now, is this concept that you don't get any protection in that sense. You get other protections. There are before and after protections. But in terms of the critical protection, which
20 is selling, which, of course, Cashmere is trying to do, we're all right now, but once that memorial goes on, then we're on the other side of the line, and I accept that.

ELIAS CJ:

Just looking at the obligation to appoint a statutory supervisor, and the fact that you
25 can be exempted from that under section 41, which is referred to in section 10, and then that leads you to section 104 for regulation making power, do you know whether there other regulations exempting the appointment of statutory registrar? And are there also, I'm sorry, I'm not as familiar with this legislation as I should be, is there, in the scheme of the Act, a power to compel compliance with some of these formalities
30 of registration?

MR HUGHES-JOHNSON QC:

There is. Section 79, of course, the prosecution section, but as been pointed out by members of the Court, it doesn't, perhaps strangely, encompass contraventions of all of the sections that you might expect. But 12, 18, 22, so 22(1) in particular.

5

ELIAS CJ:

Is there any other power of – I mean, would you get an injunction under 80, or something, to require a mandatory injunction?

10 **MR HUGHES-JOHNSON QC:**

That's contravention.

ELIAS CJ:

Yes.

15

McGRATH J:

That's focused on section 25. But you can, for example, under section 80 get an injunction in relation to just picking out one provision section 25, which prohibits certain advertising of retirement villages that are not registered, but would meet the definition in section 6, but just are not registered. So the definition of retirement village in the Order in Council that says something is a retirement village could be a relevant factor in obtaining an injunction, to enforce section 25.

20

MR HUGHES-JOHNSON QC:25

Yes.

McGRATH J:

It's just not a complete scheme.

30 **ELIAS CJ:**

No, the scheme has to be made to work, and could, indeed, the registrar be compelled to exercise powers of appointment or seek the Court approval or something of that sort? There's nothing like that?

MR HUGHES-JOHNSON QC:

You mean appointment –

ELIAS CJ:

5 Of a supervisor. Because this is –

MR HUGHES-JOHNSON QC:

No, there's no provision of that I'm aware of.

10 **ELIAS CJ:**

Because this is, after all, consumer protection legislation. I just wondered, where are the functions of the registrar in this? Where do I find those?

McGRATH J:

15 The functions prior to registration appear to involve scrutiny of the adequacy of documents in terms of section 10, then there's a duty to register. But the pre-registration functions, I don't, myself, believe go to the sort of extent you're wanting to. The registrar reacts to an application under section 10.

20 **ELIAS CJ:**

I see. Sorry, I shouldn't take up your time on this, because I should have read the Act as a whole.

BLANCHARD J:

25 The registrar has some powers under section 97 to inspect documents and take possession of them for the purpose of ascertaining whether a retirement village or an operator has complied with the Act.

TIPPING J:

30 But there doesn't seem to be anything specific that gives the registrar an ability to take steps to get section 10 complied with. This appears to me to be very flawed legislation.

ELIAS CJ:

Unless the regulations patch it up at all.

McGRATH J:

5 Whether it's flawed or not, it might be light-handed regulation. But it leaves it to the parties, it seems to me, in particular the residents of such unregistered – to take action against operators who have statutory duties which can be enforced in the Courts in the normal way. So I think it's in that light-handed context.

10 BLANCHARD J:

But that would be an extraordinary thing to be requiring of residents. Because they're the people the Act intended to protect.

McGRATH J:

15 It does, but the Act contemplates that people will carry out their statutory duties. It doesn't contemplate that the registrar will have a general function of inquiry into how developers are getting on with complying with the Act, with a view to enforcement. Because you could see that would be quite a major regulatory activity. It rather channels the registrar's functions through the notion of an application. There will be
20 a bit of this sort of litigation, I suspect, in the way the Act is constructed. But it seems to me it is a coherent approach. It's not a stupid approach.

BLANCHARD J:

Well, I may beg to differ on that. If you're looking at protecting old people, it would
25 seem to me that one of the protections is for the registrar to have sufficient power to ensure compliance without the poor residents having to take steps.

McGRATH J:

Well, perhaps the Act is deficient, yes.

30

TIPPING J:

I wonder whether section 21(3), and I'm moving tangentially, Mr Hughes-Johnson, so it's however you want to develop what you were immediately talking about. I'm going to a slightly different angle on this.

MR HUGHES-JOHNSON QC:

Can I just make one very brief point? There's the dichotomy, I suppose you can call it, between the obligations and the responsibilities of the registrar and the operator.

5 And I just suspect that the Act contemplates that the real teeth in the Act in terms of getting things done is in respect of the duties of the operator, rather than the duties of the registrar. Although, the registrar, of course, has got a number of duties in the beginning of the Act, section – I don't want to waste the Court's time.

10 TIPPING J:

I think the problem really is that we're wondering how it is the Act protects against the delinquent operator.

ELIAS CJ:

15 Yes. And given the purpose of the Act, I would have thought that the registrar does have an obligation to compel compliance.

MR HUGHES-JOHNSON QC:

20 Section 80, talking about the injunctions being granted by the Court for contravention of certain provisions, and I just haven't checked to see which ones. But that says there that a Court may, on the application of the registrar – this is, perhaps, contrary to what I've just said – a statutory supervisor or any other person grant an injunction restraining a person from engaging in conduct that would contravene. And then it's got a number of sections there.

25

ELIAS CJ:

Well, that does envisage a role for the registrar in policing matters, which, against the purpose of the Act in terms of consumer protection of people who are vulnerable. I would have thought that the registrar has the standing to do it, and I would have
30 thought that he could be compelled to do it, perhaps, in general administrative law principles.

MR HUGHES-JOHNSON QC:

Ma'am, with respect, I agree. The interesting point about this is that the central point of protection, in my respectful submission, for the residents, is the form of the occupation right agreement. Because that's what they can point to. They can say, you said you were going to do such-and-such, and you haven't done it, why haven't you done it. That's the central protection. And here the form of the occupation right agreements is prescribed by the regulations, in quite significant detail, as to what must and must not be in the occupation right agreements.

10 **TIPPING J:**

We don't have the regulations in our material. What's the reference number?

MR HUGHES-JOHNSON QC:

2006/298. And those regulations, as I say, provide for significant matters in relation to occupation right agreements. And the schedule, too, I should say.

TIPPING J:

Is there a provision, and there doesn't seem to be, that specifically empowers the registrar to injunct an operator of a village who hasn't procured registration to do so? It doesn't seem that they've thought of that.

MR HUGHES-JOHNSON QC:

No, because section 80 just starts at section 25. No, I don't think so. But as His Honour Justice Blanchard pointed out before, there seems to be a gap in that earlier collection of obligations, so to speak.

BLANCHARD J:

I must say, and I'm aware that what I'm saying is being recorded, and I'm saying it deliberately. I must say that I'm quite surprised that we don't have a representative of either of the responsible ministries here, given the course that this case has already taken. But I'm not expecting you to respond to that.

ELIAS CJ:

They may not have had notice of it.

TIPPING J:

But could I come to my section 21(3) point, Mr Hughes-Johnson, if you'll allow me, provided you aren't wanting to pursue this subject matter any further?

5 **MR HUGHES-JOHNSON QC:**

No I take it the 103 issue, well that's –

TIPPING J:

No, no this is all related to 103.

MR HUGHES-JOHNSON QC:

10 Yes, okay, right.

TIPPING J:

It's a naive and trite point in a sense, but it expressly casts the duty on the Registrar General of Land to put the memorial on, relating to a registered retirement village.

15 **MR HUGHES-JOHNSON QC:**

Yes.

TIPPING J:

Now you therefore have to find that 103 creates a state of registration.

ELIAS CJ:

20 Or an obligation to register.

TIPPING J:

Well I'm not sure about that. An obligation might mean you could subsequently be –

ELIAS CJ:

Yes.

25

TIPPING J:

– gazumped, but not now. And it just seems to me with respect that if one thing is clear, it is that you are intended by one means or another to go through the registration process set out in the Act.

MR HUGHES-JOHNSON QC:

5 And there's good reasons for that because –

TIPPING J:

And there are good reasons for that because and it would be a very long step, subject to hearing further argument against this proposition to say that 103 is a surrogate form of registration.

10 **WILSON J:**

I think isn't that supported by the wording at 21(1) imposing the obligation of notification of registration not of the making of the 103 order?

TIPPING J:

Yes it all hangs together wherever you look.

15 **ELIAS CJ:**

But you don't want to argue against that.

MR HUGHES-JOHNSON QC:

No, but, but most importantly too, even if one were to take the most generous, I suppose in one view, approach to interpreting this legislation, when you look at the purpose of the legislation and the matters I raised before in relation to the regulatory regime, these are the teeth, the teeth of the regulatory regime is the certainty which is imposed and of course this is relevant to the issue of indefeasibility et cetera. The certainty of knowing when you are in trouble or when you're not and that is when the memorial is entered, and therefore certainty is critically important.

25 **TIPPING J:**

Well the only thing that can interfere with your otherwise indefeasible title is a memorial?

MR HUGHES-JOHNSON QC:

Yes.

TIPPING J:

5 Now maybe someone should have done it. Maybe they can still do it. But at the moment you shouldn't be struck-out because –

MR HUGHES-JOHNSON QC:

No that's right, that's right.

TIPPING J:

10 – prima facie at the moment, you have an indefeasible right under your mortgage. I see it as being as simple as that and if Mr Till can show otherwise, fine.

MR HUGHES-JOHNSON QC:

Unless, unless of course in difference to my friend's argument, unless we fail on the other argument – the operator argument. Well, if we're operator then we can't succeed, we can't succeed –

15 **TIPPING J:**

Quite, quite, quite.

MR HUGHES-JOHNSON QC:

– for obvious reasons because we can't blow hot and cold.

BLANCHARD J:

20 You can't take advantage of your own wrong –

MR HUGHES-JOHNSON QC:

Wrong-doing, that's ex turpi, whatever it is, causa.

BLANCHARD J:

All that stuff.

25 **MR HUGHES-JOHNSON QC:**

Yes I accept that.

TIPPING J:

And if you can be shown to have clearly, so unequivocally consented –

MR HUGHES-JOHNSON QC:

Yes.

5 **TIPPING J:**

– then equally, but that seems a pretty long shot.

MR HUGHES-JOHNSON QC:

Yes well that's – the argument there just is essentially that the law's very settled about what is a consent and what is not a consent.

10 **TIPPING J:**

Well I'm not inviting you to develop that unless you want to.

MR HUGHES-JOHNSON QC:

No worry, well that's another issue.

TIPPING J:

15 Because we'll see what Mr Till has to say about that.

MR HUGHES-JOHNSON QC:

Yes. So really I think, I'm underpinning the 103 argument and I, with respect put significant importance on it, that it is consistent with the statutory scheme, it's not just – if you test it in the way that – that one does with legislation, testing it as against the
20 purpose of the Act, it is fairly and squarely within the purpose given the regulatory framework which is quite clearly contemplated when you look at the purpose section of the Act and I take you that. Section 3(c)(ii), the purpose of the Act is to protect the interest of residents and intending residents, we accept that. And then (c) for the purposes of that and the succeeding paragraph, "To provide an industry focus
25 regulatory and monitoring regime for retirement villages in which compliant costs are minimised." And then (iv), "To introduce requirements and procedures necessary to give effect to the regulatory and monitoring regime," which of course is what I am submitting has happened in section 21 and 22.

McGRATH J:

Just, before – are you just dealing with purpose for the relation to the whole of your argument –

MR HUGHES-JOHNSON QC:

5 No, no, just in relation to –

McGRATH J:

– no, because it seems to me you may be able to draw on other provisions – on 3(b) in relation to your wider argument in relation to who was an operator.

MR HUGHES-JOHNSON QC:

10 Well on that point, which is the question of the need for certainty, well perhaps I should come to that at the appropriate time.

McGRATH J:

Yes you come to – yes, yes.

MR HUGHES-JOHNSON QC:

15 Well I'm sorry, that's really the s103.

McGRATH J:

What were the names of those regulations Mr Hughes-Johnson, I'm afraid 2006/298 is not a good enough reference for me to get my –

ELIAS CJ:

20 Which one?

McGRATH J:

The regulations you were referring to?

MR HUGHES-JOHNSON QC:

That's properly called, The Retirement Villages (General) Regulations 2006.

25 **McGRATH J:**

And are they the, were there regulations before them or are they the first regulations?

MR HUGHES-JOHNSON QC:

I don't think they are the first, they're the – they're the ones that have got the meat in them, so to speak. I think there were other regulations which have got – which aren't really so substantive in –

5 **McGRATH J:**

I thought they might have come before but never mind that's fine thank you.

MR HUGHES-JOHNSON QC:

There are other regulations but these are the critical ones.

McGRATH J:

10 Thank you.

MR HUGHES-JOHNSON QC:

And I think I might have misled you talking about the occupation right agreements, it's also in the schedule to the Retirement Villages Act that one finds what needs to be in a, in an occupation right agreement. Schedule 1, form – sorry just the form of
15 registration. Schedule 3. So the point is that the protections are there because people can – they know that if they've got an approved occupation right agreement that these, the sorts of matters in schedule 3 are going to be taken care of.

McGRATH J:

And those advising them can rely on –

20 **MR HUGHES-JOHNSON QC:**

Yes.

McGRATH J:

– if there's registration on those matters having been complied with?

MR HUGHES-JOHNSON QC:

25 That's right. Just one other point about the timing of registration on page 11 of my submissions, real submissions, the Hansard references to the extent that they are needed and I submit they are not really because the Act's clear, but to the extent that they are needed, the dissertation from 1.15 onwards is to the effect that Parliament

recognised that there needed to be a point at which the protections were – came in and a point before which they were not, so that the passage I've – I won't read it, but the passage that's referred to on page 11 is to that effect, that Parliament struck a balance and that's consistent with the approach taken of course in the Act, not
5 unexpectedly, i.e. that the critical point is that the lodging of the memorandum, the entry of the memorandum under section 21.

