IN THE HIGH COURT OF NEW ZEALAND
GREYMOUTH REGISTRY

I TE KŌTI MATUA O AOTEAROA
MĀWHERA ROHE

CRI-2017-418-000009
[2019] NZHC 1128

BETWEEN	FM CUSTODIANS LIMITED Appellant
AND	THE QUEEN First Respondent
AND	LINDSAY BECKETT SMITH Second Respondent

Hearing: 17 May 2018

Appearances: D Goddard QC and I Tokmadzic for the Appellant
K Grau for the First Respondent
No appearance for the Second Respondent

Judgment: 22 May 2019

JUDGMENT OF NATION J

Introduction

[1] FM Custodians Ltd (FM Custodians) claimed an interest by way of mortgages over land owned by Ballarat Terrace Ltd (BTL) and a residential property owned by the Prospect Family Trust (Prospect Trust), and the proceeds of sale from those properties.

[2] An accountant, the second respondent (Mr Smith) was a trustee of the Prospect Trust and a director of BTL. In arranging loans to the Prospect Trust and BTL from FM Custodians and in making BTL a guarantor of the mortgage obligations of the Prospect Trust, Mr Smith forged the signature of a co-director of BTL, Mr Ross. Mr Ross and his wife had, through a trust, invested some $620,000 in BTL.

[3] On 19 June 2015, Mr Smith pleaded guilty in the District Court to using forged documents, knowing them to be forged, to obtain a pecuniary advantage or other consideration. The charge was laid on a representative basis. The particulars as to documents forged were stated to be:

1. Deed of Guarantee and Indemnity;
2. Private Corporate Client Authority and Instruction for Electronic Transaction;
3. NZ Mortgage Income Trust Borrower's Acceptance of Loan Application;
4. Loan Agreement with NZ Mortgage Income Trust resulting in the drawdown [of] a $264,000 loan from FM Custodians;
5. Deed of Guarantee and Indemnity to FM Custodians Ltd as lender;
6. Loan Agreement with FM Custodians Ltd resulting in the drawdown of a $520,000.00 loan; and
7. Waiver of independent legal advice.

[4] The documents were used in May 2013 to draw down loans from FM Custodians to BTL for $264,000 and to the Prospect Trust for $520,000.

[5] The prosecutor notified the Court under s 142B of the Sentencing Act 2002 that, in the prosecutor's opinion, the Court should consider whether to make an instrument forfeiture order in relation to the three properties.

[6] FM Custodians applied for relief from an instrument forfeiture order under s 142L ultimately on the basis that it had an interest in the properties and was not involved in the qualifying offence.

[7] FM Custodians' mortgage interests were held in trust for people who had invested in the New Zealand Mortgage Income Trust (No. 2 Fund) (the No. 2 Fund).

[8] On 5 September 2017, Judge Neave in the District Court refused FM Custodians' application for relief from forfeiture to the Crown.[1]

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1 *R v Smith* [2017] NZDC 19891.

[9] The decision the Judge made in the District Court on the issues before him and which I have to now consider anew in this Court on appeal ultimately determine whether the funds available from the sale of the mortgaged properties should be available to Mr and Mrs Ross or to those who invested in the No. 2 Fund.

Factual background

[10] The trustee of the No. 2 Fund was Trustees Executors Ltd (Trustees Executors). FM Custodians was a company incorporated by Trustees Executors to hold the loans and securities for Trustees Executors and thus those who had invested in the No. 2 Fund.

[11] Fund Managers Otago Ltd (Fund Managers) was the manager of the fund. Fund Managers managed the day to day operation of the fund, arranging investments through inviting the public to invest in the fund through purchasing units in the fund. Fund Managers had to operate in terms of a Deed of Trust with Trustees Executors.

[12] Mr and Mrs Ross, through their family trust, had a 50 per cent share in BTL. The balance of the shares in BTL were held by the Prospect Trust, a trust for the benefit of Mr Smith and his wife. BTL was involved in a residential development and subdivision of land at Blue Spur near Hokitika.

[13] Mr and Mrs Ross paid $115,000 for their shares in BTL. They made further cash advances to BTL of $410,000 and paid an additional $260,000 into a Bartercard account in the name of BTL to which Mr Smith had access. Their total contribution to BTL was $785,000. Returned to them over the course of a development by BTL was $114,760, leaving a balance due to them of $670,240.

[14] On May 2011, FM Custodians advanced to BTL $264,000 secured over properties owned by BTL, and $520,000 to the Smiths as trustees of the Prospect Trust secured over the Smiths' home which was owned by the Prospect Trust. The loan to BTL was supported by guarantees from Mr and Mrs Smith and the trustees of the Prospect Trust, amongst others. The loan to the Prospect Trust was supported by similar guarantees from BTL and other guarantors as for the BTL loan. The loans to

the different entities, the relevant mortgage securities and guarantees were co-extensive.

[15] Mr Ross, as a director of BTL, had to sign a number of documents for FM Custodians to have the security it required. Mr Smith forged Mr Ross's signature on those documents. Mr and Mrs Ross knew nothing of the loans and thus the way those loans and guarantees had been arranged. They therefore knew nothing of the way the value of their investment in BTL could be eroded.

[16] Following the sale of the properties in question and the making of an instrument forfeiture order in the District Court, a total sum of $648,196.97, then held in a solicitor's trust account, vested in the Crown absolutely (and was to be in the Official Assignee's custody and control).

[17] The way in which FM Custodians came to agree and arrange these loans through Fund Managers and its CEO, Mr Hutchison, was the subject of detailed evidence and cross-examination over four days of hearing in the District Court between 29 November 2016 and 5 December 2016. The essential aspects of the hearing are carefully set out in the Judge's decision of 5 September 2017. On appeal, there was no dispute as to the way the Judge summarised what had occurred.

[18] Mr Smith was an apparently successful and trusted accountant on the West Coast. Through BTL, he and his wife were involved in a property development in the Blue Spur region of Hokitika. Mr Smith sought finance from FM Custodians through an application which was considered by Fund Managers, in particular, its CEO Mr Hutchison.

[19] In May 2011, FM Custodians, through Fund Managers, offered the Prospect Trust and BTL the loans referred to. FM Custodians instructed Murdoch James & Roper, solicitors of Hokitika, to prepare the security documents for the loans which were subsequently advanced. Mr Woulfe of Murdoch James & Roper was the solicitor dealing with the matter.

[20] Documents were sent to Mr Woulfe for completion and he returned them to the lender. Where Mr Ross's signature was required and appeared, it was forged by Mr Smith. A director's certificate required from the directors of BTL was completed by Mr Smith. The director's certificate for BTL was misleading in that Mr Smith certified that none of the directors had an interest in the loan transaction. The certificate was also incorrect in recording that the company had passed a resolution that the transaction was for BTL's benefit. It was not and no resolution to that effect had been passed.

[21] The lender's requirements on instructions to the solicitor were set out in the solicitor's certificate. The letter of instruction to the solicitors states:

> The Trust relies on you to take all necessary steps to ensure that it is fully and properly secured in accordance with the instructions and attached loan offer, and to take all steps necessary or appropriate to protect the Trust's interests and whether or not they are mentioned in these instructions.

[22] The solicitor's certificates returned to the lender contained a number of matters which Mr Woulfe certified and undertook. These included an undertaking that there was prepared and available to the lender "a properly executed loan agreement in accordance with your instruction", that a copy of certified copies of debtor's identification was being provided to the lender and that, where documents were signed by a corporation, the documents had been executed so that the corporation's acceptance of those applications was valid and enforceable.

[23] Mr Woulfe returned to the lender BTL's authority and instruction to Murdoch James & Roper to register electronically the mortgage to FM Custodians over BTL's land (the A&I form). On the A&I form, Mr Woulfe certified he had witnessed Mr Ross's signature on the A&I form and had confirmed the true identity of Mr Ross as the person signing the A&I form as a director of BTL.

[24] In the circumstances of this case, Mr Woulfe thus certified and undertook that documents had been executed by BTL, duly authorised by appropriate resolution of directors and supported by certificates given by the directors in the form supplied by the lender. Mr Woulfe also certified that every guarantor had received proper independent legal advice and/or that the solicitor had recommended to the guarantor

that it should obtain independent legal advice but had chosen not to be independently advised.

[25] Among the documents produced to the Court and returned to the lender with the solicitor's certificate was another document dated 27 May 2011, the same date as the A&I form was signed. The document signed by Mr Smith as director, with Mr Ross's forged signature as director, was a waiver of independent legal advice. In the document, the directors acknowledged they had been advised to obtain independent legal advice before executing guarantee documents and had chosen not to obtain independent legal advice but fully understood and accepted the obligation BTL would have as guarantor.

Relevant legislation

[26] Sections 142A-142Q of the Sentencing Act provide for instrument forfeiture orders to be made by a sentencing court.[2] Further relevant provisions are set out in subpart 4 of Part 2 of the Criminal Proceeds (Recovery) Act 2009 (CPRA).

[27] The purpose of the instrument forfeiture regime is set out in s 3(2) CPRA:

> (2) The criminal proceeds and instruments forfeiture regime established under this Act proposes to—
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> (a) eliminate the chance for persons to profit from undertaking or being associated with significant criminal activity; and
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> (b) deter significant criminal activity; and
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> (c) reduce the ability of criminals and persons associated with crime or significant criminal activity to continue or expand criminal enterprise; and
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> (d) deal with matters associated with foreign restraining orders and foreign forfeiture orders that arise in New Zealand.

[28] Section 77(1)(a) CPRA permits a person claiming an interest in property potentially subject to an instrument forfeiture order, other than the person convicted of the qualifying instrument forfeiture offence, to apply for relief from such an order

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2 See ss 142A to 142Q.

on the grounds they have an interest in the property. The ground of relief based on undue hardship in s 77(1)(b) was not relevant in this case.

