

IN THE SUPREME COURT OF NEW ZEALAND

**SC 46/2009
[2009] NZSC 123**

BETWEEN	CASHMERE CAPITAL LIMITED Appellant
AND	PATRICK KEVIN CARROLL First Respondent
AND	THOMAS WILLIAM RAINEY Second Respondent
AND	B V STRANGER Third Respondent
AND	MARGARET MARY TERESA CUNNEEN Fourth Respondent
AND	PATRICK KEITH BROWN Fifth Respondent
AND	JUNE H PARSONS Sixth Respondent
AND	MARY ELLA LORY Seventh Respondent

Hearing: 5 November 2009

Court: Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ

Counsel: A C Hughes-Johnson QC and G A Hair for Appellant
N A Till QC for Respondents

Judgment: 4 December 2009

JUDGMENT OF THE COURT

A The appeal is allowed.

B The judgment of the Court of Appeal is set aside.

C Costs are awarded to the appellant in the sum of \$5,000, plus disbursements to be fixed if necessary by the Registrar, to be costs in the cause.

REASONS

(Given by McGrath J)

Introduction

[1] This appeal raises an issue of priority between persons having competing interests in an unregistered retirement village. The appellant is the holder of a registered mortgage secured over property comprising part of the retirement village. The respondents occupy residential units in that part of the village. They have exclusive rights of occupancy for life under unregistered agreements which are accordingly leasehold interests. They entered into those agreements with a company which is the owner of the retirement village. It is also the mortgagor. The issues between the parties to the appeal have arisen because of irregular acts of the owner which appears now to be insolvent, although it has not at this point been put into liquidation.

[2] Two issues in the appeal raise questions concerning the meaning of provisions of the Retirement Villages Act 2003, which was enacted to provide a regime for the protection of all residents of retirement villages. The third concerns whether the appellant mortgagee has consented to the residents' interests in a manner that has caused it to lose the priority it would otherwise enjoy under the Land Transfer Act 1952.

Background

[3] Since 1986 Crossdale Properties Ltd (Crossdale) has been registered as proprietor, under cross leasehold and freehold certificates of title, of eight residential units, in a complex comprising 22 former motel units, in Curlett's Road, Christchurch.

[4] Between 1998 and 2004 Crossdale entered into agreements with five of the respondents, Messrs Carroll, Rainey, Stranger and Brown and Ms Lory. These agreements gave each the right of occupancy of a particular unit during his or her lifetime. In return each respondent made an unsecured loan advance to Crossdale and became liable to pay a weekly charge for village services. Similar agreements were entered into by Crossdale with two other respondents, Ms Cunneen in November 2006 and Ms Parsons in 2007. The loans ranged between \$24,950 and \$54,950. They were repayable on death, when possession of the unit would revert to Crossdale.

[5] The agreements between Crossdale and the respondents (the residents) were not registered against the certificates of title, nor did any of them lodge caveats against the titles to notify their interest.

[6] In August 2006 the appellant, Cashmere Capital Ltd (Cashmere) advanced a total of \$875,000 on loan to Crossdale secured by a first mortgage registered over the certificates of title to the seven units occupied by the residents, and one additional unit not involved in the proceedings. There was a further advance of \$65,000 on 28 September. Cashmere registered its mortgage under the Land Transfer Act 1952 on 11 September 2006. Crossdale's covenants as mortgagor are supported by the personal guarantee of Garry Campbell who was Crossdale's principal shareholder and director. Crossdale defaulted in payment of interest and repayment of principal on the loans and, following service of default notices under the Property Law Act 1952, it became Cashmere's intention to exercise its power of sale of the property.

[7] In February 2008 an employee of Cashmere visited the property. Some of the residents advised her of the agreements they had entered into with Crossdale, their rights of occupancy and the payments they had made. Affidavits filed in this proceeding indicate that this was when Cashmere first learned of these transactions. Cashmere's evidence is that at the time when, in good faith, it made the loans it was informed by Crossdale and believed that the residents were each tenants of a unit at a weekly rental of \$187. In fact, under their agreements, the residents were making weekly payments of only \$30 for the very basic services provided by Crossdale to the complex and each unit.

[8] Cashmere wrote to the residents on 14 February 2008 asserting that its mortgage had priority over their interests and seeking that they vacate their units. It also issued proceedings in the High Court against Crossdale, Mr Campbell and the residents.

The proceedings

[9] Cashmere's statement of claim sought judgment against Crossdale and Mr Campbell, for the amount of the debt. Against the respondents it pleaded that it had the rights under its mortgage to enter into possession of the property and to sell it under its power of sale. Cashmere sought orders that the residents vacate and deliver up vacant possession of their respective units. It applied for summary judgment against all parties asserting that none of them had a defence to its claims.

[10] In their notices of opposition the residents pleaded that Cashmere's rights as mortgagee were subject to their rights, under both their agreements with Crossdale and the Retirement Villages Act 2003. They said that statute required Cashmere to apply for and secure registration of their units as a residential village under the 2003 Act. Cashmere would then be precluded from disposing of the units, when exercising its power of sale as mortgagee, other than as part of a residential village which was a going concern.