ELIAS CJ:

Sorry, I'm just forgetting the chronology now, does section 12 apply at all to this retirement village or is it –

10 **MR HUGHES-JOHNSON QC:**

Yes it does because by dint of the Order in Council, this is a retirement village and it must therefore be an existing retirement village and therefore it must be caught by section 12. But of course the point about that is well who's going to do the registration, it's a matter of – the question's whether we're an operator or not,
15 whether Cashmere is an operator and has that obligation which is of course another argument.

ELIAS CJ:

Well where do you want to go now, I'm sorry we've –

MR HUGHES-JOHNSON QC:

20 I wonder whether, really I think the scheme of the Act's been dealt with.

McGRATH J:

Yes.

MR HUGHES-JOHNSON QC:

I don't think I need to deal with – that was really the starting point, I'd sort of gone to
25 103 and over and jumped over the scheme, but the scheme's really been dealt with now I think and I don't really want to say any more about that. Then there was the 103 argument and I think possibly the next thing is – the question of necessary implication, I don't know whether I need to deal with that, that's on page 14 of my written, of my real submissions.

ELIAS CJ:

No I think you can –

MR HUGHES-JOHNSON QC:

5 Which I've already, I think I've dealt with that. And there's the retrospectivity
argument too which I again I don't apprehend I may not need to deal with page 17, I
would ask that they be taken into account. Really in my respectful submission, the
crunch point in this case is whether Cashmere is an operator or not. If Cashmere's
an operator, it can't be ex turpi causa et cetera, it has to, it can't advance its cause
10 by attempting to sell when it's got a duty to register. So if we're an operator, we're
out, if we're not an operator then there's no constraint. So that really is the critical
point. Now, that's dealt with at page 18, where the definition of "operator" is set out.

McGRATH J:

15 At some stage, will you be taking us to the factual material, such as we have in the
affidavits –

MR HUGHES-JOHNSON QC:

Yes.

20 **McGRATH J:**

– as to exactly what Cashmere has done in respect of its security? I mean, it seems
to me it's quite important that we understand what steps it has taken to enforce its
security.

25 **MR HUGHES-JOHNSON QC:**

Yes, yes. With respect, Sir, the critical point is it has not gone into possession, that's
the critical point.

McGRATH J:

30 Yes, that's what I understood your argument to be. But I think, in this, given the sort
of difficult procedural history of this case, we need to just see what facts are in the
affidavits which are presumably not disputed, or you don't think are disputed.

MR HUGHES-JOHNSON QC:

Yes, yes. So, the starting point, I think, of this argument, is to look at what the definition is, and that's at 4.1, and I think it's common ground that the real battlefield is over the question of whether Cashmere is exercising effective management or control of the retirement village under section, under that definition. Now, I submit that the common theme linking those persons who are defined as "operator" is that they all control the revenue of the business. Now, it's fundamental to the submissions that I am about to make that Cashmere has not ever controlled the revenue of the business and that to be an operator – and I'll develop this later in greater detail – but to be an operator it must be – sorry, start again. To be said to be exercising effective management or control, you have to be in control of revenue stream. Now, that's a statement which I'll support with the analysis which follows, but it's critical to the argument.

15 **ELIAS CJ:**

Can you just hold on a second? In the definition, which I haven't looked at before, so the liquidator is an operator?

MR HUGHES-JOHNSON QC:

20 Yes.

ELIAS CJ:

Under the definition section.

25 **BLANCHARD J:**

It certainly appears to be the case.

ELIAS CJ:

Yes.

30

BLANCHARD J:

Which makes the action –

MR HUGHES-JOHNSON QC:

Yes.

BLANCHARD J:

5 – of the Official Assignee even more worrying.

MR HUGHES-JOHNSON QC:

I, to be frank, I hadn't considered that point until His Honour raised it, but clearly the liquidator is, within that definition, an operator.

10

TIPPING J:

It would suggest also that while a liquidator is in office it is the intention that the liquidator be the operator, not the holder of the security.

15 **ELIAS CJ:**

Yes.

MR HUGHES-JOHNSON QC:

Well –

20

TIPPING J:

Now, when a liquidator ceases to be in office by dissolution or going off the register or whatever it might be, then a more difficult situation might arise. So your possibly problematical point will be after the liquidator ceases to exist, because I don't think it could be said that you have two operators.

25

McGRATH J:

Well, I think that might be said –

30 **MR HUGHES-JOHNSON QC:**

Well, you could, with respect.

McGRATH J:

– that might well be said, under the Act, there could be multiple operators as I understand it.

5 **MR HUGHES-JOHNSON QC:**

Mmm, you could, you could have two.

TIPPING J:

Well, you could, but it would be highly unlikely that you would have a liquidator in
10 office.

McGRATH J:

But the definition of “operator” does say, “Any person who’s one or more,” –

15 **TIPPING J:**

Yes.

McGRATH J:

– so we just need to bear that in mind.
20

TIPPING J:

Yes, I accept, I accept that, but –

MR HUGHES-JOHNSON QC:

25 I’ve taken it that there can be more than one operator –

TIPPING J:

Oh, of course.

30 **MR HUGHES-JOHNSON QC:**

– with a statutory duty, I mean.

ELIAS CJ:

Who is the operator at the moment?

MR HUGHES-JOHNSON QC:

There isn't one.

5 **ELIAS CJ:**

But, there must be.

MR HUGHES-JOHNSON QC:

Sorry, there no one –

10

McGRATH J:

No, because there's no registration.

MR HUGHES-JOHNSON QC:

15 – carrying out the function of an operator.

ELIAS CJ:

Oh, no registration, yes, sorry.

20 **MR HUGHES-JOHNSON QC:**

What's happened is, I think, is the factual back –

ELIAS CJ:

Well, you don't have to –

25

BLANCHARD J:

Well, you can have an operator before you have a registration.

ELIAS CJ:

30 Without registration – that's right, you wouldn't –

BLANCHARD J:

Otherwise section 10(1) wouldn't make sense.

ELIAS CJ:

Yes, yes.

MR HUGHES-JOHNSON QC:

5 Yes.

BLANCHARD J:

10 So it looks as though, at the point when Crossdale went into liquidation, it was the operator, this is subject to any question of action by the security holder, and then the liquidator became an operator. Now, I wouldn't be entirely convinced that the liquidator can simply remove himself from being an operator by dissolving the company.

MR HUGHES-JOHNSON QC:

15 Well, I don't know what –

BLANCHARD J:

There may be a personal –

20 **MR HUGHES-JOHNSON QC:**

Yes.

BLANCHARD J:

25 There may be a continuing personal obligation. I'm not saying there is, I'm just saying it's something that needs to be considered.

MR HUGHES-JOHNSON QC:

30 I mean, I don't know whether there some provision akin to onerous obligation that can be disavowed, I don't – in the other statute – I don't know, to be frank, Sir, I hadn't considered that.

BLANCHARD J:

It's possible there is.

MR HUGHES-JOHNSON QC:

It's possible, yes. So the point really, here, is that when you look at each of these, (a), (b), (c), the central feature, in my submission, is this question of exercising effective management control involving control of the revenue stream. Now, I know
5 that the crunch point here, if I can put it, is going to be, if we exercise our powers as mortgagee, isn't it inevitable that there will be a going into possession? Answer, no, in my submission. But that is the argument, I think it's being put, is, look, you're going to sell this property, as mortgagee, surely you're going to have to go into effective management or control, as part of that process, and therefore why are you
10 here? The answer to that, in my respectful submission, is to consider that when selling as a mortgagee, the mortgagee is selling the realty, not the business, and the business is not necessarily one and the same as the realty, or associated as closely with the realty that inevitably the business must go.

15 ELIAS CJ:

That may well be right in terms of exercising the power of sale, but the word is "effective management or control". Who else could? I mean, to be – you mean, an operator doesn't have to be somebody who is using their powers of management and control, it may be that it's the person entitled to exercise.

20

MR HUGHES-JOHNSON QC:

Well, that's what His Honour, Justice Fogarty, held –

ELIAS CJ:

25 Yes.

MR HUGHES-JOHNSON QC:

– and I respectfully submit that is the wrong test.

30 ELIAS CJ:

Yes.

MR HUGHES-JOHNSON QC:

Because this concentrates upon not your capacity to do these things –

McGRATH J:

But your exercise.

5 **MR HUGHES-JOHNSON QC:**

But the question, it means any person who is a person who is liable to fulfil, or, the obligation or the occupation rights, the whole of the security is who is exercising, it doesn't say, who has the capacity to exercise, who is exercising.

10 **ELIAS CJ:**

Well, there's exercising effective – well, I suppose, yes...

McGRATH J:

15 It's really a person who de facto is getting what A is getting, isn't it? Covering B covering someone who de facto is doing what A is involved with, or those sort of functions.

BLANCHARD J:

20 The Property Law Act's got a similar concept in it. There, it talks about asserting management or control.

MR HUGHES-JOHNSON QC:

Yes. I come to that, Sir, that's the old section, I think 106, now 137.

25 **ELIAS CJ:**

What, of the Property Law Act?

MR HUGHES-JOHNSON QC:

30 That's correct, with respect, Sir. Section 137 of the Property Law Act, the new Property Law Act, which –

TIPPING J:

My brother sleeps with it under his pillow, Mr Hughes-Johnson, so he's well ahead of most of us on that subject.

MR HUGHES-JOHNSON QC:

I must confess, my learned junior has made sure that I read the section, so I'm thankful to him for that. On page 20 I set it out, the section 137 is set out there, and
5 this is, His Honour Justice Blanchard is just pointing out that it talks of "asserting management or control," again reinforcing, in the context of a mortgagee entering into possession, it's not the capacity to assert but the actual assertion.

BLANCHARD J:

10 And it's by requiring payment of rent –

MR HUGHES-JOHNSON QC:

Yes.

BLANCHARD J:

– that would otherwise to the mortgagor.

MR HUGHES-JOHNSON QC:

That's right, and that's – I'm relying on this as supporting the view that to be in
20 effective management or control you've got to get your hands on the income stream, otherwise you're not – if you're not actually in control of the income stream you are not in effective management or control, that's –

TIPPING J:

25 Is there not some connotation in (b) of going concern, in the sense that you're exercising effective management or control as a going concern, you're not doing it for the purpose of exercising your security? Although that may –

MR HUGHES-JOHNSON QC:

30 Well, that could be, which supports the view that if you're taking, if you are simply a mortgagee who says, look, I put my mother's money into this house, I want to sell now, I want to realise the security and realise the money that I put in. Why on earth should that person be in a situation where he or she is constituted as an operator, has to go through the registration process? Because that's the critical point, really,

is, that if I'm wrong about this and Cashmere is the operator, then any mortgagee in Cashmere's position has to go through the registration process, because the Act says it has to, it's an operator –

5 **McGRATH J:**

One –

MR HUGHES-JOHNSON QC:

– just to, and in that –

10

TIPPING J:

Just to exercise its power of sale.

MR HUGHES-JOHNSON QC:

15 Which it can't do anyway, because once it's registered it's –

McGRATH J:

At the end of the process it's disqualified.

20 **MR HUGHES-JOHNSON QC:**

Yes, so it's –

McGRATH J:

No incentives.

25

MR HUGHES-JOHNSON QC:

Yes, I accept – and I think this was the point we made before – I accept that if Cashmere is an operator and has an obligation to register, that it can't proceed with a mortgagee sale, *ex turpi causa et cetera*. So we get back to the question, in my
30 respectful submission, 137 underpins the argument that I am putting forward now, which is that there needs to be this link with the revenue stream.

ELIAS CJ:

But there is no revenue stream in this case.

TIPPING J:

137, with respect, I think is a wholly different context. It demonstrates how, for those purposes, you enter in possession of mortgage, land or goods.

5

MR HUGHES-JOHNSON QC:

Yes.

TIPPING J:

10 For those purposes. But it doesn't really tell us much about what effective management and control is for these purposes.

MR HUGHES-JOHNSON QC:

Well, if –

15

TIPPING J:

Isn't it a fact-based assessment, bearing in mind the context in which this provision applies and the consequences of holding one way or the other, against the statutory scheme?

20

MR HUGHES-JOHNSON QC:

Well –

TIPPING J:

25 I would be surprised if they intended this to catch the security holder who was simply exercising their security.

BLANCHARD J:

Unless they went into possession.

30

TIPPING J:

Unless they actually went in, in the conventional sense.

ELIAS CJ:

But the Official Assignee might be the operator, even if the company has been dissolved, replying, because –

5 **TIPPING J:**

That's a separate point.

ELIAS CJ:

Yes, yes, sorry, I'm just thinking out loud.

10

McGRATH J:

Or he might have acted negligently if he'd allowed the company to be dissolved without discharging its responsibilities.

15 **ELIAS CJ:**

But there may be a direct statutory obligation that he remains under, in any event, because he is in a position to –

McGRATH J:

20 Yes, yes.

ELIAS CJ:

– restore the company and do whatever...

25 **MR HUGHES-JOHNSON QC:**

Well, the other –

McGRATH J:

30 I suppose, Mr Hughes-Johnson – could I just add one more comment? If in fact, merely by exercising the power of sale the financier was going to become an operator, that's hardly conducive to the purpose of the Act of facilitating the development of retirement homes. I mean, financiers would have to think long and hard before they entered into any financial arrangements in respect of the development of retirement villages, wouldn't they?

MR HUGHES-JOHNSON QC:

Yes, well, I think they do anyway.

5 **McGRATH J:**

They may do, but that's because the Act give certain priorities to protect consumers. But this would be something over on top, it was be imposing onerous obligations to no useful end, as far as they were concerned.

10 **MR HUGHES-JOHNSON QC:**

Yes, that's right –

BLANCHARD J:

What is it – I'm sorry.

15

MR HUGHES-JOHNSON QC:

Sorry, Sir. The only other point I was going to make is if the legislature had intended to capture a mortgagee in possession in that definition, or the exercising of power of sale, why didn't it say it? There's no reference to it, and that also, in my respectful
20 submission, supports the view that by exercising your power of sale you are not caught with that definition.

TIPPING J:

You don't go into possession by exercising your power of sale, as I understand
25 traditional in – is that...

MR HUGHES-JOHNSON QC:

Well, that's my point really.