[29] The circumstances in which the Court will grant relief from an instrument forfeiture order are set out in s 142L Sentencing Act:

> **142L Court may grant relief from instrument forfeiture order to applicant who establishes interest in property**
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> (1) This section applies if –
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> (a) a person applies to the court under section 142J for relief from an instrument forfeiture order in respect of an interest in property on the ground set out in section 77(1)(a) of the Criminal Proceeds (Recovery) Act 2009; and
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> (b) the court is satisfied, following a hearing under section 142K, that the applicant has established on the balance of probabilities that the applicant –
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> (i) has an interest in the property to which the instrument forfeiture order relates; and
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> (ii) was not involved in the qualifying instrument forfeiture offence to which the order relates.
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> (2) If this section applies, the court must make an order –
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> (a) declaring the nature, extent, and value of the applicant's interest in the property; and
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> (b) either –
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> (i) directing the Crown to transfer the interest to the applicant; or
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> (ii) declaring that there is payable by the Crown to the applicant an amount equal to the value of the interest declared by the court; or
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> (iii) directing that the interest not be included in an instrument forfeiture order made in respect of the proceedings that gave rise to the application; or
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> (iv) determining, in accordance with section 142N, not to make an instrument forfeiture order.
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> (3) Despite subsection (2), the court may, but is not required to, refuse to make an order under subsection (2) if it is satisfied that –

(a) the applicant was, in any respect, involved in the commission of the offence in respect of which forfeiture of the property is or was under consideration; or

(b) if the applicant acquired the interest at the time of or after the commission of the offence, the applicant did not acquire the interest in the property in good faith and for value.

(4) The court must not make an order under subsection 2(b)(ii) unless it is satisfied that it cannot reasonably make an order under subsection (2)(b)(i) or (iii) (for example, because the interest of the applicant is not severable from the other property in question).

The District Court decision

[30] The Judge made the various factual findings that I have already referred to. The Judge found Fund Managers was acting as the agent for Trustees Executors and FM Custodians in the various transactions.[3] The Judge recorded there was no dispute that Mr Smith had been convicted of a qualifying instrument forfeiture offence. The Judge also went on to say:[4]

> Further, nor is there any real dispute that the property in question, namely the land owned by BTL, was used to commit or facilitate the commission of the offence – namely the forgery of Mr Ross's signatures on the relevant documents.

[31] Consistent with authorities, actual involvement in the offence or at least wilful blindness was required before a person will be treated as having been involved in the relevant events for the purposes of s 142L.[5]

[32] The Judge then discussed the contrast between ss 142L(1) and 142L(3). Section 142L(1) provides that s 142L applies if the applicant has an interest in the relevant property and "was not involved in the qualifying instrument forfeiture offence to which the order relates". Section 142L(3) confers a discretion on the Court to refuse to make a relief order to the extent provided for in s 142L if it is satisfied that the applicant for relief "was, in any respect, involved in the commission of the offence". The Judge expressed the view that:

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3 R v Smith, above n 1, at [28]–[32].
4 At [36].
5 For example *R v Matamua* CA569/95, 10 July 1996 at 12-13.

> [49] The structure of the legislation would suggest that proof of a more significant degree of involvement ought to be required to shut out the applicant from relief completely under s 142L(1) than may be required, for what is clearly a discretionary exercise under s 142L(3).
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> …
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> [51] … there is a strong argument for saying that if by its own processes or failure to follow or insist upon its own processes, the lender has created the situation whereby the fraud has occurred, it could be said to have been "involved" in the offending, so as to dis-entitle them from relief.

[33] The Judge noted the criticisms that were made of Fund Managers, in particular, the CEO Mr Hutchison.

[34] Through submissions and cross-examination, Ms South for the Crown in the District Court highlighted ways in which Mr Hutchison's assessment of the loan application, the ability of the borrowers to service the loan and the value of the security being offered for the loans was inept and inconsistent with the Lender's Mortgage Investment Guidelines. It was also submitted that Mr Hutchison permitted the loan application to be considered by FM Custodians without qualifying or amending financial information provided by Mr Smith which was misleading.

[35] The Judge said the Crown had attempted to characterise Mr Hutchison's:[6]

> … far from perfect performance of his duties as evidence of bad faith so as to lead to a finding of at least recklessness, or at least wilful blindness, such as to amount to proof of involvement in the offence.

[36] The Judge accepted that the evidence did not establish this. He held that to be reckless Mr Hutchison had to have been aware Mr Smith was acting fraudulently but proceeded anyway. He held there was no evidence that Mr Hutchison ever turned his mind to the possibility.[7]

[37] The Judge held that this was not a situation where Mr Hutchison had been wilfully blind in a way that could amount to dishonesty. The Judge was of the view that what had happened here was incompetence, not conspiracy. He said it was clear

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6 At [118].
7 At [120].

from the evidence the lender, through Mr Hutchison, and ignoring the safeguards imposed by the lender's own procedures, focused solely on this being an asset lend.[8] In other words, once the lender was satisfied there was sufficient security for the loan to Mr Smith, the lender (or at least Mr Hutchison) considered the lender's position to be secure and took the matter no further. The Judge said this was clearly a situation where there was sufficient security for the loans once the assets of BTL became available to support the advances.

[38] Although the Judge decided that Mr Hutchison may have been "clearly negligent", he did not consider Mr Hutchison's conduct to have been criminal, nor did he consider the lender had acted in bad faith in the manner in which it had elected to realise its security.[9]

[39] In terms of agency, the Judge decided the case was indistinguishable from the Supreme Court decision in *Dollars & Sense Finance Ltd v Nathan* (*Nathan*).[10] He found that the lender had clearly instructed Mr Woulfe, as its agent, to ensure proper execution of the documents and, where necessary, to obtain the signature of Mr Ross and to advise him or at least ensure he received appropriate advice about the transaction. Mr Woulfe did not do that. The Judge considered whether this was because Mr Woulfe participated in Mr Smith's deception in the subscription of Mr Ross's signature. The Judge considered it was far more likely Mr Woulfe delegated to Mr Smith the task of obtaining the signature of Mr Ross and passing on such information as may have been necessary. That carelessness provided the opportunity for the offending to take place.[11] He noted the lender did not expressly authorise the use of Mr Smith's service as its agent to procure execution of the loan documents. He considered that argument did not assist FM Custodians any more than it did the lender in *Nathan*.[12]

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8 At [123]-[124].
9 At [126].
10 *Dollars & Sense Finance Ltd v Nathan* [2008] NZSC 20, [2008] 2 NZLR 557.
11 In his submissions before me, Mr Goddard for FM Custodians said Mr Woulfe was extremely careless.
12 At [110].

[40] The Judge was satisfied that Mr Woulfe allocated to Mr Smith tasks which made Mr Smith agent of the lender, and he set out his reasons for that conclusion.[13] He found that bad faith, recklessness or wilful blindness had not been made out in respect of Mr Hutchison. He considered that, as a result of the agency relationship between the lender and Mr Smith, the lender had knowledge of the fraud and it would be unconscionable to allow it to take advantage of the liabilities created by Mr Smith's forgery.[14]

[41] The Judge found:[15]

(a) FM Custodians did not have a valid interest in the property as its mortgage was created by fraud;

(b) If he was wrong in that conclusion it followed, because of the agency relationship created with Mr Smith, that FM Custodians was involved in the qualifying instrument forfeiture offence to which the order relates; and

(c) If he was wrong in that, then, in his view, the conduct of the lender and its agents was such that in some respects they were involved in the commission of the offence.

[42] The Judge emphasised that Mr Woulfe (who was the lender's agent):[16]

> … clearly completely ignored the instruction to make sure Mr Ross had independent advice. Had he done so the whole fraud would have collapsed. The gross failures on the part of the lender's agent set out above, in my view, justifies the exercise of the disaction (sic) in s 142L(3) against the applicant.

Issues on appeal

[43] Mr Goddard QC identified the essential issues on the appeal as being:

(a) Were the properties instruments of crime i.e. were they used to commit or facilitate the commission of the relevant offence?

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13 At [113].
14 At [134].
15 At [137].
16 At [137].

(b) Did FM Custodians have an interest in the properties by virtue of its mortgages?

(c) Was FM Custodians involved in the offending by Mr Smith?

(d) Having regard to those matters, should an instrument forfeiture order have been made or should relief have been granted to FM Custodians?

[44] Mr Goddard submits, and I accept, that those questions fall to be determined on the basis of the District Court's findings of fact that Mr Hutchison had not acted in bad faith or recklessly or with wilful blindness. There was no cross appeal against those findings and Ms Grau for the Crown did not in submissions contend to the contrary.

Were the properties an instrument of the offending?

Submissions

[45] As Mr Goddard acknowledged there can be no criticism of the District Court Judge for not giving detailed reasons as to how he found that the properties were used to commit or facilitate the commission of the qualifying instrument forfeiture offence, namely the forgery of Mr Ross's signature on the relevant documents. No issue was made as to that in the District Court. Mr Goddard did not then appear as counsel for FM Custodians. FM Custodians does now raise this as an issue on appeal. Ms Grau for the Crown accepts it is entitled to do so.

[46] An instrument forfeiture order can be made where a person is convicted of a qualifying instrument forfeiture offence and "any property was used to commit, or to facilitate the commission, of that offence".[17] FM Custodians argues that the various properties were not used to commit the offence of using forged documents. Far from being instruments of the offending, they were the target of the offending. Mr Goddard argues the forged documents were used to steal some of the value of the properties.