[11] Cashmere subsequently filed an amended statement of claim pleading that it was not bound by the residents' agreements. It claimed that Cashmere was not required to obtain registration of the units under the 2003 Act because it was not an "operator" of a village in terms of that Act. The Act did not impinge on Cashmere's interests as a registered mortgagee and it could sell the land as mortgagee under its power of sale on the basis that the purchaser was entitled to vacant possession.

[12] One resident, Mr Carroll, then applied to strike out Cashmere's claim on the further ground that Cashmere had consented to the residents' agreements and accordingly was required by ss 105 and 119 of the Land Transfer Act 1952 to accord the residents' interests priority over its own registered mortgage.

Judgments of the High Court and Court of Appeal

[13] In the High Court,¹ Cashmere's application for summary judgment against the residents came before Fogarty J who was not persuaded that there was no bona fide or reasonable ground for the residents to defend Cashmere's claim. He therefore dismissed Cashmere's application for summary judgment. During the hearing counsel for the residents had applied for judgment to be entered against Cashmere in the proceeding, on the ground that none of its causes of action against the residents could succeed.² Fogarty J set a date for the hearing of this application and that of Mr Carroll, giving Cashmere leave to file further affidavits on the two defences raised by the residents. The first was that Cashmere had consented to the residents' occupation agreements and was bound by them. The second defence was that Cashmere was an 'operator' of a retirement village comprising the residents' units. As operator, it was bound to obtain registration of the village under the 2003 Act. That precluded Cashmere from giving clear title when exercising its power of sale of the units under its mortgage.

[14] After hearing argument at the resumed hearing, Fogarty J delivered a second judgment.³ On the first issue he decided that Cashmere had consented to the residents' occupancy agreements as leasehold interests. It followed, through the combined effect of ss 105 and 119 of the Land Transfer Act 1952, that the residents' interests in the mortgaged land had priority and were binding on Cashmere. On the second issue the Judge accepted the residents' submission that Cashmere had become an operator of a retirement village as a result of the steps it had taken to enforce its mortgage. That conduct had made Cashmere a security holder who was exercising effective management or control of the village.⁴ As an operator, Cashmere was required to ensure the residents' units were registered as a retirement village by making the necessary application under the 2003 Act. Under the Act the

¹ *Cashmere Capital Ltd v Crossdale Properties Ltd* (High Court, Christchurch, CIV 2008-409-000825, 9 September 2008, Fogarty J).

² Under r 136(2) of the High Court Rules.

³ *Cashmere Capital Ltd v Crossdale Properties Ltd* (2008) 9 NZCPR 766.

⁴ In terms of the definition of "operator" under s 5 of the Retirement Villages Act.

effect of registration would be that the residents' interests would take priority over Cashmere's mortgage.⁵

[15] The residents had accordingly established the priority of their occupancy interest to Cashmere's interest as registered mortgagee on each of the grounds they relied on. Fogarty J accordingly gave judgment for them.

[16] Cashmere appealed. The Court of Appeal differed from Fogarty J on the question of consent, holding that there was no positive affirmative act of acceptance of the occupancy agreements by Cashmere, nor any implied acceptance of the residents' interest by conduct.⁶ The Court of Appeal, nevertheless, decided the appeal in the residents' favour on a new point which had not been the subject of argument. An Order in Council had been made under s 103 of the 2003 Act on 30 June 2008, which declared all 22 units in Crossdale Courts to be a retirement village under the Act. The Court of Appeal held that, on the making of the Order in Council, the 2003 Act imposed an implicit duty on the Registrar-General of Lands to enter a memorial on the titles to the units in the retirement village stipulating that the residents' rights had priority over those of security holders.⁷

[17] As a result of this finding it was unnecessary for the Court of Appeal to address whether Cashmere was an operator of a retirement village under the 2003 Act. The Court dismissed Cashmere's appeal.

Issues on appeal

[18] Cashmere appeals with leave against the Court of Appeal's judgment. The approved ground is whether the restrictions in s 22(1) of the Retirement Villages Act will apply if Cashmere exercises its rights under its mortgage. The residents, as respondents in the appeal, support the judgment of the Court of Appeal in their

⁵ Under ss 21 and 22 of the Act.

⁶ *Cashmere Capital Ltd v Crossdale Properties Ltd* [2009] 3 NZLR 612 (Hammond, Arnold and Baragwanath JJ).

⁷ As provided in s 21(3) of the 2003 Act.

favour on that point and also rely on two additional grounds to support that judgment. The first renews the argument that Cashmere consented to leases in favour of the residents. The second is that Cashmere became an operator under the Retirement Villages Act with the consequence that it was obliged to obtain registration of the retirement village with the result that the residents have the protection of s 22 of the Act.

The Retirement Villages Act 2003

[19] The Retirement Villages Act 2003 is a measure directed specifically at giving protection to residents of retirement villages. Its genesis lay in concerns over the adequacy of the protection given by general securities legislation to residents of retirement villages from common financial risks in their contractual arrangements. A second concern was the lack of understanding by current and intending residents of the structure, and of the rights and obligations they assumed, in retirement village arrangements.⁸ These concerns are reflected in the two principal purposes of the 2003 Act:

3 Purpose

The purpose of this Act is—

- (a) to protect the interests of residents and intending residents of retirement villages:
- (b) to enable the development of retirement villages under a legal framework readily understandable by residents, intending residents, and operators:

[20] The 2003 Act lays down a regulatory framework that applies to every “retirement village”, a term which is defined in s 6:

6 Meaning of retirement village

- (1) In this Act, ... **retirement village** means the part of any property, building, or other premises that contains 2 or more residential units that provide, or are intended to provide, residential accommodation together with services or facilities, or both, predominantly for persons in their retirement, or persons in their retirement and their

⁸ See New Zealand Law Commission, *Retirement Villages* (NZLC R57, 1999), para [16] and Justice and Electoral Committee, “Retirement Villages Bill” at p 1.

spouses or partners, or both, and for which the residents pay, or agree to pay, a capital sum as consideration ...