30 **TIPPING J:**

No great demur.

MR HUGHES-JOHNSON QC:

Well, that's the point really. I mean, if that –

ELIAS CJ:

Well, they're not necessarily alternatives, they might be serial...

5 **MR HUGHES-JOHNSON QC:**

Because that's all that Cashmere wants to do. Cashmere wants to sell, it doesn't want to go into possession, it's not gone into possession, doesn't want to, doesn't want to have control of the revenue stream – not much point in having control of this revenue stream – but it doesn't want to anyway, and all it want to do is to deal with
10 the realty and to convey the mortgagor's interest to a third party.

BLANCHARD J:

What is it that is being said against you concerning things that your client has done which are said to be exercising management or control?
15

MR HUGHES-JOHNSON QC:

Right. Well, the first one is writing a letter saying that they wanted to go into possession, but didn't go into possession. So the question is –

20 **TIPPING J:**

They wanted to?

MR HUGHES-JOHNSON QC:

Yes. But that can't possible be going into possession, just writing a letter –
25

WILSON J:

Pretty good evidence, though, isn't it?

BLANCHARD J:

30 Well what did it say?

MR HUGHES-JOHNSON QC:

No, no. Because section 139 makes it absolutely clear that you don't go into possession as a mortgagee unless a Court – sorry, I've got a different point, but this

is – it prescribes when you are a mortgagee in possession, section 139, which is the old section 106 of the Land Transfer Act, and I read, “The date on which the mortgagee enters into or takes physical possession of the land.” Well, it hasn’t done that. It wrote a letter saying, at one stage, intimating that it wanted to, but it didn’t do it. Secondly, “The date on which the mortgagee first received any income” – well, it hasn’t done that – “from the land or goods as mortgagee in possession” – it hasn’t done that – “the date of an application to the Court for an order for possession of the land or goods, if the Court makes the order” – hasn’t done that. So therefore, the only one it could possibly be caught under is the date on which the mortgagee enters into or takes physical possession, and that clearly contemplates actually going in and taking possession. Therefore, under section 139 of the Act, it hasn’t taken possession.

TIPPING J:

But that’s not the same as exercising effective management or control. They expressly don’t say, “Goes into possession in terms of section whatever it is of the –

MR HUGHES-JOHNSON QC:

Yes, but the letter, I’m talking about the le – I’m concerned about the letter.

BLANCHARD J:

Where is that? Have we got it?

MR HUGHES-JOHNSON QC:

I’m sorry, I haven’t, I had made, in the yellow pages I mentioned the letter, but I haven’t got the – I’m not allowed to refer to that, so I –

ELIAS CJ:

Well, you can refer to it.

MR HUGHES-JOHNSON QC:

Sorry, I’m getting confused. It was 312, that’s Volume 3, 312, document 312, paragraph 4.

ELIAS CJ:

“Has elected.”

BLANCHARD J:

5 Well, that might be some form of constructively becoming a mortgagee in possession.

MR HUGHES-JOHNSON QC:

10 Well, in my submission, Sir, the question whether it is or is not, it just falls on the wording of the Act, contemplating only...

TIPPING J:

15 But mortgagee in possession might not equate to effective management or control, because of the technicalities of mortgagee in possession. I don't know, it's a somewhat awkward few words.

ELIAS CJ:

Well, they're managing by that “requiring vacation”.

20 **TIPPING J:**

“Vacate the premises.” This is a letter to a particular – did this letter go to all the unit holders?

ELIAS CJ:

25 Yes, yes, if you flip on you'll see the...

MR HUGHES-JOHNSON QC:

30 So, the issue here is clearly whether that is the exercise of effective management or control –

WILSON J:

Well, doesn't it certainly assume control, writing that letter? Otherwise what's the point of that statement?

MR HUGHES-JOHNSON QC:

I don't know what the response was, I think there probably wasn't one, I don't think there was a response.

5 **TIPPING J:**

Isn't it an assertion of control?

BLANCHARD J:

Yes.

10

McGRATH J:

Yes, it's assertion – well, it's a decision, isn't it, whether anything's been done in relation to the decision making...

15 **TIPPING J:**

It's an assertion, these are the unit holders that, "We now control the show, get out."

WILSON J:

20 And therefore, "We require you to leave." And reinforced by the second sentence of paragraph 5.

MR HUGHES-JOHNSON QC:

It may not suffice for the purposes of section 137 of the Property Law Act, which by the time this letter was written had come into force, but it might suffice under paragraph B of the definition of operator.

25 **ELIAS CJ:**

And raise the ex turpi causa as you said.

MR HUGHES-JOHNSON QC:

Well with respect no, because that is simply a letter indicating a future intention.

BLANCHARD J:

30 Well no it's not, it's saying, we are mortgagee in possession, we've elected to become so, and we require you to get out.

WILSON J:

Within a short timeframe.

MR HUGHES-JOHNSON QC:

5 But in fact at the time, Cashmere was not mortgagee in possession in accordance with the provisions of the Act.

ELIAS CJ:

What Act?

MR HUGHES-JOHNSON QC:

Because if you look –

10 **ELIAS CJ:**

But it's precluding anyone being in possession, it's appropriating that function.

TIPPING J:

Aren't you exercising thereby effective control of the Village by writing to all the unit holders in these terms. It's a pretty strong, pretty – not a bad argument?

15 **MR HUGHES-JOHNSON QC:**

Well it could be, I don't accept that it's even purporting, well it's purporting to take a step but this is, this section in my respect – well the definition in my respectful submissions is taking it a step further, it was actually exercising.

TIPPING J:

20 Well you are exercising it by telling them to get out. I mean if this isn't exercising control, asserting the right to tell them to get out, that's a pretty fundamental form of control. Just being the devil's advocate for a moment Mr Hughes-Johnson, what could be more controlling than to tell them to get out.

MR HUGHES-JOHNSON QC:

25 Well I suppose one's looking at the effect of the communication.

TIPPING J:

Well the fact they didn't go surely is nothing to the point. And you see paragraph 6 of this letter isn't particularly helpful to your client either because it's in effect saying,

we're not going to take any nonsense from you. Paragraph 6 of page 312 in effect, sort of saying, you may assert something but there's nothing in it?

MR HUGHES-JOHNSON QC:

5 But should a person who is testing the water, let's assume that it's testing the water in the sense that the other party might come back and say well, sorry but we're not going to move out and then Cashmere says, all right well we're not going to go into possession and didn't go into possession.

WILSON J:

But this is anything but a request for discussion or negotiation.

10 **MR HUGHES-JOHNSON QC:**

But Cashmere did not go into possession and didn't take the next step.

TIPPING J:

No but it was asserting control –

15 **MR HUGHES-JOHNSON QC:**

I understand the argument.

TIPPING J:

– it was asserting control and I would say that is exercising control within the meaning of B, but perhaps we should take the adjournment.

20 **McGRATH J:**

I think that perhaps what you're really saying, Mr Hughes-Johnson, is that for a mortgagee who wants to do nothing more than sell the property, to tell people to leave, is barely exercising your right, your rights not to be bound by occupation agreements. I think the trouble though is that we've used the words, the words have
25 been used, "mortgagee and possession" which is a bit more than the attempt to sell with vacant possession.

MR HUGHES-JOHNSON QC:

Well again the other aspect – this has to be seen against the scheme of the Act and was it really intended that a mortgagee could become an operator precluded from

exercising the power of sale by dint of being an operator because of all the registration obligations simply by writing a letter like that.

TIPPING J:

5 But what's the point of electing to become mortgagee in possession. It was intended presumably to signal something, it wasn't just saying, we intend to exercise our power of sale – get out.

MR HUGHES-JOHNSON QC:

I don't know what the response was and I just wonder whether I could just have an opportunity just to –

10 **ELIAS CJ:**

Yes we'll take the –

WILSON J:

Page 326 the response from the solicitors.

MR HUGHES-JOHNSON QC:

15 326?

WILSON J:

I'm sorry, 320.

MR HUGHES-JOHNSON QC:

20 320. Well could it be the – within the scheme in contemplation of legislation that in circumstances such as this, where Steel & Co come back and say, well you can't do that, and then in fact nothing happens that you are thereby precluded?

TIPPING J:

It may be quite a difficult point.

MR HUGHES-JOHNSON QC:

25 It's, it is obviously I accept that there's certainly an argument that that's an attempt to exercise management or control, the question really is one of whether if you accept that within the scheme of the Act, it should mean that you're –

ELIAS CJ:

Well the scheme of the Act is for consumer protection of vulnerable people. Anyway, we should –

WILSON J:

5 You might like to note thought Mr Hughes-Johnson at page 322 –

MR HUGHES-JOHNSON QC:

Sorry Sir, I wonder if I can just –

WILSON J:

– can I just draw this to your attention so you can look at it – 322 response from your
10 instructing solicitors to the respondent’s solicitors, paragraph 4 of that letter at 322 –
“Will be acting as mortgagee in possession.”

COURT ADJOURNS: 11.36 AM

COURT RESUMES: 11.54 AM

15 MR HUGHES-JOHNSON QC:

I wonder if I could draw your attention to the correspondence that was the subject of the submissions just before the break, starting at document number 312, just encaps – just summarising the position. Malley & Co on behalf of Cashmere document 312 wrote, stating that the client had elected to become mortgagee in possession and
20 required vacant possession. Document 320, Steel & Co write back saying, “You are well aware that the residents occupy pursuant to occupation agreements” on the 14th of February. On the 15th of February the letter from Malley & Co dated the 15th of February, sorry document 322, “Our client will be acting as mortgagee in possession, your clients are required to vacate” followed by document 324 which is
25 the response from Steel saying, “That any sale of the property must be subject to the residents’ rights under their occupation agreements and any proceedings to obtain vacant possession will be defended. In fact I’m advised there was an application to the Court for vacant possession but that was later abandoned and the declaratory orders sought which are the subject – which are known to the Court. Now that must
30 be seen in my respectful submission in the context of the Order in Council being

made later, namely on the 30th of June 2008, so that at this point whilst it was known that there were occupation right agreements, Malley & Co was writing asking for copies of those agreements, but there was no definitive statement that what one was dealing here was in fact a retirement village and it was only on the 30th of June that that matter was put beyond doubt by the Order in Council which took effect from that day. So –

WILSON J:

Is there any evidence of a withdrawal or purported withdrawal by Cashmere Capital of its election to become mortgagee, become mortgagee in possession?

10 **MR HUGHES-JOHNSON QC:**

By conduct yes, because it didn't and secondly by amending its Court pleading as I understand the position, from first of all seeking an order for vacant possession and later resiling from that position and abandoning that application for possession, in the face of the clear opposition from the other party. So the question then becomes, as against that background and in particular the later date of the Order in Council, 15 30th of June '08, whether that is asserting management or control.

TIPPING J:

Are you really saying Mr Hughes-Johnson, perhaps as a fallback, that even though this might not look too good from your client's point of view, it can't be resolved firmly 20 against it –

MR HUGHES-JOHNSON QC:

No it can't, no.

TIPPING J:

– without a full trial?

25 **MR HUGHES-JOHNSON QC:**

No. No, well I do, I gratefully thank you for –

ELIAS CJ:

You would rather have a firm conclusion the other way, but if you can't have that you'll settle for not proven?

MR HUGHES-JOHNSON QC:

I would. I would but with respect also, it would be – I am asking for the Court to interpret the assertion of management or control in such a way as given the circumstances of this particular case.

5 **TIPPING J:**

I suppose if it turns solely on documents and I emphasise solely, we might be in a position to come to a concluded view but you may not be wise to have it determined solely on document?

MR HUGHES-JOHNSON QC:

10 No, but I, my primary position is still that there was never any actual intermeddling with the income screen, of course you understand –

TIPPING J:

Yes I understand that.

MR HUGHES-JOHNSON QC:

15 And that merely writing a letter threatening something which in the event did not take –

TIPPING J:

20 You didn't threaten anything, you say what you had done. You had elected to become mortgagee in possession and then you acted in terms of that, by seeking vacant possession. You didn't act seeking vacant possession in terms of your power of sale – alone.

MR HUGHES-JOHNSON QC:

Yes but took no actual steps to obtain other than to intimate that that was the intention.

25 **TIPPING J:**

All I can say is I think it's at best from your point of view, muddy.

MR HUGHES-JOHNSON QC:

Well I fall back on the argument Sir, that when one looks at the scheme of the Act, that it could not be contemplated that –

TIPPING J:

And the circumstances in which the liquidator bowed out and presumably, presumably and I emphasise that – I'm just making an inference that it's not founded in evidence at the moment. On the – the liquidator bowed out on the premise that
5 your client would exercise its power of sale and thereby convey to a purchaser without the liquidator having to convey to the purchaser. Now all that seems to me to be very much – what if any arrangements there were between your client and the liquidator either expressed or implied –

MR HUGHES-JOHNSON QC:

10 I don't know.

TIPPING J:

– yes I know you don't know, and I'm not criticising you but all that seems to me to be highly relevant to whether you became an operator.

MR HUGHES-JOHNSON QC:

15 I mean as discussed previously it may well be the liquidator took the view that – he wasn't thinking well the mortgagee's going to steps because he'd recognised –

TIPPING J:

Well we just don't know Mr Hughes-Johnson – we just don't know –

MR HUGHES-JOHNSON QC:

20 – it's just speculation.

TIPPING J:

But somehow or other the liquidator seems to have bowed out and wound the company up without remaining on the title, so he must have been assuming, assuming that he was thinking at all, that the mortgagee would convey.

MR HUGHES-JOHNSON QC:

25 Not necessarily with respect, the liquidator may well have thought, this is too hard, there's no money in it for me and I don't know what's going to happen if I walk away –

TIPPING J:

Yes precisely.

MR HUGHES-JOHNSON QC:

– but not necessarily thinking that the mortgagee would take a step.

5 **TIPPING J:**

But he winds the company up while he's still, while the company's still the registered owner of land.

BLANCHARD J:

10 And while he's still the operator.

TIPPING J:

While he's still the operator. I mean something must have been going on.