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17 Sentencing Act, s 142B.

[47] Mr Smith was convicted of one representative charge of forgery under s 257(1)(a) Crimes Act 1961, which provides:

> **257 Using forged documents**
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> (1) Every one is liable to imprisonment for a term not exceeding 10 years who, knowing a document to be forged, -
>
> (a) uses the document to obtain any property, privilege, service, pecuniary advantage, benefit, or valuable consideration; …

[48] Mr Goddard argues that Mr Smith used forged documents to obtain advances from the fund and to procure the registration of mortgages over the BTL properties in favour of FM Custodians as security for the lending to BTL and the Prospect Trust. He submits that in committing the offence of forgery Mr Smith would have used various items of property – photocopiers, pens etc. - but it was artificial and inconsistent with the scheme of the legislation to treat the properties as property that was used by Mr Smith to commit the offence. He submits that it was the value of those properties that was the target of the offending. He submits it is important to distinguish the property used by the offender to commit the offence and the property that is the target of the offence. Counsel referred to an observation from the High Court of Australia:[18]

> Conduct involving property which is no more than a necessary condition of the commission of a subsequent offence does not on that account amount to the use of the property in or to facilitate the commission of that offence.

[49] Mr Goddard submits that the existence of the three properties was a necessary condition for the offence to have been committed but this did not mean the three properties were used to commit the offence any more than it could be said that property which is stolen could be described as property used to commit an offence. He suggested the position was particularly clear with the property owned by the Prospect Trust where Mr and Mrs Smith, as trustees, validly executed a mortgage over that property.

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[18] *Milne v The Queen* [2014] HCA 4, (2014) 252 CLR 149 at [37].

Discussion

[50] I analyse the situation in the way Ms Grau for the Crown submits is appropriate.

[51] The pecuniary advantage or consideration obtained by Mr Smith's forgery was the loans secured by mortgage over the properties of both BTL and the Prospect Trust. FM Custodians could not have obtained its interest in those mortgages without the properties being offered as security. Mr Smith, as a director of BTL, and as a trustee of the Prospect Trust which owned the family home, used those properties to obtain the loans from FM Custodians.

[52] The value or "target" which Mr Smith's fraud was aimed at was those loans, not the properties owned by BTL. Just how those loans and the security for them would ultimately have affected the value of the land owned by BTL available to those who had invested in BTL or the Prospect Trust could only be a matter of speculation. Like many similar fraudsters, Mr Smith may have hoped that, from other investments, either he or the Prospect Trust would ultimately have been able to pay the total debts associated with the loans and guarantee so that the value of the land would ultimately not have been affected.

[53] It accords with the ordinary meaning of "use" that people would have understood and accepted that Mr Smith had used the properties owned by BTL and the Prospect Trust to obtain loans from FM Custodians. In the circumstances of this case, he used the properties to obtain advances but also admitted that this was done using documents, knowing them to be forged, to obtain a pecuniary advantage, ie the qualifying offence.

[54] Construing the situation that way accords with the purposes of the CPRA. It enables the value of that property to be available to compensate the victims of Mr Smith's fraud. FM Custodians' interest as mortgagee would, however, be protected if they held a valid mortgage and had not been involved in the qualifying instrument forfeiture offence.

[55] I thus hold there was no error in the District Court Judge proceeding on the basis the relevant properties had been used to commit or to facilitate the commission of the relevant offence.

Did FM Custodians have an interest in the properties by virtue of its mortgages?

Could the District Court go behind the registered title interests and decide that FM Custodians had no mortgage interest because those mortgages had been obtained by fraud?

Submissions

[56] FM Custodians' first submission in this regard is that the Judge should not have gone behind the registered mortgage to ascertain whether the mortgage was liable to be set aside on the grounds of fraud, so as to be protected by the indefeasibility provisions of the Land Transfer Act 1952.[19] In referring to ss 74, 78 and 79 District Court Act 2016, FM Custodians submits the District Court did not have jurisdiction to hear and decide a claim for removal of these registered mortgages, and no such claim had been brought in any court. FM Custodians submits that, in the absence of an order made by a competent court setting aside the registered mortgage, the register should have been treated as decisive.

[57] Again, this was not an issue when the proceedings were heard in the District Court.

[58] FM Custodians' mortgages secured advances for $784,000. Section 74(1) says that, in its general civil jurisdiction, the District Court has jurisdiction to hear and determine a proceeding:

> (a) in which the amount claimed or the value of the property in dispute does not exceed $350,000;
>
> (b) that, under any enactment other than [the District Court Act] may be heard and determined in the court.

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[19] Since the hearing, the Land Transfer Act 1952 has been repealed and replaced by the Land Transfer Act 2017. The 1952 Act was the governing Act for the purposes of this proceeding. Any reference to the Land Transfer Act in this judgment is to the 1952 Act.

[59] Section 75(1) says the District Court has jurisdiction to hear and determine a proceeding:

> (a) for the recovery of any penalty, expenses, costs, contribution or similar monetary liability that is recoverable under any enactment; and
>
> (b) in which the amount claimed does not exceed $350,000 excluding interest …

[60] Sections 78 and 79 limit the Court's jurisdiction to hear proceedings for the recovery of land. Had FM Custodians or the Crown been seeking recovery of the land owned by BTL and the Prospect Trust, the value of the land would have been outside the jurisdiction of the District Court in this regard.

[61] Mr Goddard submits that, at its highest, the District Court could have properly held only that, by reason of the claimed fraud, FM Custodians had a defeasible mortgage over the land. Until that interest had been set aside through a judgment to that effect from a court of competent jurisdiction, the mortgage interest had to be recognised.

[62] Ms Grau for the Crown submits the jurisdiction the Court was exercising was derived from the Sentencing Act and the relevant provisions of the CPRA.

[63] Ms Grau submits, in exercising the jurisdiction conferred on it as to the making of an instrument forfeiture order through the Sentencing Act and the CPRA, the District Court Judge must have been entitled to consider whether the mortgage obtained by FM Custodians was obtained by fraud or whether the Court had to be bound by what was shown on the title.

Discussion

[64] The District Court's jurisdiction to consider whether to make an instrument forfeiture order in respect of property used to commit or facilitate the commission of a qualifying instrument forfeiture offence was derived from the Sentencing Act.

[65] The Sentencing Act provides for "the court" to be able to make an instrument forfeiture order.[20] "The court" must also decide whether an applicant for relief against the making of that order is entitled to such relief.[21] The court which has the jurisdiction and is required to consider these questions is the court sentencing the offender for the qualifying instrument offence. That court is the court exercising jurisdiction in criminal cases.[22]

[66] The District Court, as the sentencing Court, thus had the required jurisdiction to determine whether to make an instrument forfeiture order and whether FM Custodians was entitled to relief from the making of such an order.

[67] In considering those questions, it is apparent from the legislation that the court would not be concerned just with persons who are shown on the title to have an interest in the property in question.

[68] A prosecutor who has notified the court that it should be considering whether to make an instrument forfeiture order in respect of the property in question, must take all reasonable steps to notify every person who, to the knowledge of the prosecutor, has an interest in the property.[23]

[69] Under the CPRA, interest, in relation to property of any kind, means:[24]

(a) a legal or equitable estate or interest in the property; or

(b) a right, power, or privilege in connection with the property.

[70] The requirement for notice is thus not limited to those who have a registered interest in the property in question. It could include those who have a beneficial interest in the property. In *R v Van de Ven*, Woolford J said:[25]

> The definition of interest under the forfeiture legislation is a wide one and cuts across traditional legal and equitable categories of ownership.

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20 Sentencing Act 2002, s 142N, following the prosecutor's notice under s 142B.
21 Section 142L.
22 Sentencing Act, s 4, definition of "court".
23 Sentencing Act, s 142E.
24 Criminal Proceeds (Recovery) Act, s 5 definition of "interest".
25 *R v Van de Ven* [2013] NZHC 479 at [33].

[71] In that case, Woolford J relied on s 58 CPRA in allowing a court to consider the extent to which a respondent has effective control over property in determining whether a respondent should be treated as having an interest in the property. Woolford J found that, although the son was the legal owner of the property because his name was on the Certificate of Title, his legal ownership was subservient for the purposes of the forfeiture legislation to the contractual rights of his father.

[72] I do not accept that the provisions of the Land Transfer Act regarding indefeasibility of title are to be applied or interpreted to mean that an interest recorded on the title but obtained by fraud must be recognised until a court of competent jurisdiction in specific proceedings declares it to have been obtained by fraud.

[73] Relevantly, s 62 Land Transfer Act stated:

> … the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register constituted by the grant or certificate of title of the land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever, - …

[74] Section 63 protects the registered proprietor against any action for possession or other action for the recovery of any land except in five specified cases including fraud. Relevantly, it states:

> **63 Registered proprietor protected against ejectment**
>
> (1) No action for possession, or other action for the recovery of any land, shall lie or be sustained against the registered proprietor under the provisions of this Act for the estate or interest in respect of which he is so registered, except in any of the following cases, that is to say:
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> …
>
> (c) the case of a person deprived of any land by fraud, as against the person registered as proprietor of that land through fraud, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud:

[75] The Privy Counsel in *Frazer v Walker* also noted that the provisions in the Land Transfer Act which confer "indefeasibility of title" upon the registered proprietor do not protect the registered proprietor against any claim whatsoever. The registered proprietor may be exposed to claims in personam.[26]

[76] In these proceedings, the District Court was concerned effectively with the interest of FM Custodians as mortgagee and whether its rights, both as mortgagee and in personam, should have precedence over the Crown's right to an instrument forfeiture order through the use of land in the commission of an instrument forfeiture offence. To determine that FM Custodians had such an interest, the Judge had to determine whether FM Custodians' mortgage interest had been obtained by fraud. There was nothing in the Land Transfer Act, Sentencing Act or CPRA which stated the fraud exception to indefeasibility had to be established in proceedings brought in a court of competent jurisdiction solely for the purpose of establishing the fraud for that purpose.