[21] The 2003 Act prohibits any person from offering, or advertising, rights of occupancy in a retirement village, unless the village has been registered under the Act.⁹ It also imposes duties on the operators of retirement villages. “Operator” is defined to include all those who assume contractual obligations to persons who are or will become residents of the retirement village. The operator of a retirement village is required to ensure that it is registered.¹⁰

[22] Every operator also has a duty to appoint a statutory supervisor for the retirement village unless an exemption has been obtained.¹¹ Statutory supervisors are the contact persons for residents who wish to make complaints about breaches of their rights.¹² They also represent the interests of residents in a number of other ways provided for in the Act. These include representation of interests of residents in negotiations with a liquidator appointed for an operator.¹³

[23] The 2003 Act, and regulations made under it, are also highly prescriptive in detailing the requirements for registration. An application for registration must be accompanied by a disclosure statement containing information stipulated in Schedule 2 to the Act. This information includes details of the ownership structure and type of occupancy rights that are to be offered. Information must be given concerning the type of interest residents will have, whether those interests can be transferred and any restrictions on such dealings. Details of management arrangements for the village must be provided. The identity and role of the statutory supervisor must also be stated or that there has been an exemption from the requirement to appoint one. Information must be given about the state of the retirement village, the number of units that are occupied and unoccupied, the services and facilities, all charges

⁹ Section 25.

¹⁰ Section 10(1). Under s 12(1) an application for registration should have been lodged by 1 November 2007.

¹¹ Section 38(1). The Registrar of Retirement Villages may exempt an operator from the requirement but only in accordance with criteria specified in regulations: ss 41 and 104.

¹² Schedule 4.

¹³ Section 24.

imposed, provision made for maintenance and refurbishment and accounting arrangements.¹⁴

[24] Details concerning provisions to be included in occupation right agreements are also specified.¹⁵ They include arrangements following termination of occupation agreements and the financial implications of termination for residents. The Act requires that disclosure statements are complete in these respects with only limited exceptions. The Act also stipulates provisions which occupation right agreements must contain in relation to staffing, safety and management.¹⁶ The form of the occupation agreement must also accompany an application.¹⁷

[25] A Registrar of Retirement Villages is appointed under the Act. The Registrar on receipt of an application must register the village if the operator has complied with the statutory requirements but must not do so if the application or any supporting information is false, misleading or omits any material particular.¹⁸

[26] Once a retirement village has been registered, occupiers and promoters may advertise and enter into agreements for occupancy. The village remains registered unless its registration is cancelled or suspended under the Act. There are provisions for cancellation of registration which require the consent of 90 per cent of residents of the village after they have received independent legal advice.

[27] The Act also has provisions for continuing certification of the correctness and currency of registered documents by operators following registration.

[28] The Registrar of Retirement Villages must notify the Registrar-General of Lands of the registration of every retirement village. The Registrar-General is then required to note on every certificate of title or computer register relating to a retirement village, the words:¹⁹

¹⁴ Schedule 2, cls 1 and 2.

¹⁵ Schedule 2, cl 3.

¹⁶ Schedule 3.

¹⁷ Schedule 2, cl 3.

¹⁸ Section 10(3).

¹⁹ Section 21(3).

Subject to section 22 of the Retirement Villages Act 2003 (which provides priority for the rights of residents ahead of the rights of holders of security interests).

Notice of that memorial must be given to the holder of any security interest registered on the certificate of title.²⁰

[29] The entry of the memorial has important consequences for the protection of the interests of residents of the village through curtailment of rights of persons holding security interests over property of the village. Section 22 so far as is relevant for present purposes, provides:

22 Effect of memorial

- (1) If a memorial is entered under section 21, then, unless all residents of the retirement village have received independent legal advice and at least 90% of those residents have consented in writing, the holder of a security interest or any receiver or liquidator or statutory manager of property comprising the retirement village or of any operator of the village must not exercise any right to—
 - (a) dispose of the retirement village other than as a going concern; or
 - (b) disclaim any occupation right agreement relating to the retirement village as onerous property under section 269 of the Companies Act 1993 or section 117 of the Insolvency Act 2006; or
 - (c) evict any resident or exclude any resident from the use of any facilities or any part of the retirement village to which that resident is ordinarily entitled.

[30] That protection applies whether or not the security interest is registered on the certificates of title of the retirement village and even if the security was registered prior to a resident entering into an occupancy right agreement. The priority given by s 22(1) is, however, qualified by s 22(3):

- (3) The holder of the security interest, or any receiver or liquidator or statutory manager of property comprising the retirement village or of an operator of the village, may apply to the High Court for an exemption from any requirement of subsection (1), and that exemption may be granted subject to any conditions that the Court considers appropriate.

²⁰ Section 21(4).