MR HUGHES-JOHNSON QC:

I don't –

15 **TIPPING J:**

Yes I know. But that's why I say I don't think we can be certain sufficiently to give a binding ruling on what is in effect a strike-out.

MR HUGHES-JOHNSON QC:

That's what I'm asking you to do of course.

20 **TIPPING J:**

We have tried to make it very clear in recent decisions that we don't do strike-outs unless the position is –

MR HUGHES-JOHNSON QC:

Yes.

25 **TIPPING J:**

– absolutely plain and can't be illuminated by further evidence. And we've tried to make that clear in several recent decisions, which the Chief Justice was a leading contributor.

ELIAS CJ:

I was just thinking, watch this space.

MR HUGHES-JOHNSON QC:

That message obviously didn't filter through to the High Court in this case.

5 **TIPPING J:**

Well a lot of things may not have filtered through to them, but quite honestly I would have thought you've got a very hard road to hoe to say that it in the light of all this, it's so clear that you weren't an operator, that we should so declare.

MR HUGHES-JOHNSON QC:

10 I have attempted to emphasise –

TIPPING J:

I'm not asking you –

MR HUGHES-JOHNSON QC:

15 – the connection with the income stream –

TIPPING J:

– that's why I asked you on the fall back position. Is that –

MR HUGHES-JOHNSON QC:

20 I really fall back to the position that, that given that that is a view, i.e. that there's danger, the critical point is to look at this in the context of the purpose of the Act and saying whether in a situation like this, given a mortgagee in this situation, it could have been intended that he would be encumbered with the –

TIPPING J:

If this was all there was maybe –

25 **MR HUGHES-JOHNSON QC:**

Yes.

TIPPING J:

But there's clearly more behind this I would have thought. Well put it this way, it is distinctly possible vis-à-vis the liquidator?

MR HUGHES-JOHNSON QC:

5 Yes, I don't know, that is possible – I don't know

McGRATH J:

As to the purpose of the Act Mr Hughes-Johnson, I can see strength in your argument that it couldn't, it could not have been contemplated that the Act would preclude a mortgagee selling with vacant possession in circumstances where there'd
10 been no consent to lease it and obtaining vacant possession for the purposes of the sale. I think if you're wanting to go further than that in terms of concepts of entry into possession and the rest of it, I'm not quite with you because it seems to me that when you take it, do anything further than as a mortgagee than wish to sell with vacant possession, you're probably starting to get close to management or control.

15 MR HUGHES-JOHNSON QC:

Well as it turns out of course, we – this one's just going over old ground but Cashmere didn't go into possession actually, and therefore –

McGRATH J:

Yes I'm not – yes I'm not, I don't want to talk about facts now –

20 MR HUGHES-JOHNSON QC:

No.

McGRATH J:

– I'm just talking about – you're already raising an argument of the policy of the Act and I'm just saying I think the policy of the Act you're referring a line at the moment
25 can be drawn which would allow a mortgagee to do, if he is able to, to sell with vacant possession without being in control or management.

MR HUGHES-JOHNSON QC:

And I think my point must be in the particular circumstances of this case –

McGRATH J:

That fits.

MR HUGHES-JOHNSON QC:

– that he didn't go – he was on the right side of the line.

5 **McGRATH J:**

Yes, yes you're not trying to move the line?

MR HUGHES-JOHNSON QC:

No.

McGRATH J:

10 No. That's fine.

MR HUGHES-JOHNSON QC:

But that clearly the scheme of the Act is that this section is aimed at who was an operator not anything else and that's critical really because one then says well what does an operator have to do and adopting a purposive approach to the interpretation
15 of exercising effective management control, it's against the background that we're talking about the appointment of an operator who has the statutory obligations appointing supervisors et cetera, et cetera.

McGRATH J:

Oh yes, but clearly it contemplates that a mortgagee can become an operator?

20 **MR HUGHES-JOHNSON QC:**

Yes, of course does, yes I accept that yes if he's on the wrong side of the line.

McGRATH J:

Absolutely.

ELIAS CJ:

25 And doesn't the assertion of authority to the exclusion of anyone else prevent anyone becoming an operator and mightn't that be something of significance given the purpose of this legislation?

MR HUGHES-JOHNSON QC:

Yes it, it could be in the right – given facts which support the view that there was an absolute attempt to exclude everyone else from the dominion of the revenue, so to speak – using my terminology. And clearly in that situation if the attempt was to
5 exclude from the dominion of the revenue, then yes obviously the person would be an operator.

ELIAS CJ:

There isn't really – I'm not sure that the Property Law Act provision is enormously helpful because in many of these residential villages, there isn't really an income
10 stream in that sense, is there?

MR HUGHES-JOHNSON QC:

Well often the residents pay a lump sum of 50,000 and they don't keep –

ELIAS CJ:

They've usually bought, they've usually bought their unit and they –

15 **MR HUGHES-JOHNSON QC:**

Yes they've bought the unit.

ELIAS CJ:

And they pay what – operating?

MR HUGHES-JOHNSON QC:

20 For the gardening.

ELIAS CJ:

Yes.

MR HUGHES-JOHNSON QC:

You know things like that, I mean picking up the rubbish and nursing services and
25 this sort of thing – there's often a gradation of services and they you know, choose category 1, 2 or 3 or whatever in the sophisticated ones – having paid the lump sum to start off with, so to speak.

BLANCHARD J:

Do we have any information about when Crossdale went into liquidation and when it was struck off?

MR HUGHES-JOHNSON QC:

5 No Sir, I haven't got that information, I will get that information – I'm sorry I haven't got that.

BLANCHARD J:

Well is it in evidence?

MR HUGHES-JOHNSON QC:

10 The only evidence I've seen is that is – to the effect that it had been struck off and I think I saw that in an affidavit – may I just –

ELIAS CJ:

It's not in the chronology. Yes do you know Mr Till?

MR TILL QC:

15 Your Honour, the position is that there is no evidence before the Court about it. Indeed my learned friend said earlier that it was common ground that it had been struck off or removed from the register, I can't confirm that. During the break I made a call to my instructing solicitor and he is making some enquiries and I hope later in the day to be able to give you some information about it. The only information that
20 I'm aware of in the documents before you, comes from the record in the first judgment of Justice Fogarty that at the first call there was an appearance by Mr McDuff before him and so I can direct the Courts –

TIPPING J:

For the Official Assignee?

25 **MR TILL QC:**

Yes but, but the company was not then in liquidation. What Mr McDuff advised the Court was that the company was insolvent and expected to shortly be liquidated and he sought leave and was granted leave to withdraw. So that is recorded in the first judgment of Justice Fogarty at page 48 of volume 1, paragraph 1, in the middle of

that paragraph, Justice Fogarty records, “The first defendant is not yet in liquidation. The second defendant, the individual director is bankrupt –

TIPPING J:

5 So he was appearing strictly for Mr Campbell?

MR TILL QC:

Correct.

10 **TIPPING J:**

But, Official Assignee in the bankruptcy of Campbell, but he also gave the Judge that additional information.

MR TILL QC:

15 That's quite so, Your Honour.

BLANCHARD J:

Well, I've been working on the assumption that the Official Assignee became the liquidator. It's possible that it was someone else.

20

MR TILL QC:

Yes, I can't assist at the moment further, but I will endeavour to do so later.

MR HUGHES-JOHNSON QC:

25 Yes, I'm sorry, I think that the genesis of my understanding was from that comment and Justice Fogarty's judgement, and Mr McDuff, I remember Mr McDuff, there's reference to Mr McDuff, and I'm sorry that I can't take the matter any further without further enquiry.

30 **WILSON J:**

Mr Hughes-Johnson, just looking at that judgment of Justice Fogarty at page 48, the first line of the second paragraph is interesting, “The plaintiff, as mortgagee, has elected to take possession.”

MR HUGHES-JOHNSON QC:

Sorry, if I can just – paragraph 48?

WILSON J:

5 Page 48, paragraph 2, line 1. It seems to be common ground at that time.

TIPPING J:

Well, it's contradictory –

10 **BLANCHARD J:**

Top of page 5 is even more significant –

ELIAS CJ:

Yes, yes.

15

BLANCHARD J:

– argues that, “As mortgagee who has elected to go into possession, it is entitled to orders of possession.” Now, had it applied for them?

20 **MR HUGHES-JOHNSON QC:**

Yes it had as I indicated Sir. My understanding is that it resiled from –

ELIAS CJ:

Is this what the strike-out is? I haven't looked at the pleadings.

25

BLANCHARD J:

Well in that case he is a mortgagee in possession under the Property Law Act. If it's applied to the Court for an order for possession section 137(1)(c) makes it a mortgagee in possession.

30

TIPPING J:

Only if the Court makes the order.

MR HUGHES-JOHNSON QC:

Only if the Court makes an order under section 139.

BLANCHARD J:

5 Sorry I haven't got 139 in front of me.

MR HUGHES-JOHNSON QC:

139 Sir, yes. Only if the Court makes that order.

10 **BLANCHARD J:**

And that's never happened?

MR HUGHES-JOHNSON QC:

And that's never happened.

15

TIPPING J:

But how can paragraph 1 of this first judgment, the plaintiff is seeking orders for possession and on the other hand has elected to take possession.

20 **BLANCHARD J:**

I suppose that could be read as to be signalling an intention to try to go into possession by getting an order.

TIPPING J:

25 Yes that's the only way of harmonising, isn't it, which is in Mr Hughes-Johnson's –

BLANCHARD J:

Yes.

30 **MR TILL QC:**

Your Honours I wonder if I might just assist with something procedurally which I think the Court's labelling under misapprehension. I don't seek to –

TIPPING J:

Can you move to the central mike please?

MR TILL QC:

5 Yes, by all means Your Honours. The history of the proceeding is not a strike-out. The history of the proceeding is an application by the appellant for summary judgment in the terms described by Justice Fogarty at the top of the second page of the judgment before you. At the end of that hearing, and in that first judgment, His Honour was satisfied that there was no case for summary judgment and
10 dismissed it. However, during the course of that hearing I advanced the proposition that the claim of the appellant/plaintiff, was so weak that indeed the respondent/defendants were entitled themselves to judgment. His Honour then gave time for the filing of further evidence which was taken up by the appellant. The matter then came back before the Court for the hearing of the respondent's
15 application for summary judgment as defendants.

TIPPING J:

So there was no actual literal strike-out.

20 **McGRATH J:**

Yes it was at page 41, there's an application to strike-out.

ELIAS CJ:

I had understood about the application for summary judgment by the, by the
25 mortgagee but had thought that what we were dealing with was the strike-out application by the respondents.

MR TILL QC:

No that's not –

30

ELIAS CJ:

That's not right?

MR TILL QC:

Not correct. The application in fact is one for summary judgment but possibly advanced in the alternative as a strike-out but it was primarily an application for judgment by the defendants.

5

ELIAS CJ:

The defendant's summary judgment?

MR TILL QC:

10 Yes that's correct, and so the nature of its recorded by His Honour at page 49, paragraph 5 of the judgment and then the consequential orders leading to that follow, over the page, page 50 at paragraph 3, the leave to file further evidence and then there was a further hearing with the judgment delivered, starting at page 52.

15 **ELIAS CJ:**

But just pause, page 50, the second paragraph is to resolve the defendant's application that the plaintiff's claim should be struck out.

MR TILL QC:

20 Or otherwise dismissed.

TIPPING J:

So it was a double-headed claim.

25 **ELIAS CJ:**

But it's under rule 186, oh what's rule 136?

MR TILL QC:

Under 136, which is for judgment, summary judgment.

30

ELIAS CJ:

Oh it is right, I see thank you.

MR TILL QC:

So I was slightly incorrect in saying there was no claim to strike-out, there clearly was in the alternative –

5

TIPPING J:

It says we either can have summary judgment or strike-out, the same result, claim dismissed.

10 **MR TILL QC:**

That's correct.

ELIAS CJ:

Where's the statement of claim, sorry, what page?

15

MR TILL QC:

Your Honours the amended statement of claim is before you at page 24, the original is not before the Court and again at the adjournment I requested –

20 **ELIAS CJ:**

Well we'll accept, was this the one that matters preceded on, the one we have at 24?

MR TILL QC:

Yes indeed, but –

25

ELIAS CJ:

Well then, that's all good.

MR TILL QC:

30 But the original is relevant to the point that was being discussed before and for that reason I'd ask that a copy be transmitted to the registrar so that I can address that later.

ELIAS CJ:

Thank you.

BLANCHARD J:

5 Do we have the order made by the High Court?

MR TILL QC:

There is no sealed order I believe Your Honour, but the judgment of the High Court is that of Justice Fogarty, commencing at page 52 and the actual –

10

BLANCHARD J:

He gives judgment for the defendant in the last paragraph.

MR TILL QC:

15 Yes.

BLANCHARD J:

On what basis? Strike-out or summary judgment or both?

20 **WILSON J:**

It appears from paragraph 6 that he's considering both.

BLANCHARD J:

25 How did the matter get to the Court of Appeal without a sealed order of the High Court?

TIPPING J:

Nothing has gone very well in this case, but anyway that's all by-the-by isn't it?

30 **WILSON J:**

This actually illustrates the importance of complying with the rule of sealing an order the basis for appeal.

MR TILL QC:

Right I trust that intervention was helpful to the Court.

ELIAS CJ:

5 Yes thank you.

BLANCHARD J:

In fact I notice Justice Baragwanath saying in the second paragraph of his judgment,
“In the High Court Justice Fogarty gave summary judgment in favour of the
10 respondents.”

TIPPING J:

Well whatever route he said you couldn't succeed. You want it resurrected?

15 **MR HUGHES-JOHNSON QC:**

Yes, and I don't know whether it – whether it makes, in terms of the jurisdiction requirements, whether there's much in it. I doubt it.

TIPPING J:

20 I think it maybe more than a theoretical difference, given that the strike-out has obviously got to be based on the pleading, whereas the summary judgment application takes accounts of such evidence as is before the Court.

BLANCHARD J:

25 It seems to have been argued in the Court of Appeal, as an appeal from a summary judgment.

ELIAS CJ:

30 But that was on the basis of finding that the plaintiff had consented to the leases on a different basis.

TIPPING J:

I wonder if it's – now is a good time to get to the question of consent. I'm not wishing to sound pre-emptory.