[77] In all these circumstances the District Court Judge was not bound to accept that FM Custodians' mortgages on the relevant titles were validly registered, thus indefeasible and thus immune from attack under the relevant provisions of the Sentencing Act and the CPRA.

[78] I thus reject the argument that the provisions in the Land Transfer Act which provide for indefeasibility of title barred the District Court Judge from finding that FM Custodians' interest in the mortgage over the relevant land had been obtained by fraud.

[79] However, to find the mortgage had been obtained by fraud, the Judge had to find there had been actual fraud by the registered proprietor FM Custodians or its agent.[27]

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26 *Frazer v Walker* [1967] 1 AC 569 (PC).

27 *Frazer v Walker*, above n 26, at 580; *Assets Co Ltd v Mere Roihi* [1905] AC 176 at 210; *Dollars & Sense Finance Ltd v Nathan*, above n 10, at [5]–[6].

Did FM Custodians obtain its mortgage interest by fraud?

Submissions

[80] Mr Goddard submits the fraud identified by the District Court in this case was the forgery by Mr Smith. The Judge found there had not been any dishonesty on the part of FM Custodians' CEO, Mr Hutchison. Nor was there any finding of dishonesty in connection with the forgery (as opposed to the failure to carry out the instructions from FM Custodians) on the part of the solicitor, Mr Woulfe.

[81] Mr Goddard suggested that, on that basis, the key question was whether Mr Smith's dishonesty can be attributed to FM Custodians on the basis that Mr Smith was the duly authorised agent for FM Custodians to obtain the signatures of Mr Ross, and his conduct in forging the signature was within the scope of that agency.

[82] Ms Grau for the Crown did not disagree with that submission. The Crown submits that, as to the Judge's finding that there was no valid mortgage and that Mr Smith in forging the documents was acting as the agent of FM Custodians, the case was on all fours with *Nathan*. In that case, the Supreme Court agreed with the trial Judge that Mr Nathan had forged documents as an agent for the lender.

[83] Mr Goddard submits the starting point is that:

(a) An agent cannot, except with the express or implied consent of the principal, delegate their authority. The principal will not be bound by the act or contract of a sub-agent whose appointment has not been authorised by the principal.

(b) In particular, solicitors may not normally delegate the performance of tasks entrusted to them as agent.[28]

[28] Referring to HG Beale (ed) *Chitty on Contracts* (32nd ed, Sweet & Maxwell, London, 2015) vol 2 at [31-041].

[84] FM Custodians accepts that Mr Woulfe and his firm were instructed to attend to documentation on behalf of the intended mortgagee, FM Custodians, as its agents. Fund Managers was authorised to issue those instructions to Mr Woulfe on behalf of FM Custodians.

[85] FM Custodians submits:

(a) Mr Woulfe was required to carry out the instructions of FM Custodians personally unless authorised expressly or by implication to delegate some or all of those tasks to another person – and in particular, to a person other than a solicitor.

(b) The instructions to Mr Woulfe did not expressly authorise sub-delegation of any of the tasks he was instructed to perform. The instructions required Mr Woulfe to attend to the preparation and due execution of the relevant documents and to the registration of security documents, and thus required him to obtain an accurately completed executed client A&I form. As the completed client A&I forms dated 27 May 2011 illustrate, those forms required the solicitor to certify they had witnessed the signatory sign the form and had confirmed their identity.

(c) The District Court Judge found FM Custodians had not given express authority to Mr Woulfe to delegate the task of obtaining Mr Ross's signature to any other person.[29] There was nothing in the instructions and accompanying documents that could sensibly be read as implicit authority to do so. There was "absolutely nothing in the documents to displace the normal principle that a solicitor cannot sub-delegate". To the contrary, the language of the instructions and requirements in relation to the client A&I forms could not be reconciled with sub-delegation.

(d) Mr Goddard submits the circumstances in *Nathan* which led to the Court there finding the fraud was committed by Mr Nathan as agent were materially different from the situation here. It was material to the decision in *Nathan* that signatures were to be obtained from someone who it was

[29] At [110].

known was not living in the same town as the lender's solicitor so that inevitably the task of obtaining those signatures would have to be delegated to someone else. That inference could not be drawn in the present case because the solicitor instructed was the solicitor for BTL based in the same town where BTL's business activities were located. It would thus not have been inevitable as far as FM Custodians was concerned that Mr Ross, who was a director of BTL, would have to sign the required documents away from Hokitika.

(e) As Mr Goddard put it:

> Perhaps more importantly, the electronic registration regime introduced since *Nathan* was decided requires the certifying solicitor responsible for the electronic dealing to be present in person when the client signs the dealing authority, and to give a certificate to that effect.

So, the expectation about use of agents to obtain signatures at a distance reflected in *Nathan* can no longer apply in relation to land dealings. Mr Goddard submits that it followed that Mr Woulfe had no authority to appoint Mr Smith as an agent for FM Custodians to obtain signatures of Mr Ross on the relevant documents. Mr Smith was thus not FM Custodians' agent. His conduct and knowledge could not be attributed to FM Custodians.

(f) On the basis of those submissions, it could not be said FM Custodians obtained the mortgage through the fraud of FM Custodians or its agent.

Discussion

[86] I note that in the letter of instruction from Fund Managers to Murdoch James & Roper (Mr Woulfe) of 24 May 2011, the lenders' instructions were:

> Please act for the Trust in attending to the preparation and due execution of the loan agreement and initial disclosure to the borrower pursuant to the Credit Contract and Consumer Finance Act 2003.

[87] That instruction required Murdoch James & Roper to be responsible for "*due execution* of the loan agreement and initial disclosure".[30] It did not specifically require Murdoch James & Roper to witness the signatures of those executing documents as required for there to be due execution.

[88] The instructions also required the solicitors, when registering the mortgage electronically, to follow and adhere to the New Zealand Law Society guidelines for electronic registration using Landonline and to:

> … obtain an accurately completed and executed client authority and instruction form which specifies the memorandum of mortgage number and the required priority amount.

[89] There was a specific instruction to:

> Please explain the client authority and instruction form to the mortgagor(s) including that it takes effect as a legal mortgage. Please also ensure a copy of the memorandum of mortgage terms are attached to the client authority and instruction form and have each page initialled by the mortgagor(s)".

[90] There were then these instructions under the heading "Execution, disclosure and other legal requirements":

> All the Trust's requirements are set out in the enclosed solicitor's certificate (other than any preconditions to the loan itself, which are set out in the loan offer or term loan contract). Any deletions from or amendments to the form of the solicitor's certificate must be clearly marked.

[91] The A&I form, which the guidelines required the solicitors to have to proceed with electronic registration of the mortgage, had to be signed by the required authorised signatories for BTL, Mr Smith and Mr Ross. With their signatures they authorised the e-dealing on behalf of BTL and confirmed BTL had passed the necessary resolutions as required by its empowering constitution rules or statute to authorise registration of the mortgage. There was nothing in that part of the form to indicate it had to be signed by the solicitors.

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[30] Emphasis added.

[92] Another part of the form, headed "Signatory Identification" required the person establishing the identities of the signatories to tick which form of identification was being used. It then stated:

> I certify that:
>
> (a) I have witnessed the signatory(s) sign this form;
>
> (b) I have sighted the original form(s) of identity ticked above;
>
> (c) I have attached a copy of ID(s) used;
>
> (d) the photo(s) name(s) and signature(s) match the signatory(s) name(s) and identification provided.

[93] Mr Woulfe signed that form as the person who had witnessed the signatures of Mr Smith and Mr Ross and who had confirmed their identities from driver licences. The form did not, however, require that signatory identification part of the document to be completed by Mr Woulfe or a solicitor. It could be completed by any "Person establishing identity". That person had to provide his or her full name and details. In terms of New Zealand Law Society guidelines for electronic registration,[31] the witnessing and identification can be done by someone of good standing whose honesty can reasonably be relied on by the solicitors who are submitting the land transfer document for registration.

[94] Relevantly, the guidelines as to matters of identification state:

> 8.30 The lawyer takes responsibility for all certifications made. It is therefore imperative for the protection of both the lawyer and the integrity of the Register to be satisfied that reasonable steps have been taken to establish the **identity, capacity and bona fides** of the client on whose behalf the certifications are being made. There is no independent checking carried out by LINZ prior to registration and the lawyer's actions directly affect the Register.
>
> …
>
> 8.32 In all cases it is essential that the identity of the interested party be verified. All lawyers must be familiar with and comply with the latest Standard for verification of identity for registration under the Land Transfer Act 1952 LINZS20002 (www.linz.govt.nz) which sets out the minimum requirements for verifying identity for the purpose of registering land transactions.

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[31] New Zealand Law Society Property Law Section *Property Transactions and E-Dealing: Practice Guidelines* (July 2012, updated April 2015).

> 8.33 In the case of a landowner transferring or mortgaging a property, comply with the requirements in the latest Standard for verification of identity for registration under the Land Transfer Act 1952 LINZ (http://www.linz.govt.nz/land/land-registration/rules-standards-and-guidelines).
>
> 8.34 *It is not necessary for a lawyer personally to witness the A & I being signed. Where the lawyer cannot personally verify the identity of an interested party the lawyer may have identity verification carried out by a delegate who must be an independent person on whom the Conveyancing Professional can reasonably rely*.[32]

[95] The standards for verification of identity for registration under the Land Transfer Act 1952 expressly recognised that verification as to the identification of the person signing an authority for an e-dealing could be provided by "an independent trusted person who the practitioner can reasonably rely on", not necessarily the solicitor acting in the transaction.[33]

[96] I do not accept the submission for FM Custodians that either the required A&I forms or the Law Society guidelines required the solicitor to certify they had witnessed the signatory sign the form and had confirmed their identity or that they required the certifying solicitor responsible for the electronic dealing to be present in person when the client signed the dealing authority.