[31] The extensive documentation concerning the retirement village required to obtain registration becomes available for inspection on a public register.²¹ The registration process, in this way, contributes to the statutory purposes by providing what the legislation intends to be a readily understandable, accurate and accessible record of the legal framework of the retirement village and the rights and obligations of residents and of operators with whom they deal. The availability of the prescribed information on a public register is a feature of importance in the scheme of the 2003 Act.

[32] There are a number of provisions empowering making of regulations. They include s 103 of the Act which empowers the Governor-General in Council to make an Order in Council declaring specified property or buildings to be or not be a retirement village. The power may only be exercised on the recommendation of the responsible Minister who must be of the opinion that the Order in Council is necessary for one of two purposes. The first purpose is to prevent avoidance of obligations under the Act through a scheme or arrangement. The second purpose is to clarify whether any particular property, the status of which is in doubt, is or is not a retirement village.

Is the Registrar-General required to enter a memorial?

[33] It is convenient to address first whether the Court of Appeal was correct to find that, on promulgation of the Order in Council declaring all units in the complex to be a retirement village, the Registrar-General of Lands was required to enter the memorial on the certificates of title of the units. We were advised by counsel that no submissions to this effect had been made to the Court of Appeal. Nor had the Court itself raised the issue during or following its hearing.

[34] It is helpful to set out the Court of Appeal's reasoning leading up to its conclusion. Once the 2003 Act was fully in force, mortgagees whose security was over land that became a registered retirement village were subject to the Act's provisions giving protection to interests of residents of the village. Operators of land

²¹ Schedule 1, cl 14.

or buildings that came within the definition of a “retirement village” were required to apply for and obtain registration. If this duty was not performed, because of uncertainty over whether a property fell within the definition of “retirement village”, an Order in Council could be made under s 103 to clarify the status of the property. That transpired in the present case but no application for registration was ever made. Had Crossdale applied for and obtained registration of the residents’ units as a retirement village, the Registrar would have notified the Registrar-General of Lands, who would have entered a memorial on the relevant certificates of title giving notice of the priority of the residents’ interests.

[35] Up to this point the Court of Appeal’s analysis is undoubtedly correct. Cashmere takes issue, however, with the validity of the following, purely conclusory, step in the Court of Appeal’s reasoning:²²

The Act is to be read as a whole. It must follow that, if there has been no application for registration under s 10, but there is an Order in Council under s 103, the Registrar-General must note on the certificate of title to the land comprising the village that it is subject to s 22. At that point s 22 bites.

[36] Section 21 of the 2003 Act states that the Registrar of Retirement Villages must notify the Registrar-General of Lands of the registration of a retirement village. It is on receiving that notification that the Registrar-General must note the memorial on the relevant certificates of title. If, as the Court of Appeal held, an Order in Council declaring certain property to be a retirement village gives rise to a duty on the Registrar-General to enter the memorial, that must be because the Order in Council has the same effect under the Act as does registration of the village to which it relates. In other words, it must have the effect of deeming the property concerned to be a registered retirement village. That is the only basis on which s 21 can operate in the manner that the Court of Appeal found. There are, however, two major difficulties of principle with its approach. The first arises from the terms of s 103 itself, and the second from the importance of the registration process in the statutory scheme.

[37] Section 103 provides:

²² At para [30] per Baragwanath J for the Court.

103 Regulations defining retirement villages

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, declare specified property, buildings or other premises, or property, buildings, or other premises of a specified class, to be or not to be a retirement village for the purposes of this Act.
- (2) The Minister must not recommend the making of any Order in Council under subsection (1) unless, in the opinion of the Minister, the Order in Council is necessary—
 - (a) to prevent the avoidance of obligations under this Act as a consequence of any scheme or arrangement; or
 - (b) to clarify whether—
 - (i) specific property, buildings, or other premises; or
 - (ii) property, buildings, or other premises of a specified class—

whose status is in doubt are or are not a retirement village.

[38] The Minister who makes the recommendation to the Governor-General must be of the opinion that the Order in Council is necessary for one of the two stated purposes. Section 103(2)(a) is concerned with the purpose of preventing avoidance of statutory obligations by structuring schemes or arrangements for what are in substance retirement villages in a form that takes the land or buildings concerned outside the provisions of the 2003 Act. An Order in Council may be made to defeat such devices by declaring the property concerned to be a retirement village.²³

[39] The second purpose that may justify the Minister's opinion that an Order in Council is necessary is that which applied in this case. Section 103(2)(b) is concerned with clarifying in cases of doubt whether a particular property is or is not a retirement village.²⁴ The utility of the provision for an Order in Council for this purpose is clear. Its proper use will facilitate the process of registration of retirement villages by clarifying whether there is a duty to apply for and ensure registration of a particular property.

²³ This purpose is also reflected in s 6(5) of the 2003 Act which states that whether or not premises are a retirement village is to be determined by considerations of nature, substance and economic effect rather than form or description in any documents.

²⁴ Section 6 of the Act, defining "retirement village" must be read in conjunction with s 103, see s 6(7).

[40] Neither purpose, however, requires that the status conferred by an Order in Council is that of a *registered* retirement village, so that a memorial must be entered, without anyone having applied for and obtained registration of the property. In concluding that this is a consequence of making an Order in Council, the Court of Appeal is reading the legislation in a way that achieves an effect which goes beyond the purposes for which the Act permits an Order in Council to be made.