ELIAS CJ:

Or directional.

5 **TIPPING J:**

I was just making a quiet suggestion to you Chief Justice.

ELIAS CJ:

I realised, that's why I said directional.

10

MR HUGHES-JOHNSON QC:

I think probably in terms of that issue I've taken it as far as I can, I do urge the Court to consider the statutory framework in interpreting the provision and also of course the fact that the order in council was later in time than those earlier – the
15 correspondence that was referred to. That I think leaves one last topic and that is the question of consent, which is the final matter which I would wish to address and the issue here simply is whether or not Cashmere did or did not consent.

TIPPING J:

20 I'm puzzled as to how in personam business came into the arena Mr Hughes-Johnson, surely as you've just said, it's a question of whether they did or did not consent, within the proper connotations of the concept of consent, it's got nothing to do with the in personam.

25 **MR HUGHES-JOHNSON QC:**

Well I think it's - where that appears to have arisen Sir is in the Court of Appeal judgment as my friend has, I think he's relied on this, that the Court of Appeal appears to have used as an aid to interpreting the term consent and the relevant statutory provisions, the concept of whether or not the in personam approach. I'll put
30 it another way, it's using the in personam approach as an aid to interpreting the term consent and I don't think that that's appropriate.

TIPPING J:

Well I don't want to muddy the waters, and it seems a bit odd to me. No, it seems very odd. You've either consented or you haven't.

5 MR HUGHES-JOHNSON QC:

Yes, and the real issue is, well what is the test for consent, and in my respectful submission I don't need to read through the submissions here. The test for consent is well established. Mere acquiescence is not enough, standing by is not enough and this is the *New Zealand Fisheries* case at 6.4 of my submissions where
10 Justice Casey in the Court of Appeal made two points really. One is that consent shouldn't be too readily assumed or spelt out from the course of dealings between the parties. That's the first point and over the page, on page 24 at the top, "That acquiescence involves no more than the passive standing by without objection, whereas consent requires a positive affirmative act such as written or oral
15 acceptance or even as implied acceptance by conduct." Now as against that approach, which, and I've – the submissions are slightly more extensive than that, one then looks to see is that approach, this is 6.7 in my submissions, consistent with the scheme of the Land Transfer Act and the importance of indefeasibility and I hardly need I think, to comment on the fact that this Court on more than one
20 occasion, has made it clear that it has emphasised the sanctity of the principle of indefeasibility.

ELIAS CJ:

Well, yes.

25

TIPPING J:

Well I don't think indefeasibility comes into it because section 105 of the Land Transfer Act itself recognises the possibility of a consent. It really is a question of what does consent mean in these circumstances?

30

MR HUGHES-JOHNSON QC:

But Sir I wonder whether in relation to interpreting consent, one's not entitled to look at it as against the framework of indefeasibility, in other words that one, because of the requirements of certainty and the desirability of certainty when considering the

concept of indefeasibility, one should have a clear position as to when one has or has not consented and that's why one would not be happy with a concept of consent, equating to for example, just mere acquiescence, it's got to be something positive.

5 **TIPPING J:**

Well the classic distinction is as you say between the positive and negative, you have to have done something positive to signal consent. It's not spelt out from inaction.

10 **MR HUGHES-JOHNSON QC:**

And I accept really in terms of the in personam debate, that the Court of Appeal when looking at this, appears as I've indicated previously, to have used the in personam doctrine as an aid to interpreting the statutory term consent in the relevant statute of provisions.

15

BLANCHARD J:

It's really a consent to being bound.

MR HUGHES-JOHNSON QC:

20 Yes.

BLANCHARD J:

By the lease, in the sense of accepting that it will have priority over your interest.

25 **MR HUGHES-JOHNSON QC:**

Yes, and it's a bit difficult to see how in this case there could be consent when, for the reasons which I think I've set out in paragraph 7.2, under the heading, "Did Cashmere in fact consent?" Firstly, the occupation loan agreements of course were not registered and Cashmere was entitled to rely on the fact that the register did not reveal any leasehold, interest, or indeed a caveat, claiming such an interest and the Court of Appeal has observed in my submission, correctly at paragraph 18 of their judgments, as I'm reading from 7.2 (i), "In their absence (of any registered interest) it was reasonable for Cashmere to infer that the tenancies were of a relatively short term which it could terminate on relatively short notice."

30

ELIAS CJ:

But that might be so if there's no other indication in the evidence. And because I hadn't appreciated that the determination was in summary judgment and therefore
5 on the evidence, I don't know, and maybe this is a question for Mr Till, what position the respondents took as to the sufficiency of the evidence before the Court, because there is a glaring omission in that the operator who's gone to Australia hasn't given evidence, so we have assertions by the finance company about what they understood, which the residents aren't really in a position to dispute, whether the
10 residents complained about that, as not being sufficient foundation for summary judgment, is not something I know the answer to.

MR HUGHES-JOHNSON QC:

Well obviously my first port of call is to resist the summary judgment or any form of
15 judgment for the other side.

ELIAS CJ:

Yes, sorry, yes it's their assertion, yes.

20 **MR HUGHES-JOHNSON QC:**

And so you know, that really, that supports the view that at least to that level, I can't get to the next level which is the positive affirmation that we didn't consent, then my next position of course is that position.

25 **ELIAS CJ:**

Yes, sorry I'd forgotten.

MR HUGHES-JOHNSON QC:

But in my submission when you look at the – I'm conscious of the fact of course and
30 your point as well, all the evidence isn't before the Court.

ELIAS CJ:

All the possible evidence.

MR HUGHES-JOHNSON QC:

But in the context of the summary judgment application and an application, the summary judgment application of course, their contention was that there was enough evidence to say that we did consent.

5

ELIAS CJ:

Yes, yes.

WILSON J:

10 Mr Hughes-Johnson do you accept that we are dealing with a defendant summary judgment application?

MR HUGHES-JOHNSON QC:

Well having heard the debate previously, I'm not sure, because it seems to be dealt with either one or the other. The only thing I can – having not been involved until this Court, all I can say is that I had thought that all roads lead to Rome until I heard Your Honour's comment about well the different standing in relation to how you'd approach the strike-out and the summary judgment application, so I'm sorry, I can't really assist, as much as I'd like to.

20

McGRATH J:

Are you content in the question relating to summary judgment and fact, just to rely on the Court of Appeal's findings –

25 **MR HUGHES-JOHNSON QC:**

Yes.

McGRATH J:

Saying that you don't need to go back to the affidavits themselves.

30

MR HUGHES-JOHNSON QC:

Yes.

McGRATH J:

I suppose that would be all right if Mr Till doesn't want to improve on the Court of Appeal from his point of view.

5 **ELIAS CJ:**

In which case you can reply.

TIPPING J:

10 Mr Hughes-Johnson I have just a slight puzzlement as to how you can get the affirmative of they failing to – if they fail to show that you have consented on their application, it doesn't necessarily follow that you will get a cross declaration that you haven't consented.

ELIAS CJ:

15 No, well you've accepted that.

MR HUGHES-JOHNSON QC:

Well I do accept that, but –

20 **TIPPING J:**

Oh I see, you do accept that. But I thought you were trying to get something from us affirming the view that you hadn't consented as a positive.

MR HUGHES-JOHNSON QC:

25 Well I suppose, let me put it this way. In the Court of Appeal's judgment that is a finding that we did not, there was no consent effectively. May I just look at the Court of Appeal judgment?

TIPPING J:

30 Yes, well I know there might have been, but frankly I don't think there was any jurisdictional foundation for making any formal declaration to that effect, because it's the corollary of what they were seeking isn't necessarily what you're seeking.

MR HUGHES-JOHNSON QC:

Yes. In other words what you're saying with respect Sir, is that looking at the evidence which the other side put forward, there was not enough evidence to show that we did consent, but –

5

TIPPING J:

Well –

BLANCHARD J:

10 Your summary judgment was dismissed and there's been no appeal from that.

TIPPING J:

And you, because they failed to show you did consent –

15 **MR HUGHES-JOHNSON QC:**

Yes I understand that point.

TIPPING J:

Doesn't lead inexorably to the view that you didn't.

20

ELIAS CJ:

Or that you did.

MR HUGHES-JOHNSON QC:

25 And again I may need to be – I understand the difference of course. I may need to be content with first of all resisting the other side's claim that we did consent –

TIPPING J:

I think the best you can do is to say you're afloat.

30

MR HUGHES-JOHNSON QC:

Yes that's right. Resisting their claim together with hopefully some pronouncements from this Court which would indicate, which would give the parties at least some

guidance as to whether this Court is supporting the approach which was taken on the legal issue.

TIPPING J:

5 Well we may be able to give some help but what I'm saying is I don't think we can give a binding.

MR HUGHES-JOHNSON QC:

10 Yes, I understand what you're saying Sir, and I can't really take that matter any further because I think my main aim, obviously at this point, is to resist the other side's claim for the – that in fact we did consent. Now in relation to that issue, and I just wander, I should cover these points obviously still.

ELIAS CJ:

15 Well I'm just really wondering whether you haven't in fact covered everything.

MR HUGHES-JOHNSON QC:

20 Well just the 7.2 point and I think I probably have covered those. I think that the background point Ma'am is I think, and it's an important one, that these, this issue of consent was being considered against a background where the Cashmere was being deceived, was being misled about the position –

BLANCHARD J:

25 But not by the residents?

MR HUGHES-JOHNSON QC:

No, not by the residents.

BLANCHARD J:

30 I don't see you can take that point against them.

MR HUGHES-JOHNSON QC:

But of course the question is well what were they consenting to, it's relevant, with respect, to the question of what they were consent – they can only consent to what –

Cashmere can only consent to what it had knowledge of and therefore what it had knowledge of it is relevant to consider, with respect, what it was being told by the landowner because that fixed its knowledge about –

5 **ELIAS CJ:**

But that's for another forum and another day.

MR HUGHES-JOHNSON QC:

10 Yes, that would appear so Ma'am. And then there's the question of the vitiation of consent which would appear – there's a final passage about the vitiation of consent and I'm not sure whether you want me to cover that at all. That is, the submission there is that because of the approach which was taken when the consent was given, the consent was vitiated by misrepresentations but His Honour Justice Blanchard is questioning whether that can be in the circumstances –

15

BLANCHARD J:

Well I think I agree with my brother that we don't really get into that.

MR HUGHES-JOHNSON QC:

20 No, well they are my submissions.

ELIAS CJ:

Yes, thank you very much Mr Hughes-Johnson. Yes Mr Till?

25 **MR TILL QC:**

Thank you Your Honours. Your Honours, might I revert to the history of the proceeding first of all. Really to continue from where I was a moment ago and ask you to look at page 59 of volume 1 and there Justice Fogarty continued to consider the basis on which he was ruling. On the previous page he'd set out rule 136, which
30 is the rule where a summary judgment can be given, and it can be given, as you'll see from 136(2), against a plaintiff if the defendant satisfies the Court that none of the causes of action can succeed and he also, as Your Honours correctly referred to rule 186 in relation to striking out. Over the page at 59 His Honour said at paragraph 17 that this was a case where the relevant facts can be and have been set out

emphatically in the plaintiff's favour. The Judge then referred at paragraph 19 to the differences between the two rules, saying that he thought the strike-out rule 136 was the more appropriate to the issue.

5 **BLANCHARD J:**

Summary judgment?

MR TILL QC:

Summary judgment, yes. And in the middle the plaintiff, he said the plaintiff had filed
10 extensive affidavits in exhibits –

ELIAS CJ:

It's very strange though that he makes these assumptions in the plaintiff's favour
which is the approach on strike-out that's to be adopted but deals with it on the basis
15 of the defendant summary judgment.

MR TILL QC:

Yes but he addresses it slightly differently, Your Honour, in the middle of paragraph
19, where he says the plaintiff's filed extensive affidavits and exhibits. None of this
20 has been disputed by the defendants. So from a summary judgment perspective the
evidence was in, that the plaintiff wished to be in, and the defendant's position, as
recorded, was that it could not contest any of that evidence, and did not contest any
of it. So in reply to your question of you Chief Justice, as to the director of Crossdale
the defendants accepted they could not get any evidence from him. He'd absconded
25 the country, they didn't know where he was, they didn't believe that they could obtain
anything useful, nor could they contest the evidence filed by the plaintiff.

ELIAS CJ:

They might well have taken that position for the summary judgment but did they
30 acknowledge it for the proceedings? I'm thinking here of the question of consent.

MR TILL QC:

Well this, I'm putting, of course, the position of the respondents in this appeal –

ELIAS CJ:

Yes.

MR TILL QC:

5 – the defendants in that summary judgment, I think your question is actually directed to the plaintiffs. The question is whether they accepted they had put all their evidence in and my understanding is that they did. They were given the opportunity at the end of the first hearing, as is recorded in that first judgment, to file any further evidence that they wished.

10

WILSON J:

It would have been unwise not to put it in facing a defended summary judgment application.

15 **MR TILL QC:**

Yes. So at no point has the appellant said, we could bring further evidence and both parties have proceeded to this point on the basis that the evidence which is now before you, is the relevant evidence that could be brought on these issues, and accordingly Justice Fogarty looked at the difference between strike-out and summary
20 judgments. Said summary judgment is more applicable and then proceeded to give his judgment on that basis, uncontested evidence for the appellant in that Court.

I would like to briefly direct you to some of the evidence. It is very brief. You've seen most of, what I submit, is relevant and I take account of what the Chief Justice
25 said about right of reply. So firstly I ask you to look at the volume 2, that's the evidence, at page 146 of volume 2. That is the affidavit of Mr Hamilton. It's, I think, his third affidavit. He swears that in support of the appellant's position. At paragraph 12 on page 146 he sets out matters which had been taken into account. Maybe I should start on the preceding page, page 145, paragraph 11. He said there, "As
30 noted in the application approval," he sets out a number of points and then at paragraph 12, "The rental amount used for the approval of the loan was \$60,000 per annum." So he – my point is to show that he confirms that there was knowledge by the mortgagee of rental income being received.