[97] Consistent with the Law Society guidelines, clause 7 of the Mortgage Management Agreement for the No. 2 Fund between Fund Managers and Trustees Executors of 19 June 2008 stated:

> The manager agrees with the trustee for the benefit of the fund that the manager will ensure that all security documentation and other matters of a legal nature relating to advances made by the fund or to the mortgage investments generally shall where necessary be prepared or perused by a solicitor instructed by the manager on behalf of the fund. The manager will also ensure that on each occasion of instruction it receives a solicitors certificate addressed to the trustee in a form acceptable to the trustee to the effect that all mortgage or other advances are secured by documents that are valid and binding upon the borrowers and all other liable parties and that any other documentation to be relied upon or executed on behalf of the trustee, including documentation in relation to variations of existing loans or security arrangements, it is in order for acceptance by it.

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[32] Emphasis in bold in original. Emphasis in italics added.

[33] Land Information New Zealand *Standard for verification of identity for registration under the Land Transfer Act 1952* (LINZS20002, 30 October 2013) at G2.

In that agreement, Trustees Executors did not require the instructed solicitors to witness the execution of any required documents.

[98] Here, the solicitor, Mr Woulfe, certified that he had witnessed Mr Ross signing the A&I form. He certified that he had seen the original of Mr Ross's driver's licence, a copy of which was attached to the signed A&I form. He also certified that the photo and signature of Mr Ross, which he had certified he had witnessed, matched the signature and identification provided on the licence. That certification was untrue because Mr Woulfe had not witnessed Mr Ross signing the document. It is also apparent from a cursory and non-expert examination of the signatures for Mr Ross in the two documents that they did not necessarily match.

[99] In his submissions for FM Custodians, Mr Goddard accepted that Mr Woulfe was dishonest vis-à-vis FM Custodians because he knew he had not personally witnessed the signature of Mr Ross on the A&I form, contrary to the certificate he gave to FM Custodians. It was also contrary to the certificate he gave to Murdoch James & Roper as part of the authority and instruction to Murdoch James & Roper to register the mortgage from BTL over the properties for FM Custodians as mortgagee.

[100] Mr Goddard submits that the issue the Court had to consider was not whether Mr Woulfe had been dishonest in a general sense but whether he had been dishonest in the fraud committed by Mr Smith, the fraud which could justify the making of an instrument forfeiture order. Mr Goddard noted the Judge had found on the evidence that it was likely Mr Woulfe had arranged with Mr Smith that Mr Smith would procure the signature of Mr Ross. Consistent with that, Mr Woulfe would have expected Mr Ross to sign the documents although not in Mr Woulfe's presence. The Judge found that Mr Woulfe was not knowingly a party to Mr Smith's dishonesty in the way Mr Smith forged Mr Ross's signature. There is no dispute on the appeal as to that finding. It is however accepted that Mr Woulfe was dishonest in the way he certified to Murdoch James & Roper, as the agents for FM Custodians, that he had witnessed Mr Ross's signature on the A&I form and had established that the person signing as Mr Ross was in fact truly Mr Ross.

[101] That dishonesty did not mean that Mr Woulfe or Murdoch James & Roper were a party to the qualifying offence but, in circumstances here where Mr Ross's signature had been forged, Mr Woulfe's dishonest certificate does mean that FM Custodians obtained their mortgage over the BTL properties in part through the dishonesty of Mr Woulfe while he was acting as their agent. But for Mr Woulfe's certificate, FM Custodians would likely not have obtained the mortgage as Mr Smith's fraud would have been detected.

[102] The Law Society guidelines, referred to by Mr Goddard and by the lender in its instructions to Murdoch James & Roper, emphasise the importance of the practitioner's responsibility with regard to establishing the identity, capacity and bona fides of clients on whose behalf certifications are being made and of how fundamental this is to "the integrity of the Register".

[103] Here, the Registrar General of Land accepted the electronic transaction for registration of the mortgage over the BTL land, submitted by Murdoch James & Roper, on the basis Murdoch James & Roper had been authorised by BTL and its directors, Mr Smith and Mr Ross, to register the mortgage over BTL land in favour of FM Custodians.

[104] Murdoch James & Roper were not however properly and duly instructed to register that electronic transaction because Mr Woulfe had been dishonest in certifying that he had witnessed and could confirm the true identity of Mr Ross when Mr Ross purportedly signed the A&I form. Mr Ross's signature on the A&I form authorising Murdoch James & Roper to electronically register the mortgage over the BTL land was forged. The mortgage over the BTL land was thus wrongfully registered through the fraud of Mr Smith in forging Mr Ross's signature on various documents including the A&I form and the certification of Mr Woulfe on the A&I form.[34]

[105] In the District Court, the Judge did not discuss whether there was any difference between the way FM Custodians obtained its mortgage interest over the BTL land and the way in which it claimed to have acquired a mortgage interest over

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[34] Consistent with the decision of the then Supreme Court, *District Land Registrar v Thompson* [1922] NZLR 627 (SC).

the Prospect Trust land. The Judge, applying *Nathan*, found that both claimed mortgage interests had been obtained through the fraud of Mr Smith as agent for FM Custodians so that FM Custodians did not have a valid interest in the relevant property pursuant to such mortgages. If there was such a fraud by Mr Smith as agent for FM Custodians, that was an adequate and proper basis on which to find FM Custodians' interest in the mortgage over the Prospect Trust land had been obtained by fraud and was thus invalid.

[106] There can however be no suggestion that FM Custodians obtained its interest over the Prospect Trust land through any dishonesty on the part of Mr Woulfe.

[107] The A&I form for registration of the Prospect Trust mortgage to FM Custodians had to be signed only by the trustees of the trust, Mr and Mrs Smith. They did sign the form with Mr Woulfe certifying that he had witnessed their signatures and providing the required certificate as to identity. There is no suggestion that there was anything false about that document.

[108] Whether or not FM Custodians obtained its mortgage interest over the Prospect Trust property thus depends on whether FM Custodians obtained its claimed mortgage interest through the fraud of Mr Smith as its agent. The Crown also relies on the fraud of Mr Smith as agent of FM Custodians as a basis for the Court to hold that FM Custodians' mortgage over the BTL land was also obtained by fraud.

[109] I thus now consider whether there was such fraud on the part of Mr Smith as agent for FM Custodians.

[110] There is no dispute that Mr Woulfe was the agent of FM Custodians.

[111] I do not accept that there is a presumption against an instructed solicitor being able to delegate tasks required of them in the general way Mr Goddard submits, with reference to a brief passage from *Chitty on Contracts*, referred to earlier.[35]

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[35] Beale, above n 28, at [31-041].

[112] In *Nathan*, counsel for Dollars & Sense (D&S) had referred to a comment from Stuart-Smith LJ in *Royal Bank of Scotland v Etridge (No 2)* that the Court doubted it would ever be possible to treat a husband as the creditor's agent where he or his company is the principal debtor in obtaining a signature from the husband's wife.[36] In its judgment, the Supreme Court said that it might be unsound practice for financiers to leave it to borrowers to organise the signatures of guarantors, with the borrowers in so doing fulfilling the role of agents for the financiers. The Court said it would:[37]

> … in a particular case be very much a question of factual assessment and judgment whether the borrower has indeed acted as an agent for the lender to obtain signature or has merely acted as the conduit for the delivery of the documents. But to say that it is never possible for the borrowers to act as agent, as was suggested by the Court of Appeal in *Etridge*, is to fail to appreciate the realities of cases like the present.

It was not suggested in *Nathan* that there was a general presumption against an instructed solicitor being able to delegate which had to be weighed in the balance in deciding whether a solicitor could arrange for a document to be signed at a distance.

[113] There was also nothing in the specific instructions the lender gave to Murdoch James & Roper that was consistent with there being no ability to delegate in such a general sense.

[114] In the letter of instruction from the lender to Murdoch James & Roper for the loans to both the Prospect Trust and BTL of 24 May 2011, the solicitors were asked to act for the trust "in attending to the preparation and due execution of the loan agreement and initial disclosure of the borrower pursuant to the Credit Contracts and Consumer Finance Act 2003". There was nothing in the instructions to indicate that Murdoch James & Roper had to be present when the loan agreement was signed. It was however asked to accept responsibility for making sure the agreements were signed and there was disclosure to the borrower as required by the legislation.

[115] The lender did assume that the solicitors would be dealing personally with the mortgagors. In the letter of instruction, the solicitors were told "please explain the client authority and instruction form to the mortgagors including that it takes effect as

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36 *Royal Bank of Scotland v Etridge (No 2)* [1998] 4 All ER 705 at [28].
37 *Dollars & Sense Finance Ltd v Nathan*, above n 10, at [25].

a legal mortgage". That statement was however made in the context of the solicitors being asked to ensure they "followed and adhered to the New Zealand Law Society guidelines for Electronic Registration using Landonline" and that they obtain "an accurately completed and executed client authority and instruction form which specifies the memorandum of mortgage number and the required priority amount". The requirement was for them to "obtain an accurately completed and executed client authority and instruction form", not to be present when that form was completed and executed.