[41] The second difficulty of principle with the Court of Appeal's reasoning is that its view of the effect of an Order in Council under s 103 is inconsistent with the importance of the prerequisites for registration in the statutory scheme. The Court of Appeal recognised that registration of a retirement village gives those who are or intend to become residents priority for their rights over those of mortgagees, once the memorial is entered on certificates of title. It did not, however, recognise the fundamental role that compliance with the process for registration plays in the scheme of the Act.

[42] The process of obtaining registration is intended to create a record, in the form of a public register, containing specified detailed information about ownership, management and the state of the retirement village. That purpose will not be achieved if registration can be obtained independently of the application procedure. The Court of Appeal's view of the effect of s 103 overlooks the importance of this feature of the statutory scheme.

[43] If the Act had contemplated that an effect of an Order in Council would be the deemed registration of the property declared to be a retirement village, the legislation would have provided for the Registrar to require the registration of documentation concerning the village. The absence of such powers strongly indicates that there was no such purpose.

[44] For these reasons we disagree with the Court of Appeal's finding that once the Order in Council was made the Registrar-General was required to enter a memorial on the certificates of title to the land that had been declared to be a retirement village.

Is Cashmere an “operator”?

[45] In the High Court Fogarty J concluded that in enforcing its rights as mortgagee Cashmere had become an operator of the retirement village in which the residents’ units were situated. This finding was of great importance to the respective rights of Cashmere and the residents. If Cashmere were an operator of the retirement village it had a duty to apply for and obtain its registration. The consequence of registration would be entry of a memorial on the certificates of titles to the village. Cashmere’s registered mortgage would be relegated to take effect subject to the residents’ occupancy interests. Cashmere could not take advantage of its own wrong in not applying for registration of the village. As indicated, the Court of Appeal did not address the question of whether Cashmere had become an operator of the village. In this Court the High Court’s finding and reasoning is relied on by the residents as an additional ground in support of the Court of Appeal’s judgment.

[46] The term “operator” is defined in s 5 of the 2003 Act:

operator, in relation to a retirement village, means any person who is 1 or more of the following:

- (a) a person who is, or will be, liable to fulfil all or any of the obligations under occupation right agreements to residents of the village:
- (b) a holder of a security interest who is exercising effective management or control of the retirement village:
- (c) a receiver of the property comprising the retirement village, or the liquidator of the person to whom either of paragraph (a) or paragraph (b) applies

[47] Section 10(1) of the 2003 Act provides:

10 Retirement villages to be registered

- (1) The operator of a retirement village must ensure that it is registered.

[48] Fogarty J said that the language of the definition of “operator” had to be considered in the context of the legislative purpose of protection of the interests of consumers and intending residents. The statutory scheme also required that there

always had to be an operator of a retirement village. These factors indicated that the definition had to be read broadly.

[49] A letter had been sent to the residents by Cashmere on 14 February 2008, telling them to leave their units. Fogarty J concluded that the terms of the letter amounted to an election by Cashmere as mortgagee to endeavour to obtain control of the retirement village premises. The Judge reasoned that Cashmere was in a position to exercise effective management or control of the village in terms of paragraph (b). It alone among persons potentially covered by the definition had an active relationship with occupiers. Cashmere was the holder of a security interest who was endeavouring to obtain control of the retirement village premises and accordingly an operator of the retirement village. The Judge accepted that a liquidator of Crossdale could potentially become a co-operator with Cashmere. That possibility, however, was not before him.

[50] Paragraphs (a) and (b) of the statutory definition of ‘operator’ cover persons who have different types of interest in a retirement village business. Paragraph (a) defines an operator who is usually an owner-operator of the retirement village. Typically this operator will set up and run the retirement village and enter into occupancy right agreements with intending residents. Assumption of contractual obligations to residents of the village, under those agreements, make that person an operator. Paragraph (b) of the definition covers a person who is acting neither as the owner of the retirement village, nor pursuant to any contractual relationship with residents. Such an operator is simply exercising powers under its security. Typically that will be a debt security, such as a mortgage over the retirement village property, and the security holder will be taking enforcement action.

[51] Where the holder of a security is exercising its powers in a manner that amounts to “exercising effective management or control of the retirement village”, it will be an operator in relation to the retirement village under paragraph (b). The security holder is then subject to all obligations that the 2003 Act places on operators. Cashmere’s mortgage was secured over only eight of the 22 units but no issues arise on that account in this proceeding.

[52] As well, paragraph (c) of the definition makes the liquidator of a person who is an operator under either paragraph (a) or (b) itself an operator. The receiver of retirement village property is also made an operator by paragraph (c). As Fogarty J recognised, there can be more than one operator of a retirement village at any time and if there is each must perform the statutory obligations.

[53] In the context of the whole of the definition of “operator”, the role of paragraph (b) can be seen to be complementary to that of paragraph (a). An owner-operator, under paragraph (a), such as Crossdale, will remain an operator while its occupation right agreements with residents are in force. On the winding up of such an operator, its liquidator will become an operator and assume those obligations. But the 2003 Act also recognises that holders of securities such as mortgagees can, in exercising powers given by their security, exercise the effective management or control of a retirement village instead of the operator who has contractual obligations. The role of paragraph (b) of the definition is to ensure that, while such mortgagees are exercising “effective management or control” of the village, they also are bound as operators under the Act. In this way the 2003 Act seeks to ensure that both those with contractual obligations to residents, and security holders who, under powers sourced under the contract giving rise to their security, are actually managing or controlling the retirement village, are all bound by the 2003 Act’s requirements. This raises the question of what type of actions by the holder of a security interest amount to exercising management or control.