Then there's the evidence in the letters which the Court looked at before. That's at volume 3 and there is one preceding letter to the ones which the Court viewed earlier this morning. That is at page 309 of volume 3. It's a letter dated the 7th of February 2008 and as with the other one you saw this morning it's sent to all the residents.

5 That gives notice of the mortgage of default under it and at paragraph 3 says that, the mortgagee understood that they were tenants of the property. Expresses surprise to learn that money had been paid by the tenants to the owner and then advised at paragraph 4 that the property is to be sold at mortgagee sale. That's the 7th of February. A week later is the letter which you, the Court saw this morning, and

10 that's clearly a development by the mortgagee moving to a point where at paragraph 4, as the Court noted, it elected to become mortgagee in possession and required vacant possession of the premises. So the point is that there's a change of position between the 7th and the 14th of February. That is confirmed by the letter which appears at page 330 of the same bundle written by the appellant's solicitors to

15 Mr Jim Anderton MP. In the middle of paragraph 2, page 330, there's a paragraph commencing towards the right-hand side of the page, middle of the paragraph, originally. Originally it had been the intention that these units would be sold subject to the tenancy. It was only when the representative for our client went to the units as a matter of courtesy to advise them that the units were going to be sold by

20 mortgagee sale auction and to ascertain the current rental, which was anticipated would have increased beyond \$185 per week, was there realisation that the elderly people had entered into unsecured loan agreements under which they claimed occupancy rights. Now that –

25 **TIPPING J:**

Those occupancy rights were for life and if more than one of the survivor. Was that the position?

MR TILL QC:

30 They were for –

TIPPING J:

For life?

MR TILL QC:

Yes.

TIPPING J:

5 And if more than one of the survivor. If it was a couple.

MR TILL QC:

Correct, correct Your Honour, yes. Now that is also confirmed in an affidavit sworn on behalf of the appellant. If I can ask you to look at volume 2, page 120. That's an
10 affidavit by the solicitor for the appellant Mr Tait. He'd been the author of the letters you've looked at earlier. And he said, at paragraph 19 on page 120, that it was initially understood that people would occupy the units as tenants. On that basis a mortgagee auction, subject to the tenancy agreements, was anticipated.

15 **BLANCHARD J:**

What are you asking us to draw from that?

MR TILL QC:

What I'm asking you to draw from that is coupled with the claim made in the original
20 statement of claim, there was firstly knowledge of the fact of these tenancies and as I develop consent, but secondly an exercise, an election by the appellant to go into position which I say constitutes the appellant being an operator with the consequences that follow. So those are the two main points which I advanced in the High Court and I advance again here today. Namely those of the appellant being an
25 operator with the requirement to register and I say cannot benefit by its breach of the obligation to register and secondly that in terms of the Property Law Act there has been consent to the leases such that the mortgagees aren't by them.

TIPPING J:

30 Is it part of your first argument that the change, if you like, from selling subject to the tenancies, which was simply a mere exercise of a power of sale, to the second stage of asserting a taking of possession, is highly relevant to this operator issue in the sense that it takes them much closer to being, if not actually being, an operator than

simply exercising a power of sale subject to the tenancies? Is that the connotation, just following up from what my brother Blanchard asked you?

MR TILL QC:

5 That isn't particularly an argument which I was advancing Your Honour in that –

TIPPING J:

I thought that's what it was so I'm glad I asked.

10 **MR TILL QC:**

Yes. In terms of there having been consent, I point to that change of position as being significant.

BLANCHARD J:

15 Why?

MR TILL QC:

Because –

20 **TIPPING J:**

I thought it went much more to the operator issue than to the consent issue.

MR TILL QC:

25 Yes but – I'm just dealing with them separately but just in terms of firstly the consent argument, my point is that there you have a mortgagee who not only has knowledge of and takes security subject to those leases, but also at first instance wishes to exercise its power of sale subject to the leases, it's only once it becomes aware of the precise terms of the lease that it changes its mind and says, no, get out, I want to sell with vacant possession.

30

BLANCHARD J:

To me, none of that amounts to more than acquiescence and then a decision that it's not a good idea to acquiesce to that extent. If we were to hold that this amounted to consent, it would have considerable ramifications.

MR TILL QC:

That's as may be Your Honour but my submission is that the –

5 **BLANCHARD J:**

Doesn't consent actually have to be addressed directly or indirectly to the tenants and say, we agree that we're going to be bound by your leases so that they'll have priority over our interest.

10 **MR TILL QC:**

Well that's exactly what I suggest the actions of the mortgagee were in this case.

BLANCHARD J:

Oh no.

15

MR TILL QC:

By taking that security with knowledge of and in reliance on –

BLANCHARD J:

20 Well in that case there's an awful lot of consenting going on around the country which will come as a very considerable surprise to conveyancers?

MR TILL QC:

25 Well Your Honour the mortgagee has a choice when the lease is in place before it takes its security which is the case here in all but two of my clients. It has the choice of taking that security, subject to the leases, or not taking the security, so the position is quite different from one where the mortgage comes first and leases have been affected later. So the reasonable inference, I advance, is that where the mortgagee elects to make its advance and take the security knowing that there are leases, the
30 only reasonable implication is that it is thereby consenting to those leases.

ELIAS CJ:

Well he says in this affidavit at 19 that he did anticipate that the auction would be subject to the tenancy agreements.

MR TILL QC:

Precisely Your Honour and that supports –

5 **ELIAS CJ:**

Yes. No I understand that.

MR TILL QC:

– the earlier statement made that the decision to make the advance was partly in
10 reliance on the income expected to be received.

ELIAS CJ:

And it was really the difference was finding out that instead of being on the assumed
short term tenancy arrangements they were occupation rights for life.

15

MR TILL QC:

Yes, at that point the mortgagee resiled. Now my submission is you can't have an
acquiescence amounting to consent, I say, when it suits you and when it doesn't you
go the other way and tell them to get out.

20

TIPPING J:

I thought Mr Till, and you may be able to correct me, that to consent in this context
you either have to consent to the actual terms or willy nilly. In other words, there's a
world of difference between consenting to what you think is a short term and to a
25 lifetime interest. I mean it, isn't the law that, at least prima facie, that you have to
either know the terms and consent to them, or say, I don't care, I'm consenting to
whatever you've got.

ELIAS CJ:

30 Well it's the later that you're contending for, isn't it?

MR TILL QC:

Yes and I'm contending that –

TIPPING J:

That's very unreal in this case though.

ELIAS CJ:

5 Willy-nilly?

TIPPING J:

Are you saying it was a willy-nilly consent? Just by saying we'll sell subject to the –

10 **ELIAS CJ:**

Well it's more that they took. They advanced the money without ascertaining the terms, isn't it?

MR TILL QC:

15 They advanced the money without making any proper enquiry as to the terms when it was in their control –

TIPPING J:

20 Well that's an earlier point. I thought you were relying on the fact that they were saying that they would sell subject to the tenancy agreements?

MR TILL QC:

25 No, no I'm – not relying on that per se. I go back to the point of the acceptance of the security. The making of the advance and at that point the mortgagee has it within its power to make full enquiries if it chooses of the terms but does not do so.

McGRATH J:

30 So your point then comes down to this, does it? That if you make a loan knowing a property is tenanted you will be taken to as consented to the terms of the tenancy and if you don't like that you've got to actually go out and ascertain them actually for yourself?

MR TILL QC:

Yes.

McGRATH J:

And don't make the loan otherwise?

5 **MR TILL QC:**

That's right.

TIPPING J:

10 So you're deemed to have consented to whatever the terms of the tenancy actually are?

McGRATH J:

If you know there is a tenancy.

15 **TIPPING J:**

If you know there is a tenancy, that's your proposition?

MR TILL QC:

20 That's my proposition.

ELIAS CJ:

Because they must propose to take, to advance the money on the terms of the known tenancy agreements.

25 **MR TILL QC:**

Yes and they have a choice at that time of either making the advance or not. If they choose to make it with knowledge that there are tenancies then I submit that is a consent to –

30 **McGRATH J:**

What's your best case for saying that's a good enough consent? Have you got a case that says that or is that something you're inviting as whole?

MR TILL QC:

Well my best case really I suppose is *Thompson* which says that the mortgage, the mortgagor –

5 **McGRATH J:**

This is Justice Fogarty's justification – Justice Williams' case?

MR TILL QC:

Well it's referred to by Justice Fogarty. It's an early case and it's –

10

McGRATH J:

Is it helpful to look at the case itself or to look at Justice Fogarty's treatment of it?

MR TILL QC:

15 Well I think perhaps Justice Fogarty's extraction from the case is sufficient I think Your Honour. It's volume 1, page 66 at paragraph 37 Justice Fogarty set out briefly the facts of the case so there'd been a mortgage and thereafter a lease and after some time the land was sold and the land was – the purchaser then argued that the lease was not binding and the important part of the decision, I submit, is the part that
20 is in bold in the second paragraph towards the bottom which is that the interest of the mortgagor so sold would be subject to any rights created by him in favour of third persons which were antecedent to the mortgage or which the mortgagee might choose to recognise as antecedent to his mortgage.

25 **BLANCHARD J:**

Isn't that something, isn't that consistent with the test that I was suggesting? That there has to be effectively an acceptance that you will be bound.

MR TILL QC:

30 I agree with that test Your Honour and I suppose it's, the next point is then whether the actions of the mortgagee in this case can be taken as accepting that it is bound.

TIPPING J:

But doesn't this passage suggest two circumstances. One, that if the lease is antecedent to the mortgage then presumably if the mortgagee knows of the lease you're asserting they're bound by it unless – is it just simply by mortgagee knowing
5 that there's a lease or a tenancy in place?

MR TILL QC:

Yes but I –

10 **TIPPING J:**

If it's the second one, where it comes later that the lease comes after the mortgage that there's got to be actual consent, isn't it, according to this formulation. Am I right in that?

15 **MR TILL QC:**

Yes well the, the reason why I don't place more reliance than I've stated on the first part is because the provisions of the Property Law Act need to be held into account and they specifically provide that the sale by the mortgagee is then free of any interest save those to which he has consented.

20

TIPPING J:

So the first part of this is now overcome or supplanted by the Property Law Act?

MR TILL QC:

25 Yes now there was a similar provision in force at the time that Justice Williams made that pronouncement so in fact the law is really no different today, I believe, than it was at the time of this decision.

BLANCHARD J:

30 Which provision are you referring to in the Property Law Act?

MR TILL QC:

I'm referring to –

ELIAS CJ:

119 was it?

McGRATH J:

5 You've not referring to the provision that Justice Fogarty refers to, I take it, no?

MR TILL QC:

10 Yes I am Your Honour. If I can just turn to my synopsis where I've set them out. At page 15 of my submissions I've set out section 105 and 119, 105 being to the effect that the transfer by the mortgagee is free of any interests save for those which the mortgagees consented to as being binding on him and 119 really being the counterpart of that to the effect that no lease is binding upon the mortgagee except so far as he has consented.

15 **McGRATH J:**

That's the provision which Justice Williams never referred to?

MR TILL QC:

No.

20

TIPPING J:

Well isn't that the sole issue in this case? Whether there has been consent? The fact, the order in which these transactions took place has got nothing then to do with it.

25

MR TILL QC:

I think you're right Your Honour. I'm not suggesting that merely by virtue of the leases preceding the mortgage, they take priority. I say it's because of consent, as you say, but that –

30

TIPPING J:

But you're saying that if a mortgagee lends money, knowing that there are leases in place, it's not such a long step to say that he's consented to them.

MR TILL QC:

Correct.

TIPPING J:

- 5 Yes. That's where the question of acquiescence and positive assent comes very sharply into focus, doesn't it? It's one thing to say you know of them, it's quite another thing to say you have consented to them, positively.

MR TILL QC:

- 10 I agree with that Your Honour but what I say is that the distinction between acquiescence and consent is much sharper and more necessary when the lease is being created out of the mortgage and when the lease predates the mortgage I suggest that acquiescence and consent are not really apt terms. Simply a question of whether there is consent or not and my suggestion is that the taking of security
15 with knowledge of a prior lease is consent. It is a positive act. It's not merely an acquiescence. In fact the concept of acquiescence really doesn't have any part to play in that factual matrix.

TIPPING J:

- 20 What about that bit in the Land Transfer Act which says that notice of an outstanding interest –

BLANCHARD J:

Yes, section 182?

25

TIPPING J:

Yes, shall not of itself be, you know, you're not fraudulent just because you take with notice of an outstanding interest which you later give up by dint of indefeasibility. Fraud is not – I know I'm talking about fraud but we've got to reconcile this with that.

30

MR TILL QC:

Well of course I'm not arguing fraud.

TIPPING J:

No I know you're not but we've got, we've got to see this question of consent as surely meaning more than just being aware of.

5 **MR TILL QC:**

Yes but consent here is a very real issue for a mortgagee taking its security, knowing that there are tenants, and indeed using that income stream as part of its rationale for accepting the security in the first place. So that's not merely taking its security with knowledge but in reliance on and in that way with approval of and I say
10 that that's a positive action amounting to consent.

BLANCHARD J:

It maybe approving that there are leases there and there's an income stream but it's not a consent to the leases ranking ahead of the registered interests which it is
15 taking.

ELIAS CJ:

Unless it's an implied consent and that's the issue, really, isn't it?

20 **BLANCHARD J:**

And you can get implied consent in certain circumstances.

ELIAS CJ:

Yes.

25

MR TILL QC:

Well that's, that's what I am arguing.

ELIAS CJ:

30 Yes.

MR TILL QC:

I'm not saying that there was a piece of paper signed by the mortgagee saying, I consent, or indeed words to that effect.

McGRATH J:

And you're also accepting, aren't you, that its' got to be more than acquiescence in a state of affairs to be consent?

5

MR TILL QC:

I do. I don't –

McGRATH J:

10 So you're not disputing the line of authority in the *New Zealand Fisheries* case. You're basically saying on the facts it was established without argument that it had gone beyond that and had become a consent.

MR TILL QC:

15 Precisely. I don't disagree with any part of what Your Honour's just said.

McGRATH J:

Okay. I understand your argument.