[116] The solicitor's certificate which Murdoch James & Roper was required to provide for the loan funds to be available included its certifying and undertaking that:

> Every guarantor has received independent legal advice and the solicitor who gave that advice has confirmed to us that:
>
> a. an explanation was given to the guarantor of the terms and effect of the guarantee and the extent of the guarantor's obligations under the guarantee; and
>
> b. the guarantor has confirmed that the guarantor understands the nature of the transaction and the extent of his her or its liability under the guarantee
>
> OR
>
> a. we have recommended to the guarantor that the guarantor should obtain independent legal advice as to the guarantee; and
>
> b. the guarantor has chosen not to be independently advised regarding the guarantee and we have written confirmation from the guarantor to that effect.

[117] It is apparent from the wording of that clause that it was contemplated Murdoch James & Roper could delegate the task of ensuring every guarantor had received legal advice as to the effect of the guarantee and the guarantor's understanding of their obligations under the guarantee to another independent solicitor. In that regard, the lenders' instructions contemplated there could be some delegation.

[118] There was no evidential basis on which it could be inferred that FM Custodians must have anticipated that Mr Ross would be able to sign documents in Hokitika because he was associated with BTL whose properties and business were located near Hokitika. Under cross-examination in the District Court, Mr Hutchison accepted that he knew from company searches he had carried out when considering the loan

applications that Mr Ross lived in Picton. He also accepted in cross-examination that he had not attempted to make any contact with Mr Ross when the loan application was being considered or around the time the loans were made. He said he had anticipated Mr Smith would be discussing with other shareholders what was proposed with regard to BTL.

[119] The instructions from the lender were that Murdoch James & Roper was to ensure there was due execution of the required documents but it was not implicit in that instruction that the documents had to be executed in Hokitika and, more particularly, that they had to be executed in the presence of solicitors or other staff from Murdoch James & Roper.

[120] It is useful to look at the facts of *Nathan* in more detail. *Nathan* was concerned with the validity of a mortgage secured over a property owned by Mr and Mrs Nathan but for the benefit of a company controlled by their son, Rodney. A solicitor, Mr Thomas, was instructed to act for D&S as the lender. It was anticipated that Mr Thomas would not also be acting for either Rodney or his parents. Mr Thomas arranged for security documents, including a mortgage document, to be given to Rodney for his parents to sign so that D&S could obtain the security they required for their loan. There was no dispute that Mr Thomas, as solicitor, was acting as the agent for D&S.

[121] Rodney forged the signature of his mother. The issue in the case was whether D&S had obtained its mortgage over the parents' property through the fraud of Rodney as the agent for D&S.

[122] In the Supreme Court, it was accepted for D&S that Rodney's forgery, for the purposes of establishing fraud in terms of ss 62 and 63 Land Transfer Act, must be treated as the fraud of D&S if Rodney was acting in the course of an agency for D&S when he committed the forgery, regardless of the absence of any knowledge of the fraud by D&S or its solicitor. The Supreme Court said the concession was properly made.

[123] The Supreme Court considered the crucial question was whether Rodney had actual authority, either express or implied, to obtain execution of the documents from D&S.

[124] The High Court, the Court of Appeal and the Supreme Court all held that Rodney's fraud was as agent for D&S, his knowledge of the fraud was to be imputed to D&S and thus D&S's title to an interest in the parents' property as mortgagee was not protected by the indefeasibility provisions of the Land Transfer Act.

[125] The circumstances of this case were, in a number of respects, identical and similar enough for the same finding to be made here in respect of Mr Smith's forgery and FM Custodians' position.

[126] FM Custodians, through its solicitor Mr Woulfe, asked Mr Smith to obtain the signature of Mr Ross on the required documents. I also infer from the evidence that Mr Woulfe left it to Mr Smith to make the required disclosure of the loan documents to Mr Ross. There was no documentation or evidence before the Court to suggest that Mr Woulfe had communicated directly with Mr Ross to make such disclosure to him.

[127] Neither FM Custodians, through Fund Managers, nor Mr Woulfe had made any effort to communicate directly with Mr Ross. Mr Hutchison's evidence was that he expected Mr Smith to have discussed fully with Mr Ross, as another shareholder and director in BTL, what was happening and what was required of BTL.

[128] Mr Woulfe had left it to Mr Smith to discuss with Mr Ross whether BTL would act on advice that they take independent legal advice over the guarantee BTL was providing as to the loan to the Prospect Trust.

[129] In *Nathan*, the solicitor was not acting also for Rodney or his parents with regard to completion of the required documents and may have thought that the borrower and guarantors in that situation might have their own solicitor acting for them. When documents were ultimately completed, the solicitor knew the parents did not have such independent representation. Here, Mr Woulfe was acting for the borrowers and for BTL in completing the loan documentation, as well as FM

Custodians. He was thus in a better position than Mr Thomas had been in *Nathan* to decide whether he could delegate to Mr Smith the task of having the required documents signed by Mr Ross in the required manner.

[130] For the reasons already discussed, with registration now to proceed electronically in accordance with Law Society guidelines, Mr Woulfe was quite entitled to assume that the required documents could be signed by Mr Ross independently of Murdoch James & Roper and that, where a document such as the A&I form has to be witnessed, that witness could be someone other than a solicitor or other employee of Murdoch James & Roper.

[131] It could not be assumed, from what FM Custodians through Fund Managers knew of Mr Ross's circumstances, that either FM Custodians or Mr Woulfe would have expected the required documents to be signed by Mr Ross in Hokitika. The situation was similar to that in *Nathan* where Mr Thomas was based in Auckland but documents had to be executed by Mr and Mrs Nathan who resided in or near Kerikeri. Here, Mr Woulfe was based in Hokitika. Mr Ross lived in Picton.

[132] The documents Mr Woulfe gave to Mr Smith for Mr Ross to sign included the loan offers for both the Prospect Trust loan incorporating the guarantee from BTL which BTL had to accept, and the BTL loan offer. Mr Woulfe must thus have anticipated that, in obtaining Mr Ross's signature on those documents as a director of BTL, Mr Smith would be informing Mr Ross of what BTL was doing. The documents also included the certificate from the directors of BTL in which the directors were required to acknowledge that they had resolved to sign the relevant documents and that no director had any personal interest in the proposed transactions. The required document provided for both directors to sign. Only Mr Smith signed the document but he did so on behalf of both directors. The requirement for that to be signed on behalf of the directors must have been further reason for Mr Woulfe to assume that Mr Smith would be discussing with Mr Ross all that was proposed with regard to the offered loans and the obligations BTL would be incurring.

[133] The Supreme Court held that, in view of the engagement of Rodney by D&S, through Mr Thomas, to get the mortgage signed and then witnessed:[38]

> … it would be artificial and commercially unrealistic to take the view that there was no relevant element of agency in what Rodney did. Any doubt about Mr Thomas's acceptance of Rodney's role was removed when the documents came back witnessed by a lay person, no objection was taken, the advance was made and the mortgage was presented for registration. If it were necessary to determine the point, we would be inclined to the view that, at the very least, this acceptance amounted to a ratification by Mr Thomas of Rodney's authority to arrange execution of the documents.

[134] The Supreme Court did not necessarily accept or attach much importance to the view that Rodney had been expected to give advice and to make the explanation referred to in the Statement by Covenantors as to the need for independent advice. It concluded, for reasons apart from that and as stated by both the High Court and Court of Appeal, that Rodney had been entrusted with the task on behalf of D&S of obtaining the signatures of his parents. They thus held "he was D & S's agent for that purpose. D & S implicitly authorised him to represent it in its dealings with his parents concerning their signature of the documents".

[135] The Supreme Court also dismissed, for the reasons given by the Court of Appeal majority, the argument that Mr Thomas, himself an agent, had no power to create a sub-agency. In that regard, the Supreme Court mentioned that an Auckland solicitor had been instructed when the documents were likely to be signed in Northland so that there was implicit agreement for the appointment of a sub-agent in obtaining the signatures.

[136] In her judgment for the majority in the Court of Appeal, Glazebrook J rejected the submission that the solicitor had no power to appoint sub-agents.[39] As here, she noted there was nothing in the evidence to suggest that D&S had expressly prohibited the delegation of functions by Mr Thomas. She went on to say, nor would it have been sensible for it to have done so with the solicitor being in Auckland and the Nathan parents being in Kerikeri.

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38 At [26].

39 *Dollars & Sense Finance Ltd v Nathan* [2007] NZCA 177, [2007] 2 NZLR 747 at [85].

[137] Having agreed with the findings below that Rodney's forgery was committed when he was acting as the agent of D&S, and the scope of his agency was to obtain the signatures of his parents on the documents with appropriate witnessing, the Supreme Court then considered it necessary to determine whether the forgery of the mother's signature was an act done within the scope of that agency. In considering that issue, the Supreme Court said:[40]

> The scope of the task that an agent is appointed to perform must be determined in a commercially realistic way according to the circumstances, especially when there is no general agency and the agent therefore has a limited function.

[138] As here, it was not suggested in *Nathan* that D&S or the solicitor had authorised the particular forgery or any forgery or fraudulent act at all. The Supreme Court proceeded on the basis there were two stages of enquiry: first, what acts had the principal authorised and, second, whether the agent's act was so connected with those acts that it could be regarded as a mode of performing them.[41]

[139] Here, as in *Nathan*, the forger had been authorised by the lender through the solicitor to obtain the required signature on various documents. As in *Nathan*, the issue now is whether Mr Smith's act of forgery was an act sufficiently connected with an authorised act, the obtaining of signatures, so that it can be treated as a mode of performing it and therefore done within the agency.