[54] Mr Hughes-Johnson QC for Cashmere submitted that a mortgagee could only be exercising effective management or control of a retirement village if it had assumed control of the revenue that the business was receiving. The exercise of a power of sale of mortgaged land that was a retirement village involved no element of exercise of management or control. Nor did other steps in enforcement of the security if they did not lead to assumption of control of the income produced by the village. Mr Till QC for the residents submitted that “management or control”, and in particular “control” had a much wider meaning. He also said that the words “exercising effective management or control” were concerned with the practical situation rather than the formal entitlements. We agree with that latter observation.

[55] The requirement in paragraph (b) that the holder of the security is exercising *effective* management or control of the retirement village means that management or control is actually being exercised. Whereas paragraph (a) is concerned with any person who has contractual obligations to residents, paragraph (b) is concerned with a security holder who in practical terms has taken over management or control. For that reason we do not accept that it is sufficient to bring a security holder within the definition that it is in a position to exercise management or control of the village or, as Fogarty J put it, is endeavouring to take control. The exercise of actual management or control is required before a security holder becomes an operator.

[56] The text of paragraph (b) also makes clear that the holder of a security interest is an operator only while it “is *exercising* effective management or control”. When the Retirement Villages Bill was introduced to the House of Representatives the equivalent paragraph (b) in the definition referred to a holder of a security interest who “*has exercised* a power to take effective management or control” of the retirement village. The change to the present tense was made when the Justice and Electoral Committee reported the Bill back to the House.

[57] The temporal limitation reflects the complementary role of the definition under paragraph (b). It is only while they are undertaking management or control, that security holders carry the statutory obligations of an operator of a village. If they cease to do so (for example where enforcement action ceases because a mortgagor refinances and repays the mortgagee’s debt security) the mortgagee will cease to be an operator.

[58] Exercise of management or control by a security holder is, in property law terms, linked to enforcement of its security by entry into possession of land following default. In the context of the definition the default will be that of the initial operator of the retirement village. At common law mere receipt of rents and profits did not necessarily constitute an entry into possession.²⁵ The mortgagee had

²⁵ *Noyes v Pollock* (1886) 32 Ch D 53 (CA). *Ovenden v Prins* (1898) 16 NZLR 224 (CA) at p 235.

to take management of the property out of the mortgagor's hands. In effect, this meant dealing with the tenants and requiring them to pay the mortgagee instead of the mortgagor.

[59] The common law approach is now reflected in s 137(1) of the Property Law Act 2007 which relevantly provides:

Exercise of power to enter into possession

- (1) If a mortgagee becomes entitled under a mortgage ... to exercise a power to enter into possession of mortgaged land ... the mortgagee may exercise that power by—
 - (a) ...
 - (b) asserting management or control over the land ... by requiring a lessee or occupier of the land, ... to pay to the mortgagee any rent or profits that would otherwise be payable to the current mortgagor; or
 - (c) ...

[60] Under this provision a mortgagee may go into possession of the land, without taking physical possession, by receiving income, in circumstances which amount to taking over management or control of the property.²⁶ It is in this sense that a security holder may exercise management or control under paragraph (b) in the definition of the 2003 Act.

[61] The exercise of a power of sale by a mortgagee is not however an action which of itself involves exercise of management or control of the retirement village. Nor does going into possession, simply for the purposes of exercising a power of sale, without taking control of revenue, amount to exercising such management or control. Those actions by a security holder do not bring it within the definition of 'operator' in paragraph (b) or make it a mortgagee in possession under s 137. The 2003 Act protects residents against the exercise of power of sale by mortgagees by giving residents the priority provided for in ss 21 and 22. The problem for the

²⁶ See New Zealand Law Commission, *A New Property Law Act* (NZLC R29, 1994), paras [441] – [442].

residents of course is that such protection only arises on registration of the village on the application of an operator and the noting of the title by the Registrar-General.

[62] The decision of a court on whether a security holder is exercising effective management or control requires a finding involving the exercise of judgment based on the evidence. The court must decide whether the actions of the security holder amount to assumption and actual exercise of management or control. In doing so it must also have regard to the context in which the 2003 Act operates and its purposes.

[63] If Cashmere confined its enforcement action to steps incidental to exercising its power of sale, it did not become an operator. However, arguably, Cashmere may have done more than that. The submissions in this Court focused on the meaning of correspondence sent by Cashmere's solicitors to the residents, in which Cashmere asserted its election to enter into possession. We do not regard these factual aspects of the question of whether Cashmere became an operator, under paragraph (b) of the definition, as being appropriate for determination on affidavits without cross-examination in a summary judgment proceeding. On the present state of the record, the residents have not persuaded us that Cashmere's assertion that it has no obligation under the 2003 Act to ensure the village is registered is an untenable one. That issue must go to trial with the result that Cashmere's appeal must be allowed.

Did Cashmere consent to occupancy of units by the residents?