20 **ELIAS CJ:**

Mr Till, I have a meeting now so it would suit me to take the adjournment promptly. Is that convenient?

MR TILL QC:

25 Indeed it is Your Honour, thank you.

COURT ADJOURNS: 1.01 PM

30 **COURT RESUMES: 2.17 PM**

MR TILL QC:

I was just concluding that part of my argument relating to consent before the adjournment and I don't wish to labour on in that field, but simply to draw the Court's
35 attention to page 17 of my argument as to the interpretation of consent and

particularly paragraph 57 where I make the submission that the Court of Appeal erred in applying the in personam exception and to say that it's simply the question of the application of the statutory provisions and that of consent in sections 105 and 119, which is to be applied. I carry on then through at the bottom of page 19 to deal
5 with the question of whether there was consent and at the top of page 20 summarise the reasons given by Justice Fogarty finding consent and I adopt those reasons which I summarise at page 20 and 21. Before serving at page 21, that in my submission the Court of Appeal also found there was consent but it found a consent of a more limited kind, namely one limited to a short term tenancy and my
10 submission is that it was not a logical basis on which limit consent. It's contrary to the section itself and note the registration has its own place in determining priorities as recognised by section 105. So consent will never be an issue if the leasehold interest is registered, it's only relevant, whereas here the interest is not registered, or it's registered subsequent to the mortgage. Having dealt then with consent, I move
15 unless there is anything else the Court wants me to address under that heading to the next part of the argument, namely that about whether the appellant is an operator and that's set out at page 9 of my submissions, so I note the relevant definitions, and particularly the definition of operator, which is widely defined in section 5 and the issue of course is whether the appellant was exercising effective management or
20 control and I note that neither management nor control are defined and I submit at 34 that control is a wider concept than that of management and involves the ultimate command and power to direct the course of the retirement village. At 37 I submit that the exercise of the power of sale must be the ultimate control of a retirement village, followed closely by the taking of possession and it's difficult to envisage how
25 the taking of possession and/or sale, does not amount to management, given the effect that those decisions must have on the village.

McGRATH J:

In effect you're saying that any form of exercise of the mortgage security amounts to
30 exercising that control, because you said the words "or sale".

MR TILL QC:

Yes that's right. So that's the broad submission that any exercise of those powers will suffice.

McGRATH J:

Wouldn't Parliament have been more likely to use language that said as much in (b) rather than the phrase, "exercising effective management or control?" If it simply
5 said, if it's exercising its powers of sale, or other powers under the mortgage.

MR TILL QC:

Yes, but looking at the effect of exercising the powers of sale they amount to, I submit, fulfilment of Parliament's words so that whilst it could've been expressed in a
10 different way, the way in which it was expressed suffices to satisfy to this case.

McGRATH J:

It seems to me to be a rather roundabout way of saying words such as exercising the power for sale to talk about effective management and control. It almost seems to
15 be in contrast with exercising a power of sale and denoting the ability to go in and take possession as a mortgagee, to exercise powers in that regard, in particular to receive some sort of owing to the operator under the agreements.

MR TILL QC:

20 Well there's no reference to the need to take control of an income flow, and so the concept I submit is wider than that. It's wide enough I suggest to include a number of different concepts, including those which are being – were being applied here. But the intention I suggest is to take it to a wider framework than simply the exercising of those remedies which become vested in a mortgagee following default
25 so that the definition of those that are exercising the power – if I just start that again, but. Really the answer I make to your question Your Honour is, yes it could've been put in more precise terms, but it wasn't, and the larger, broader definition, includes the particular,

30 McGRATH J:

Yes right, I understand that, thank you.

MR TILL QC:

Now once a mortgagee becomes an operator, it's bound then forthwith to make application for registration, if the time for doing so has elapsed as is the case here. And breach of that duty is a breach of section 12 and an offence under section 79.

5 Just reverting to the Court's questions of my learned friend this morning in relation to sanction, section 79, subsection (6) does include wider sanctions for any breach of the act.

BLANCHARD J:

10 Do you need to go there? If the mortgagee becomes an operator, it should've done what an operator should've done, namely make the section 10 application, everything would then have followed and the notation would have appeared on the title and the mortgagee could not in those circumstances claim to be in any better position than if there were already something on the title.

15

MR TILL QC:

That precisely is my argument Sir, and I don't seek to go further, all I do is –

BLANCHARD J:

20 I had the impression that Mr Hughes-Johnson accepted that part of the argument.

MR TILL QC:

Yes. All I was seeking to do in referring to section 79(6) was just to really respond to the Court's question of my learned friend that there is some sanction for breach of section 10, albeit a much lesser penalty under section 79(6), it's no part of my argument, it was just to fill in that gap. Can I also in the same vein, just direct attention to the provisions of section 18 of the Act in relation the power of the registrar to suspend the registration of any retirement village if there is a failure to comply with the Act. That's section 18(1)(b), so that in looking at the enforcement provisions, that's an option which is open, which I will return to in the third part of the argument in a moment.

25

30

TIPPING J:

You can't suspend a registration that hasn't occurred.

MR TILL QC:

I agree, but I really fill in the gap but come back to it in a moment in relation to this question of whether there is a deemed registration. I've made the argument I think
5 as summarised a moment ago by Justice Blanchard in relation to the exercise of effective management and control, my argument that accordingly the appellant is the operator and the consequences of obligation to register. That argument was not dealt with by the Court of Appeal at all and so I simply revert to the findings to that effect in the High Court and adopt the reasons that were advanced there, as I have
10 expressed them to be. Moving then to the deemed registration under section –

McGRATH J:

Can I just, before we leave operator, I'd like to seek your assistance in clarifying a situation as it might be, might well be for the future and other cases, but just what's
15 in my mind, but it could be in this case if we found that the mortgagee was not an operator. Can I just ask you, is the section 10 process an onerous one for a new operator, if a new operator were to be brought in, into this matter by the residents. What I have in mind, is if contracts were cancelled and the residents entered into new contracts with someone who was going to become an operator, now that
20 operator would obviously not want to take on something onerous without costs being reimbursed, but I'm just really wondering how much is there that's onerous and getting registration in that section 10 process with all the schedules and the rest of it.

MR TILL QC:

25 I think the main burden lies in the cost Your Honour.

McGRATH J:

The cost, yes.

MR TILL QC:

30 The cost. If you want me to, I can tell you what I understand that to be, but I don't want to uninvited give evidence from the bar, but that is a significant issue.

McGRATH J:

No, no, well you could probably, it's probably in the Act anyway, but it's these things, certain matters of quality that have to be certified and in relation to the premises, aren't they all.

5 **MR TILL QC:**

Well it's the matters which are set out in the schedules, and so the disclosure requirements in schedule 2 deal with ownership, management and supervision. I don't imagine that that of itself is onerous, it simply requires a statement dealing with those matters to be prepared. Likewise the state of the village, services charges and
10 accounts needs to be disclosed, so it's the sort of consumer protection type disclosure one would expect and again I don't envisage that as being particularly onerous, it's simply a question of getting those details together into the right format. The occupation right agreements and termination deductions and estimated financial returns, likewise in a reasonably organised retirement village, each of those matters
15 should be addressed and would be able to be provided. The other matters referred to in part 4 of schedule 2 relate to disclosure of security interests and again in my submission not particularly onerous. Then schedule 3 sets out the requirements for the occupation right agreements, well simply is a question of drafting those agreements to ensure that they do comply, there must be –

20

McGRATH J:

The cost burdens of a continuing kind there, but presumably it is intended will be met by regular payments.

25 **MR TILL QC:**

I think the occupation right agreements can provide for continuing payments to be made by the residents to meet ongoing costs, does that answer Your Honour's question?

30 **McGRATH J:**

Yes. And there are payments provided for in the agreements in this case I see.

MR TILL QC:

There are. Yes, they're relatively limited and the range of the services are limited and much less so than many other retirement villages but there is an element of that.

McGRATH J:

5 Of course yes, but I appreciate the sort of village this is.

MR TILL QC:

Yes. And there are – the minimum required rights to be provided in a Code of Rights under schedule 4 and likewise matters to be included in a Code of Practice in
10 schedule 5, so the actual content would appear to be not that onerous but I do understand that the financial cost –

McGRATH J:

Well perhaps I could put to you, just thinking about the scheme of the Act, if it turns
15 out that, and let's put this hypothetically, a mortgagee has not done anything that amounts to exercise effective control and management and doesn't become an operator, but your original operator is now dissolved and as, perhaps nothing effective can be done, it still would be open wouldn't it, for the residents together to terminate the occupation agreements and to reach an agreement a new operator,
20 the question would be at what cost over and above the original agreement.

MR TILL QC:

Theoretically that is possible, assuming of course –

25 **McGRATH J:**

And the new operator could get registration and the memorial would follow with all of the associated consequences possibly.

MR TILL QC:

30 Possibly, but that assumes of course that the new operator wishes to become an operator and in the hypothesis you suggest, there would be no obligation on that new operator to do so.

McGRATH J:

But they'd have to find a new operator or create a new operator perhaps to do that. But Cashmere's not going to be much of an operator if you snare them in your net. After they've done the registration, they're not going to be likely to be an operator in the normal continuing way that you have an operator.

5

MR TILL QC:

That's probably right, but of course the consequences for the residents of that would be that they do have the right then to continue to occupy their units which otherwise they would not.

10

McGRATH J:

Yes, well I'm sorry, I just wanted to float the idea of the notion that a new operator could come in, get registration and leave the residents in pretty much the same position.

15

MR TILL QC:

In theory that could happen, in practice I suggest it's most unlikely because a new operator, if a purchaser from the mortgagee free of the interests of the residents, is likely to, well they might have a number of uses for these premises and otherwise is likely to be in a position to command –

20

McGRATH J:

I'm not thinking of anyone purchasing free of the interests of the residents, no. Thank you that's sufficient for my purposes.

25

MR TILL QC:

Unless there's any further on the question of the operator, I move to the third question and that of the deemed registration under section 103 and as I indicated to the Court this morning, that was no part of the argument prior to receipt of the judgment, so I wasn't clever enough to think of that argument on my own.

30

TIPPING J:

You are to be congratulated – enough to defend it.

MR TILL QC:

Well I shall give it my best shot Your Honour. And I really start with looking at what is the purpose of section 103, which was the emphasis which Justice Tipping gave this morning and I put some emphasis on the first part of the double at section 5 103(2), subsection (a) which is the prevention of the avoidance of obligations under the Act as a consequence of any scheme or arrangement and of course there is the second of clarification. Now –

BLANCHARD J:

10 What were they thinking of when they referred to scheme or arrangement?

MR TILL QC:

I think that's put in its broadest possible terms deliberately, so that if anybody has thought of something clever, to avoid the objectives of this Act, to protect retired 15 people, consumers, then the declaration would assist in avoiding that, or preventing that. Now –

BLANCHARD J:

So this would perhaps enable the Minister to recommend the making of an Order in 20 Council in relation to something that perhaps technically mightn't be a retirement village, because of the way it's been structured, but which in reality is a retirement village.

MR TILL QC:

25 I think it would be open to that if it were a scheme or arrangement which had as its objective the avoidance of obligations which would otherwise lie into the Act.

McGRATH J:

Within section BG(1) of the Income Tax Act. Or Section 108 as you and I might have 30 known it.

MR TILL QC:

Yes. Now there is clearly no utility in a declaration under 103 in respect of a registered retirement village, so it must related to an unregistered retirement village and the question of course for the Court is, what's the consequence of such a declaration. I submit that the purpose of the declaration is to put it beyond doubt that the retirement village is subject to the Retirement Villages Act and accordingly is the equivalent of registration. So I submit that the retirement village the subject of a declaration is required to be equated to a registered retirement village and thereby become subject of the obligation of the Registrar General to note the memorial. I accept there's nothing specific in the Act which spells that out and I'm driven necessarily to the proposition that this is a requirement that arises by necessary implication.

Now as to the difficulties which my learned friend points to arising from registration in that manner, my submission is that they're more apparent than real. The fundamental purpose of this Act is to protect residents and that would be achieved by what I've just suggested. Yes there would be some technical administrative difficulties which follow, but they can be dealt with, I submit, by the section 18 suspension power of the Registrar. So that if there is a continuing default of the recalcitrant operator to provide for the matters I've just been through in the schedules, then the Registrar can under section 18, suspend the retirement village and the effect of a suspension is such that the retirement village is unable to acquire new residents or effectively extract money out of new residents, pending completion of those requirements and in that way the happy result is achieved of protecting the existing residents with without exposing this deemed registered retirement village to risk for new residents until those –

McGRATH J:

They won't be able to negotiate their interests will they? They won't be able to transfer their rights to others, their mistakes.

MR TILL QC:

No, correct, there would be some disadvantage to current residents, but for those looking at becoming prospective residents, they would be protected by such

suspension. Then the penal provisions come in which become the matter of forcing the recalcitrant operator to comply.

TIPPING J:

5 Which of (2)(a) and (b) do you say the Minister would be acting on in making a recommendation in this situation? I know we're not attacking the order, but I'm just trying to see how this scheme in this section relates to your proposition that there's necessary implication that registration follows from the making of an Order in Council, follows of itself from the making. It seems that it's not a matter of clarification, it doesn't seem very easy to fit it into the avoidance provision either, because it's not general avoidance of obligations, if they'd stop there, then that might have been a runner, but it's as a result of the consequence of any scheme or arrangement.

15 **MR TILL QC:**

The word arrangement is a wide one and the avoidance as the result of an arrangement is therefore very wide, so almost –

TIPPING J:

20 You mean this defaulted registration could be regarded as an arrangement?

MR TILL QC:

Yes. There had obviously been a long-term default by the original operator here. Now there is no evidence as to what motivated that, but if one thinks of the likely motivations, for example saving money, then that is open to being described as an arrangement by the operator, an arrangement not to –

ELIAS CJ:

30 But an arrangement must be – there must be some architecture to it surely?

MR TILL QC:

Yes, but if the –

ELIAS CJ:

There must be some design, scheme or arrangement.