[140] The Supreme Court, for reasons discussed and with reference to authority, held that an act can have the necessary "close connection" even though it is of a criminal character and done with fraudulent intent by the agent.[42] A fraudulent act impacting on a third party may, vis-à-vis the third party:[43]

> … be seen as done within the scope of an agency even if it is done exclusively for the benefit of the agent and a fortiori may be seen as an act within the agency if it is done for the benefit of the principal as well as for the benefit of the agent.

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40 At [30].

41 At [32], referring to P.S. Atiyah *Vicarious Liability in the Law of Torts* (Butterworth, London, 1967) at 178.

42 At [35], citing *Bazley v Curry* [1999] 2 SCR 534 and *Jacobi v Griffiths* [1999] 2 SCR 570.

43 At [35].

[141] To determine whether the conduct of the agent fell within the scope of the task which the agent was engaged to perform:

> [40] … the Court must concentrate on the nature of the tasks to be performed on behalf of the principal and on how the use of the agent for that purpose has created risk for the third party. Without a sufficiently close connection between the task for which an agent was engaged and the unlawful action of that agent, so that the wrong can be seen as a materialisation of the risk inherent in the task, it will be neither fair nor proper to impose vicarious (strict) liability on a principal who has not necessarily been guilty of any personal negligence and so would not be directly liable to the claimant. Strict liability of this kind is exceptional and is not to be imposed unless fully justified by these considerations. Certainly, just the opportunity to commit the wrongful act or the existence of some merely incidental connection will not suffice.
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> …
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> [43] … Liability for a fraud committed in the course of an agency does not depend upon the attribution of legal fault or moral blame to the principal. A legitimate advantage of using an agent may be that the principal does not need to inform itself about what is done on its behalf, but that ignorance should not be able to be used as a shield against liability to a third party.

[142] The Supreme Court held there is no "fraud exception" to the imputation of knowledge as to the fraud on the part of the principal where the fraudulent act otherwise has occurred within the scope of his agency. The liability of the principal is not dependent on imputation of the knowledge of the agent to the principal but arises because the agent has done an act, namely the fraud, for which the principal is vicariously responsible.[44]

[143] It must however be shown that there is a close connection between what was authorised and what the agent did; "That is what allows the agent's act to be treated as being within the scope of the agency".[45]

[144] The Supreme Court held:[46]

> … the signing of the documents was central to this agency and that is what, in relation to his mother, Rodney took it upon himself to do, albeit in a criminal manner. It could fairly be said that, despite that centrality, forging a signature was exactly what D & S did not want Rodney to do to fulfil the task entrusted to him. … an act can be within the scope of an agency even when it is the

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44 At [44].
45 At [44].
46 At [46].

> antithesis of what the principal really wanted. The true test is whether the tortious act has a sufficiently close connection with the task so that the commission of the tort can be regarded as the materialisation of the risk inherent in that task. If that is so, what the agent did can fairly be treated as an improper mode of fulfilling the allocated task ...

[145] The Supreme Court considered that someone who creates an agency in which there is a risk of improper behaviour by an agent or, as in *Nathan* and in this case, by someone entrusted with a sub-agency, should expect to bear responsibility where that risk eventuates and loss is thereby caused by the agent to a third party. The Supreme Court noted:[47]

> Forgery was a peril which was avoidable if Mr Thomas had not put Rodney in a position where it was left to him to obtain the necessary signatures. It is not therefore at all unreasonable for Rodney's forgery to be regarded as an act done in the course of the agency. All the more so is this reasonable where it can be said that D & S was in fact benefiting from the fraud. Obviously, the forgery played a material part in enabling D & S to become registered as mortgagee. By registering the forged document it obtained the status of legal mortgagee. It is seeking to retain that advantage by means of retaining its registration and exercising a power of sale under the mortgage. Where a third party is affected by the agent's forgery a principal should not be allowed to deny the agency in order to take the benefit of the registration of the forged document.

[146] Accordingly, the Supreme Court held in *Nathan* that, for the purpose of the fraud exception to ss 62 and 63 Land Transfer Act, the fraud by its agent must be regarded as the fraud of D&S, whose title as mortgagee was therefore not indefeasible.

[147] Here, registration of the BTL mortgage in respect of the FM Custodians loan to BTL was achieved through the forging of Mr Ross's signature on the A&I form.

[148] I am satisfied, as was the Judge in the District Court, that registration of that BTL mortgage was obtained through the fraud of Mr Smith as the agent of FM Custodians.

[149] Registration of the Prospect Trust mortgage over its land was not obtained through the forgery of any A&I form but was obtained through the fraud of Mr Smith, also as the agent of FM Custodians. In his evidence in the District Court, Mr Hutchison explained that it was crucial to FM Custodians' agreement to make the loan

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47 At [48].

to the Prospect Trust that FM Custodians would be obtaining a guarantee in respect of that loan from BTL. For the Prospect Trust loan to be made, BTL had to sign the loan agreement, accepting that it would guarantee performance of that loan. FM Custodians also required a certificate from the directors of BTL that the company had resolved to execute the required documents and no director had any personal interest in the transaction. Mr Smith forged Mr Ross's signature on the loan agreement as well as other documents by which BTL accepted that it would be bound by its guarantee. He also forged Mr Ross's signature on the waiver of independent advice with regard to that guarantee. Had Mr Ross's signature not been forged in this way, FM Custodians would not have made the loan to the Prospect Trust and it would thus not have obtained its mortgage over the Prospect Trust land. On that basis, FM Custodians obtained its mortgage over the Prospect Trust land through the fraud of Mr Smith. Because Mr Woulfe had delegated to Mr Smith the task of obtaining Mr Ross's signature on those documents, in committing those forgeries, Mr Smith was acting as the agent of FM Custodians.

[150] Through Mr Smith's fraud as the agent of FM Custodians, the latter could thus not rely on the indefeasibility provisions of the Land Transfer Act to find that FM Custodians had an interest in either the BTL or Prospect Trust land which had to be recognised in terms of s 142L(2) Sentencing Act.

[151] There was thus no error by the Judge in the District Court when he held that FM Custodians did not have a valid interest in the property as its mortgages were created by fraud.

Was FM Custodians involved in the offending by Mr Smith?

[152] FM Custodians was not prohibited from seeking relief against the making of an instrument forfeiture order through s 77(2) CPRA because FM Custodians was not convicted of the qualifying instrument forfeiture offence to which the notice under s 142B Sentencing Act related. The issue is whether, for the purpose of s 142L(1)(b)(ii), FM Custodians could be held to have been involved in the instrument forfeiture offence committed by Mr Smith because that offence was committed by Mr Smith as FM Custodians' agent.

[153] In *Nathan*, Rodney's mother had brought proceedings against the lender seeking, and ultimately obtaining, a declaration that the mortgage to D&S was void having been fraudulently obtained. The Court directed, pursuant to s 85 Land Transfer Act, that the District Land Registrar remove the mortgage from the Register. The issues as to whether FM Custodians' mortgage was void ab initio, whether FM Custodians had a mortgage interest and whether FM Custodians was entitled to relief have all arisen in a different legislative context, namely the Sentencing Act and the CPRA.

[154] The Supreme Court's rationale for holding that a person with a registered interest in land should be vicariously liable for the fraud of an agent committed within the scope of that agency remains appropriate when the Court has to consider an application for an instrument forfeiture order under the Sentencing Act and the CPRA. The same can be said as to the Supreme Court's rationale for holding that there is no "fraud exception" to the principle that a fraudulent act may be done within the scope of an agency, even if done exclusively for the benefit of the agent, or to the principle that the liability of the principal is not dependent on imputation of the knowledge of the agent but arises because the agent has done an act, namely the fraud, for which the principal is vicariously responsible. In the context of the situation the different courts were dealing with in *Nathan*, it was the act not the knowledge of the agent which was the critical element. The same can be said in respect of the issues which the Court has to determine in terms of Sentencing Act and CPRA provisions as to the making of an instrument forfeiture order.

[155] For FM Custodians, Mr Goddard sought to distinguish the principles and reasoning in *Nathan* on the facts of the case, not because of the different legislative context in which issues had to be considered.

[156] It follows that the Judge in the District Court was correct in finding that FM Custodians had, through the actions of Mr Smith as its agent, been involved in the relevant instrument forfeiture offence, namely Mr Smith obtaining a pecuniary advantage or other consideration through forgery.

Having regard to the Court's conclusion on the above questions, should an instrument forfeiture order have been made or should relief have been granted to FM Custodians?

[157] It follows from my determination of the above issues that there was no error in the District Court when the Judge decided to make the instrument forfeiture order sought by the Crown and refused FM Custodians' application for relief.

Was the Judge correct to hold, in the alternative, that for the purpose of s 142L(3) Sentencing Act FM Custodians was "in any respect" involved in the instrument forfeiture offence?

[158] The Judge recorded in his conclusion that, for the reasons referred to, through the fraud of its agent Mr Smith, FM Custodians was involved in the instrument forfeiture offence for the purpose of s 142L(2). He went on to say:[48]

> Further, even if I am wrong in this, in my view, the conduct of the lender and its agents is such that in some respects they were involved in the commission of the offence and therefore I refuse to make an order in terms of s 142L(2). I include in this conclusion the fact that, at best, Mr Woulfe (who it cannot be argued was not the lender's agent) clearly completely ignored the instruction to make sure Mr Ross had independent advice. Had he done so the whole fraud would have collapsed. The gross failures on the part of the lender's agent set out above, in my view, justifies the exercise of the disaction (sic) in s 142L(3) against the applicant.

Submissions

[159] FM Custodians submits it was not involved in the qualifying instrument forfeiture offence because Mr Woulfe was not a party to the offence of forgery and he was unaware of the forgery by Mr Smith. Counsel acknowledges that Mr Woulfe was extremely careless and that carelessness provided the opportunity for the offending to take place but submits Mr Woulfe could not sensibly be described as having been involved in the offending or as having facilitated Mr Smith's use of forgeries to obtain pecuniary benefits, or as having failed to take reasonable preventative steps in relation to that course of conduct.