[64] In the High Court the residents successfully argued that Cashmere could not rely on its title as mortgagee, even though Cashmere's mortgage had been registered. Fogarty J accepted that the priority given a registered mortgagee over unregistered estates or interests by ss 105 and 119 of the Land Transfer Act had been lost because Cashmere as mortgagee had consented to the instruments creating the residents' occupancy interests. The residents were therefore entitled to summary judgment against Cashmere.

[65] The Court of Appeal disagreed, holding that there had been no positive affirmative act of Cashmere amounting to acceptance by it of the residents' occupancy agreements. It followed that the consent exception under the Land

Transfer Act to Cashmere's indefeasible title had not been made out. In this Court the residents repeat their submission that Cashmere's actions amounted to consent under ss 105 and 119. Cashmere supports the judgment and reasons of the Court of Appeal.

[66] Cashmere knew of the residents' occupancy of the units at the time it made its loan advances to Crossdale in September 2006. In an affidavit filed following the first High Court hearing, Mr Hamilton, a director of Cashmere, said that on the basis of the information provided to Cashmere by an agent of Mr Campbell "the (total) rental amount used for approval of the loan was \$60,000 per annum ...". Cashmere understood at the time that the residents were tenants at weekly rentals of at least \$185 per unit. It presumably believed this would be an available source of the payments for which Crossdale would be responsible.

[67] Cashmere first learnt of the basis on which residents were occupying the units, and the loan advances they each had made to Crossdale, early in February 2008 when it was proceeding with arrangements to sell the property. Until then it had been Cashmere's intention to sell the land subject to all tenancies. By 14 February it had ascertained that payments of only \$30 per week were being made by the residents under their occupancy agreements. Cashmere then changed its mind and sought vacant possession of the units to facilitate its mortgagee sale.

[68] Mr Till QC's argument that Cashmere had consented to occupancy agreements focussed on what it knew about occupancy of the units when it made the loan. Mr Till submitted that the only reasonable implication from Cashmere's conduct was that it was consenting to the tenancies. His argument drew on the reasoning of Fogarty J on that point.

[69] The statutory provisions in the Land Transfer Act which are the basis of Mr Till's argument on this ground of appeal are:

105 Transfer by mortgagee

Upon the registration of any transfer executed by a mortgagee for the purpose of exercising a power of sale over any land, the estate or

interest of the mortgagor therein expressed to be transferred shall pass to and vest in the purchaser, freed and discharged from all liability on account of the mortgage, or of any estate or interest except an estate or interest created by any instrument which has priority over the mortgage or which by reason of the consent of the mortgagee is binding on him.

119 Lease not binding on mortgagee without consent

No lease of mortgaged or encumbered land shall be binding upon the mortgagee except so far as the mortgagee has consented thereto.

[70] The residents also place some reliance on s 138 of the Property Law Act 2007 which restricts exercise of a mortgagee's rights to enter into possession under s 137, if its consent has been given to the lease.

[71] It is not disputed that Cashmere knew of the tenancies and relied on its mistaken understanding of their terms when it made its advances to Crossdale. It is also clear that Cashmere's hostility to the occupancy agreements arose only after it had ascertained their true nature following default by Crossdale. The inference can certainly be drawn, as Mr Till argued, that Cashmere chose to make the loans against the security of the mortgage whilst aware that the residents had tenancy interests but without independently checking the terms.

[72] Section 62 of the Land Transfer Act states the general principle of indefeasibility under that Act. The registered proprietor of land holds the estate subject to interests notified on the register, but absolutely free from all other interests except as the Act specifies. Section 105 applies on registration of a transfer by a mortgagee exercising a power of sale. It states the effect of the principle of indefeasibility in relation to the unencumbered title received by the purchaser. But s 105 also incorporates its own exceptions, one of which is "an estate or interest created by any instrument which ... by reason of the consent of the mortgagee is binding on him". Section 119 mirrors s 105 and is addressed directly to leases.

[73] The correct approach to ascertaining the meaning of statutory language expressing such an exception must reflect the legislative purpose underlying

indefeasibility of title. In *Gibbs v Messer* the Privy Council summarised that purpose:²⁷

The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.

[74] In *British American Cattle Co v Caribe Farm Industries Ltd (In Receivership)* the Privy Council, in affirming this fundamental principle, said:²⁸

To achieve this objective, it is critical to keep to a minimum the number of matters which may defeat the title of the registered proprietor. However, it is well established that there are certain exceptions.

[75] In ss 105 and 119 of the Land Transfer Act the context in which the word "consent" appears is that of an exception to the general rule of indefeasibility. An expansive approach to its meaning, as favoured by the High Court, but not the Court of Appeal, would not be consistent with the purpose of legislation implementing the Torrens system of land tenure, for the reasons explained in the Privy Council's decisions.

[76] In *Registered Securities Ltd v Christensen Potato Company Ltd*²⁹ the Court of Appeal, in a judgment delivered by Somers J, summarised the rights of a mortgagee at common law where the mortgaged land had been leased by the mortgagor. While the lease would be binding between the mortgagor and his tenant:³⁰

At common law a lease by a mortgagor would be binding between him and his tenant by estoppel but as against the mortgagee's claim to possession the tenant has no defence unless the mortgagee recognises the lessee as tenant or is otherwise estopped from denying the tenancy. The onus lies on the tenant to show that the mortgagee must recognise his right of occupation. Mere knowledge by the mortgagee of the existence of the lease is not enough.