MR TILL QC:

5 But it doesn't have to be a complex design. Now if the design is simply to not comply with obligations under the Act so as to save money –

ELIAS CJ:

Oh my goodness.

10

WILSON J:

Mr Till, on the Court of Appeal approach, does the duty on the Registrar General to note the memorial arise under section 21?

15 **MR TILL QC:**

Yes, the Court of Appeal doesn't make that particularly clear Your Honour, and there's obviously two possible alternatives. One is that by reason of the ordering counsel itself, the Registrar General of land is obliged to note the memorial. The other is that the Registrar of retirement villages is required to register and the noting
20 then follows. It's not clear which the Court had in mind. Either is possible. The problem with it being firstly the registration is that there are two steps then to be taken. The problem with it not being the two steps, is that the memorial is specifically provided by section 21 –

25 **WILSON J:**

It's difficult on that approach though isn't it to, or can you suggest any reason why, if that indeed be the position, section 21 does not refer to section 103 orders as well as registered villages.

30 **MR TILL QC:**

No, and clearly it would be preferable if it did. I can't advance any rational explanation for its absence.

WILSON J:

Yes, I have a great deal of sympathy for counsel seeking to defend an argument which wasn't one that you advanced and I can certainly see that that is a response.

5 **MR TILL QC:**

Yes. So I'm really driven back to say it's by necessary implication and by one means or another but given the provisions of section 21(3) which requires the Registrar General to note on any title relating to a registered retirement village, then I'd probably have to go for the two-step answer, so that I do.

10

TIPPING J:

Yes, I think that's right Mr Till, I think you do have to go for the two-step answer, which means that the implied duty is on the Registrar of Villages to register.

15 **MR TILL QC:**

Yes, to register the village and in consequence the Registrar General to register the memorial. Your Honours, those are my submissions in relation to the deemed registration. I feel I've slipped through the material very fast and no doubt missed much of importance but thank you –

20

McGRATH J:

Were you able to ascertain any information during the day about the appointment of the liquidator?

25 **MR TILL QC:**

Yes, sorry, thank you for reminding me of that Your Honour. What I have is two things. Firstly my instructing solicitor has obtained a printout from the Companies Office which shows that Crossdale Properties Limited has been struck off as of, it appears, the 19th of November 2008 and I have copies of that to give to the Court.

30 There is no indication on this that indeed there has been any liquidation of the company.

ELIAS CJ:

Well, we've got a defaulting –

TIPPING J:

Curiouser and curiouser as somebody once said.

5 **BLANCHARD J:**

Well probably a lot easier to get back on.

McGRATH J:

And if you know of no attempts to disclaim onerous property or anything of that kind?

10

MR TILL QC:

No I don't Your Honour. So if I might hand that up. I have provided my learned friends with copies of that. the other thing I have, if the Court would find it of any assistance, is the original statement of claim and the only basis on which I would trouble the Court with that is in support of the argument that there was steps taken to obtain from the Court an order for possession and that that is relevant to the issue of the appellant being an operator. Does the Court wish to receive the statement of claim?

20 **ELIAS CJ:**

Yes, that would be fine, thank you. Unless there are other matters that I have failed to address, those are my submissions.

ELIAS CJ:

25 Thank you. Yes Mr Hughes-Johnson, do you want to be heard in reply?

MR HUGHES-JOHNSON QC:

Thank you Ma'am. I apprehend from this morning's hearing that an issue which I do need to address is the issue of the operator argument and in particular the question of the effect of threatening to take possession and I ask the Court to refer to the definition in section 3 – section 5 sorry. The whole of the security interest in this exercising effective management or control of the retirement village. Now it is, I think, common ground that possession has not, in fact, been taken so the question is, as was adverted to this morning, whether or not the threat of taking possession is

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by itself enough. Not a matter that I had considered prior to His Honour Justice Tipping raising the matter this morning but when one looks at the definition it speaks of the holder of a security interest who was exercising effective management –

5 **TIPPING J:**

What is this term, a definition of – sorry.

MR HUGHES-JOHNSON QC:

This is the definition of operator sorry.

10

TIPPING J:

Oh definition of operator.

MR HUGHES-JOHNSON QC:

15 Yes, sorry. I perhaps didn't make that as clear as I should have. The point there being that it is not, that I apprehend that what maybe against me is the suggestion well if you're attempting to get possession and you're threatening possession then you're along the path such as you are caught as being an operator, as being someone who is exercising effective management or control. The purpose of this
20 submission in reply is to ask you to consider the effect of the word effective. It is not effectively exercising management or control which would be, which could catch Cashmere in the sense that His Honour Justice Tipping referred to this morning, in other words, effectively what you're doing is you're effective, you may not be in possession, but you're effectively exercising management or control. The position of
25 the word effective, in my respectful submission, suggests something more consequential than merely making a demand for possession.

TIPPING J:

Doesn't effective probably it meant to distinguish between legal and practical?

30

MR HUGHES-JOHNSON QC:

Well with respect Sir I'd read it as in the context of the argument I'm putting now, that the management or control had to be effective. It can't be by merely threatening to

be in possession, you can't be, you can't say that the management or control is affected. It's threatened.

BLANCHARD J:

5 What does effective mean in that context? Does it mean it has to be successful?

MR HUGHES-JOHNSON QC:

No I – in my submission it means you've got to be a little bit further along the line than merely writing a letter threatening.

10

McGRATH J:

You've got to be, if you like, executing management and control.

MR HUGHES-JOHNSON QC:

15 Executing. Part of –

McGRATH J:

That's your argument?

20 **MR HUGHES-JOHNSON QC:**

– the way along, driving your truck in and saying, look, you've got to get out.

TIPPING J:

Actually managing or controlling –

25

MR HUGHES-JOHNSON QC:

Actually managing or controlling.

TIPPING J:

30 – rather than having a legal power to do so.

MR HUGHES-JOHNSON QC:

And it's the position of the wording itself. It's not effectively exercising management or control which I respectfully submit is subtly different. You could be effectively

exercising management and control by doing something that wasn't, in fact, management or control but is effectively management or control. This is dancing on the end of a pin. Well I hope it's not seen as that but.

5 **McGRATH J:**

It's looking to come back to the notion of, as opposed to legal if you like, de facto or practical or something like that. It's looking for someone who's doing the things that the operator would be doing under the contract in relation to the village, under the occupation agreements, which is what A is concerned with?

10

MR HUGHES-JOHNSON QC:

Yes and if I may pray in aid the suggestion that this is dealing with, going along the line, is that when you look at the definition of a mortgagee in possession, it contemplates again something more than merely threatening, as section 139, more than simply threatening that you were going to go into possession. I appreciate that's not the argument here. That's not directly relevant to this argument, the argument here, because this is what is effective management or control. But in my submission if Cashmere was to be captured by this definition it would have to be effectively exercising management or control. I'm not necessarily conceding that it would capture it but it would get much closer to capturing it than the wording as it is at the present time. And it must be noted that Cashmere firstly has not exercised any – in fact, exercised any form of control and of course has not, in fact, been involved in any formal management, unless one takes, leaving aside the letter and of course I accept the pleading in the Court. Now –

25

TIPPING J:

It's interesting Mr Hughes-Johnson that in C, if those are receivers or liquidators, simply being such doesn't make them an operator. They have to have either para A or para B applying to them. So they've either got to have a liability to fulfil all or any of the obligations or be effectively managing or controlling so they're not operators per se on assuming those offices. I'm not quite sure whether that helps your argument or not.

30

MR HUGHES-JOHNSON QC:

I think it does, with respect Sir, because if the argument, the argument against me is that you don't need to get very far along the line, you can write a nasty letter threatening to take possession, have that rejected and be cast as an operator. Now
5 clearly subsection (c) –

TIPPING J:

I am sorry, I think I have misread it. I think I have misread it.

10 **BLANCHARD J:**

I think the distinction is –

TIPPING J:

I'm sorry, I've –

15

BLANCHARD J:

– simply because of the different status of the receiver and the liquidator.

TIPPING J:

20 I'm sorry, I've caused you unnecessary – I have misread it. It's the receiver or liquidator of the person to whom – I just –

BLANCHARD J:

No. It deals with a receiver in relation to property because a receiver is always
25 appointed in relation to the property. The liquidator is merely appointed to fulfil -

MR HUGHES-JOHNSON QC:

Oh yes, I, yes. I accept that.

30 **TIPPING J:**

It's not, it doesn't go – Mr Hughes-Johnson I withdraw in disarray.

BLANCHARD J:

We all have moments like that.

MR HUGHES-JOHNSON QC:

I'm not going to withdraw yet but what – consistent with the, the scheme of the Act and with respect I don't agree with my friend for a minute that the obligations are not
5 onerous. Now I'm not going to give evidence from the bar but there are continuing obligations which have to be dealt with year to year and fees are incurred in relation to those obligations. There are significant obligations if one is an operator and in my respectful submission in support of the view that one should be cautious before stating that Cashmere is captured by this definition, is the proposition that because
10 there are these significant and onerous obligations, one really should not be left in a state of uncertainty as to whether you have actually been caught or not. Now writing a letter is one thing. Going into possession, one can understand if you have gone into possession or you've driven your truck in or you've taken control of the revenue stream, be quite reasonable to say, well you must have known that, that you are now
15 an operator. Writing a letter in a situation where the other side have written back and said, no, you can't do that, and resisted it in court, is that a situation where you would really think that because you've written that letter you've suddenly got to go off and register the retirement village. In my respectful submission the purpose of interpretation of that operator definition does not come up, does not result in that
20 consequence.

And lastly in this, under this head, it is to be recalled that Cashmere has only eight of the 22 units, and His Honour Justice McGrath questioned my friend about new agreements with the residents. How is Cashmere going to get an agreement with
25 residents over which it has no, it hasn't got a mortgage over all the properties, only over eight of them. So the question is, how can Cashmere in practical terms become an operator and register because the residents in respect of who there is no mortgage will say, well I'm not going to talk to you and negotiate over the terms of the occupation right agreement.

30

McGRATH J:

There are other residents with occupation agreements –

MR HUGHES-JOHNSON QC:

Yes.

McGRATH J:

5 – but no mortgages in respect of their properties.

MR HUGHES-JOHNSON QC:

Yes.

10 **McGRATH J:**

So they don't have an operator effectively. They have a struck off company as operator?

MR HUGHES-JOHNSON QC:

15 Well the point about it is that if Cashmere is to be the operator there are obviously some logistical problems in relation to how it, if it is cast as being an operator, and this Court says that it is an operator, it's then got a statutory obligation to carry out things which, in my respectful submission, it may have considerable difficulty in doing. Now that was a, I'm conscious of the fact that that was a matter which was in
20 my yellow submissions. My friend hasn't heard this particular, these particular submissions because of course they are in response to His Honour Justice McGrath's comment, but –

BLANCHARD J:

25 I suppose there is the argument coming back to operator that if the security is only in relation to some of those units, if I can call them that, it might be difficult to argue that there's an exercise of effective management or control of the retirement village.

TIPPING J:

30 But the definition of security interest talks about an interest that a person other than a resident has in all or any part of the retirement village so they've sort of half thought of that.

ELIAS CJ:

Which one's that?

TIPPING J:

- 5 Definition of security interest as in all or in part of the retirement village as a consequence of holding up anyone with those types of securities so –

McGRATH J:

What section's that?

10

TIPPING J:

It's definition of security interest in section 5.

BLANCHARD J:

- 15 Of course they have to do that for certain other sections of the Act.

TIPPING J:

It just demonstrates that this Act is not as tightly worked through as might have been desirable.

20

McGRATH J:

That is the definition of a retirement village also can cover part of any property building.

25 TIPPING J:

You can control, become an operator of part of a retirement village then, you're an operator. That's what it seems to say of that power, but that's enough.

MR HUGHES-JOHNSON QC:

- 30 I suppose where I'm heading with respect, is that in looking and giving the Act a purposive approach and in particular the section, one needs to exercise with respect, some caution about putting a party, a mortgagee, in a position where the responsibilities of registration are upon that mortgagee.

TIPPING J:

Is your best point Mr Hughes-Johnson that you did no more than is a natural corollary or consequence of exercising your security, and that cannot be intended to make you an operator.

5

MR HUGHES-JOHNSON QC:

Yes it is. I must acknowledge, a mortgagee does not need to go into possession of course to sell. Didn't go into position.

10 **TIPPING J:**

No, no, but read in context and those letters given a benevolent construction, you didn't do any more because you may have thought, by you I mean your client, may have thought that it was necessary to write those letters in order to get vacant possession, that may not have been a very lucid thought, but –

15

MR HUGHES-JOHNSON QC:

But there's one, the last letter I think is quite an interesting one, and that is the letter which – the impression one gets, if I can put it this way, in looking at the letters, is that it was thought that there would need to be vacant possession upon sale, that's perhaps to get it as shortly as I can. Whereas theoretically that is not strictly necessary legally to convey the mortgagor's title. Of course it's a matter of law that that –

20

TIPPING J:

25 But you don't have to go into possession yourself in order to give vacant possession that's the –

MR HUGHES-JOHNSON QC:

30 No, no, you get it as by operation of law. Just in relation to that point about the mortgage, of course other people have got mortgages over the other units, but my –

McGRATH J:

If their own mortgages are met.

ELIAS CJ:

Other finance companies have advised.

MR HUGHES-JOHNSON QC:

5 Other mortgages are involved with the other units, but it's just that the Cashmere, which is the appellant here, has mortgages over eight of the units.

ELIAS CJ:

So what is the position with this, with respect to the whole project?

10

MR HUGHES-JOHNSON QC:

Well I think my friend will correct if I'm wrong, two of the units of the eight I think are vacant so – and I think that the residents are still living there. At one stage there was a caretaker and that's I think in the evidence. I'm not sure what the status is, there's
15 no evidence as to whether he's still – is whether there is a caretaker there or not, because to be someone, I think they used to collect the rubbish and there was someone who would come and look after people if they were sick, they'd get a doctor and this sort of thing.

20 **ELIAS CJ:**

Well thank you counsel. We'll have to consider our decision in this matter, but thank you for your assistance.

COURT ADJOURNS: 3.05 PM

25