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[48] At [137].

[160] FM Custodians submits that, even for the purpose of s 142L(3), to establish the lender was "in any respect, involved in the commission of the offence", there had to be involvement in some measure in the actual offending. FM Custodians submit that failures on the part of Mr Woulfe which amounted to carelessness on his part as an agent of a lender cannot sensibly be described as involvement in the offending of an offender who took advantage of that carelessness where that carelessness had only exposed the lender to the deception that was practiced on it.

[161] For the Crown, Ms Grau submits that the use of the words "in any respect" in s 142L(3) required the Judge to make a wider enquiry and suggested a lesser degree of involvement than was contemplated in finding an involvement in the offence for the purpose of s 142L(2). The Crown submits that, with at least wilful blindness in respect of its agent Mr Woulfe in terms of the lack of proper attestation, there was a sufficient basis for the Judge to conclude that, without Mr Woulfe's carelessness, the fraud could not have occurred. The Crown submits that it was entirely consistent with the scheme of the criminal proceeds regime for a careless lender, who had enabled criminal offending to occur through the use of its agents or where it created the situation whereby the fraud had occurred, not to get relief from the forfeiture of the criminal's property that was used to commit the offending.

[162] The Crown submits that, consistent with the Court of Appeal's judgment in *Lyall v Solicitor-General*, participation in the offence to an extent less than would have been required to render the participant criminally liable as a party could amount to involvement and "a material association with the offending" would be enough.[49]

Discussion

[163] Having regard to relevant provisions of the Sentencing Act and CPRA, I do not consider Mr Woulfe's negligence, as described by the Judge, could have justified making a determination that FM Custodians was involved in the instrument forfeiture offence for the purposes of s 142L(3) if that negligence was not of such a nature to result in the principal being involved in the commission of the instrument forfeiture offence as provided for in s 142L(1)(b)(ii).

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[49] *Lyall v Solicitor-General* [1997] 2 NZLR 641 at 648.

[164] Under the Sentencing Act, the purposes for which a court may sentence or otherwise deal with an offender include to "provide for the interests of the victim of the offence"[50] or "to provide reparation for harm done by the offending".[51] Those purposes however apply when an offender is being sentenced or otherwise dealt with, not merely someone associated with the offender.

[165] Under s 3(1) CPRA, the primary purpose of that Act is to establish a regime for the forfeiture of property:

> (a) that has been derived directly or indirectly from significant criminal activity; or
>
> (b) that represents the value of a person's unlawfully derived income.

[166] Pursuant to s 3(2), the criminal proceeds and instruments forfeiture regime, established under the CPRA, proposes to:

> (a) eliminate the chance for persons to profit from undertaking or being associated with significant criminal activity; and
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> …
>
> (c) reduce the ability of criminals and persons associated with crime or significant criminal activity to continue or expand criminal enterprise…

[167] Pursuant to s 55, the Court must make a profit forfeiture order if it is satisfied on the balance of probabilities that the respondent has unlawfully benefited from significant criminal activity and the respondent has interests in property.

[168] Pursuant to s 50, subject to certain provisions as to potential relief, if the High Court is satisfied on the balance of probabilities that specific property is tainted property, the Court must make an assets forfeiture order in respect of that specific property. Tainted property is defined in the CPRA as meaning:[52]

> (a) … any property that has, wholly or in part, been—
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> (i) acquired as a result of significant criminal activity; or
>
> (ii) directly or indirectly derived from significant criminal activity …

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50 Sentencing Act, s 7(1)(c).
51 Sentencing Act, s 7(1)(d).
52 Section 5, definition of "tainted property".

[169] In contrast to those provisions, the provisions as to the making of instrument forfeiture orders do not refer to situations where the property that might be the subject of such an order was derived, wholly or partly, directly or indirectly, from the commission of the instrument forfeiture offence. The entitlement to relief is not expressly subject to whether the property that might be subject to such an order was obtained in such a way. Instead, the entitlement to relief requires a court to consider whether the person seeking relief may have been involved in the instrument forfeiture offence.[53]

[170] On the findings appropriately made in the District Court, neither FM Custodians nor Mr Woulfe anticipated or should reasonably have anticipated that Mr Smith would forge Mr Ross's signature on relevant documents. Neither would have wanted that to happen and it would have been contrary to both their interests for such forgery to occur. But for those forgeries, FM Custodians would have obtained a valid mortgage interest which would have entitled it to protection against the making of an instrument forfeiture order. FM Custodians had provided full consideration for the benefit it obtained, namely the loans made to the Prospect Trust and BTL. Those loans were made for the benefit of entirely innocent investors in the No. 2 Fund.

[171] If Mr Ross had in fact signed all the documents which Mr Woulfe required him to sign, he would have known of the loan being made to BTL and of the way BTL was guaranteeing the loan to be made to the Prospect Trust. He would have been on notice that BTL, as guarantor, was advised to obtain independent legal advice about the document and that BTL was waiving the need for that advice but understood all that was involved with the guarantee.

[172] There was no basis for the District Court Judge to find, and he did not find, that either FM Custodians, Fund Managers or Mr Woulfe knew that Mr Smith was going to use BTL land for dishonest purposes or to commit a forgery.

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53 Sections 77(2), 142L(1)(b)(ii) & 142L(3)(a).

[173] The Supreme Court's qualification in *Nathan* as to how a principal might be vicariously liable for the fraud of someone to whom a task has been delegated by the principal is important.[54] The fraud that was committed would have to be seen as a materialisation of a risk inherent in the task delegated. Strict liability of the kind which could arise through delegation "is exceptional and is not to be imposed unless fully justified" by the considerations referred to by the Supreme Court. As the Supreme Court indicated, "just the opportunity to commit the wrongful act or the existence of some merely incidental connection will not suffice".

[174] FM Custodians delegated to Mr Woulfe the responsibility for ensuring appropriate documents were duly executed, valid and, where necessary, the subject of appropriate advice. FM Custodians, in engaging the solicitor to perform the tasks required of him, was entitled to assume and, on the evidence, did expect the solicitor to fulfil his professional responsibilities. Before actually advancing the loans, FM Custodians required the solicitor to certify he had done all that was required of him. He did so certify. If he had in fact done what FM Custodians required of him, the forgeries committed by Mr Smith would probably have never occurred. Certainly, FM Custodians would not have made the loans which Mr Smith arranged.

[175] The forgeries or frauds of Mr Smith cannot be seen as a "materialisation" of a risk inherent in the tasks delegated to the solicitor Mr Woulfe by FM Custodians. Nor can they be seen as a risk inherent in the way Fund Managers assessed whether these loans were appropriate, having regard to their failure to follow or insist upon their own processes.

[176] In *Lyall v Solicitor-General*, the Court was considering whether applicants for relief against forfeiture were "in any respect, involved in the commission of the offence in respect of which forfeiture of the property is or was sought".[55] The Court of Appeal said that a failure to prevent property in which the applicant has an interest being used for criminal purposes could be sufficient to result in the party guilty of that failure being involved in the offence. But, importantly, the Court of Appeal said this

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54 At [40], referred to in [141] above.

55 *Lyall v Solicitor-General*, above n 49, applying the now repealed Proceeds of Crimes Act 1991, s 18(2).

would be the case where the property in which the applicant had an interest was being used for criminal purposes known to the applicant in circumstances in which the applicant should have taken practical preventative steps.

[177] It is only in respect of this aspect of his judgment that I respectfully disagree with the District Court Judge.

[178] It was the forging of Mr Ross's signature by Mr Smith that entitled the Crown to obtain an instrument forfeiture order. It was only through the way Mr Smith's involvement in that forgery, as an agent of FM Custodians, that FM Custodians was involved in the instrument forfeiture offence. The failure of Mr Woulfe to ensure Mr Ross received independent legal advice about what BTL were doing or was otherwise negligent in acting for FM Custodians was not sufficient to result in FM Custodians having an involvement in an instrument forfeiture offence for the purposes of s 142L(3).

[179] I thus do not agree that, had it been necessary, the Judge could have properly been satisfied that FM Custodians was involved in the instrument forfeiture offence so as to allow him to rely on either FM Custodians' failure to follow its own processes or Fund Managers' failure to follow their own processes, or the solicitor's negligence as reason to decline FM Custodians the relief it was seeking in the exercise of the Court's discretion. There was however no error in the Judge making the instrument forfeiture order as sought for all the reasons earlier referred to.

Conclusion

[180] There was no error in the Judge in the District Court deciding that the Crown was entitled to an instrument forfeiture order as made in that Court and in declining FM Custodians relief from the making of such an order. The appeal is dismissed.

[181] My tentative opinion is that, being successful on this appeal, the Crown is entitled to costs. FM Custodians however asked that it has the opportunity to be heard in respect of costs once the appeal has been determined. If necessary, I will hear it in this regard.

[182] If costs cannot be agreed, a memorandum is to be filed by the Crown within four weeks. Any memorandum in response is to be filed within two weeks of service of the Crown's memorandum. A memorandum in reply may be filed within two weeks of service of the memorandum for FM Custodians. The memoranda are to be no longer than five pages.

Addendum

[183] At the time judgment was given in the District Court, the Judge made certain interim orders for the suppression of certain names until further order of the Court. Neither of the parties to the appeal seeks continuation of those orders. They now lapse.

Solicitors:
D Goddard QC, Barrister, Wellington
R S Taylor & A L Sweeney, DLA Piper, Wellington
Crown Law, Wellington.