²⁷ [1891] AC 248 at p 254 per Lord Watson for the Privy Council.

²⁸ [1998] 1 WLR 1529 at pp 1533 – 1534 per Lord Browne-Wilkinson for the Privy Council.

²⁹ (1991) ANZ Conv R 57.

³⁰ At p 58 (citations omitted).

Sections 105 and 119 apply the common law principle to the Land Transfer Act to make clear that in the case of a registered lease indefeasibility does not override consent.

[77] In *New Zealand Fisheries Ltd v Napier City Council*, in a judgment delivered by Casey J, the Court said of the meaning of “consent” in ss 105 and 119:³¹

As the dictionary definition indicates, “consent” involves agreement to a proposal or request. Mere acquiescence in a state of affairs would not be enough.

And later:³²

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

[78] In the course of its discussion in the *New Zealand Fisheries* case, the Court referred to the judgment of the English Court of Appeal in *Bell v Alfred Frank*.³³ The case concerned a statutory provision in the Landlord and Tenant Act 1954 in relation to the consent of a previous landlord to a breach of the tenancy. Shaw LJ³⁴ explained the distinction between consent and acquiescence, saying:³⁵

If acquiescence is something passive in the face of knowledge, what does “consent” mean? In the context of the contrast implicit in subsection (4), the only practical and sensible distinction that can be drawn is that if acquiescence can arise out of passive failure to do anything, consent must involve a positive demonstrative act, something of an affirmative kind. It is not to be implied, because the resort to implication betokens an absence of express affirmation. The only sense in which there can be implied consent is where a consent is demonstrated, not by language but by some positive act other than words which amounts to an affirmation of what is being done and goes beyond mere acquiescence in it. It may lead, in this context, to a false conclusion to speak of “implied consent”, which is what the judge said was the proper inference to be drawn from the long history of acquiescence. I would prefer for myself to say “consent” involves something which is of a positive affirmative kind and that is what is required by section 23(4) if the immediate landlord is to be deprived of the opportunity of taking advantage of a breach of a prohibition contained in the terms of the tenancy.

³¹ (1990) 1 NZ ConvC 190,342 at p 190,344 (CA).

³² At p 190,344.

³³ [1980] 1 WLR 340.

³⁴ With whom Megaw and Waller LJJs agreed.

³⁵ At p 347.

[79] These decisions indicate that a consent which, under ss 105 and 119, binds a mortgagee to the competing estate or interest in another instrument, requires conduct which affirms the lease. A mortgagee who is aware of a third party's interest, and passively stands by, making no objection, has not consented. For there to be a valid consent the mortgagee must either have been aware of the essential terms of the lease or be shown to have consented to the lease whatever its terms may be. Only then does the mortgagee consent to the terms of the other instrument, in the sense of agreeing to be bound by it. Making an advance as mortgagee, while being aware of the other instrument and another party's interest in it, of itself, does not amount to consent.

[80] Mr Till placed some reliance on a judgment of Williams J in *Thomson and Chipp v Finlay*³⁶ which had been discussed by Fogarty J in his judgment. A mortgagee who was exercising his power of sale had advertised the land as being subject to a lease. The defendant bought the land, became the registered proprietor, and then sought to eject the lessee. Williams J's judgment turned on the facts, in particular the choice which had been made by the mortgagee at the time of sale to recognise the lease. The lease had been entered into by the mortgagor, whose estate the mortgagee was selling. In those circumstances the defendant purchaser was bound by the lease. The case is of no assistance in the present appeal because it did not concern the position of a mortgagee, but that of a purchaser who had notice of the mortgagee's recognition of the lease and had bought the property expressly on the basis that the lease would be binding on him. The predecessor of s 105 of the Land Transfer Act was not discussed in the judgment for the reason it was not in issue and not relevant.

[81] Applying the approach we have outlined to the meaning of consent in ss 105 and 119 of the Land Transfer Act, the residents' case on the consent argument appears to fall well short of establishing their entitlement to summary judgment on this point.

³⁶ (1887) 5 NZLR 203.

Conclusion

[82] This litigation is being conducted between parties whose problems arise from their respective dealings with the owner of the property that was operating it as a retirement village without complying with the 2003 Act, after its provisions came into force. Crossdale appears to be insolvent but its present status is uncertain. It has been removed from the register of companies but there is no record of its having been wound up. It remains registered proprietor of the land and, if restored to the register, will have continuing obligations under the 2003 Act.

[83] For reasons that will be apparent from the discussion of the statutory provisions in this judgment, we have concerns over the appropriateness of the course that the parties have followed to date in these proceedings. These concerns include, but are not confined to, the use of the summary judgment procedure.

[84] What is however clear is that the residents' applications for summary judgment under r 136(2) of the High Court Rules, and to strike out Cashmere's claim for vacant possession and declarations, have not been made out.

[85] In these circumstances, we must allow Cashmere's appeal, dismiss the respondents' applications and refer the proceeding back to the High Court for trial.

[86] Cashmere has overturned the summary judgment entered against it in the Court of Appeal and High Court. It should have an award of costs but, in light of the concerns we have expressed, for a lesser sum than we would normally award. We fix costs at \$5,000 plus disbursements to be fixed if necessary by the Registrar and to be costs in the cause. Costs in the lower courts must be determined by those courts in light of this judgment.

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