

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE**

**CIV-2022-409-421
[2023] NZHC 2224**

UNDER the Land Transfer Act 2017
IN THE MATTER of an application to sustain caveat
12340440.1
BETWEEN ANDREW EDWARD STILLS
Applicant
AND ROBERT JAMES LOUIS McCORMACK
and ELIZABETH ROBYN McCORMACK
Respondents

Hearing: 19 June 2023

Appearances: M P Davis and M K Thomas for Applicant
H A Evans and G C Collinson for Respondents

Judgment: 17 August 2023

JUDGMENT OF ASSOCIATE JUDGE PAULSEN

This judgment was delivered by me on 17 August 2023 at 2.15 pm
pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Introduction

[1] Church Property Trustees (CPT) is one of three bodies that make up the Anglican Diocese of Christchurch¹ and is presently the registered proprietor of 36D Lukes Road, Little Akaloa (Lot 2). Lot 2 is subject to a registered lease in favour of the applicant, Andrew Stills (Mr Stills), and his two brothers.²

[2] CPT has recently sold its fee simple estate in Lot 2 to the respondents, Robert McCormack and Elizabeth McCormack (the McCormacks). The McCormacks have settled their purchase of Lot 2, but Mr Stills has lodged a caveat to prevent the transfer of title to them.

[3] In response to an application made by the McCormacks to the Registrar-General of Land that the caveat lapse, Mr Stills applies under s 143 of the Land Transfer Act 2017 (LTA) for an order to sustain it.

[4] The estate or interest in Lot 2 claimed by Mr Stills in his caveat is as follows:

Pursuant to a cestui que trust, whereby the registered proprietor The Church Property Trustees holding in trust for the Akaroa Anglican Parish, the fee simple land – only Lot 2 DP20032 together with the rights of way to it over Lot 14 DP20032 and Lot 1 DP20032, are the trustee, and the caveator Andrew Edward Stills is one of the beneficiaries pursuant to an equitable estate in the land, including by right-of-renewal and current 46-year leaseholder and improver of the land, and including a promised and/or implied first right of purchase at fair and equitable value.

[5] Despite the wording of the caveat, Mr Stills now relies upon only one ground to sustain it. He says he has an equitable interest in Lot 2 as a beneficiary under an institutional constructive trust.³ However, he is not claiming an ownership interest in Lot 2, rather his interest is said to be a first right to be offered Lot 2 by way of private sale for a fair price, founded upon an assertion that such a right was granted to Mr Stills's mother (Mrs Stills), a former lessee of Lot 2.

¹ The existence of CPT as a body corporate is recognised by the Anglican (Diocese of Christchurch) Church Property Trust Act 2003 which also sets out its functions and powers. CPT holds and administers the property and investments of the Diocese.

² There is an issue between the parties whether the lease has been renewed from 1 April 2022 or has expired. Nothing in this judgment should be taken as expressing a view on the matter.

³ Counsel confirmed the principles in *Lankow v Rose* [1995] 1 NZLR 277 (CA) are relied upon.

[6] I consider the principles upon which Mr Stills relies have no application to the facts of this case, and that the real issue that arises is whether Mr Stills has an interest in Lot 2 as the holder of a right of first refusal.

Background

[7] In the 1950s, land at Little Akaloa was gifted to the Anglican Church. The land was subdivided into 14 lots. CPT owned and administered the properties and has, over time, sold most of them to what were previously lessees.

[8] Lot 2 is one of those properties. It is located between Lots 1 and 3 and backs on to Lot 14. At all material times, the McCormacks have owned or leased Lots 13 and 14 over which Lot 2 has enjoyed rights of way to a public road and access to services.

[9] CPT initially leased Lot 2 to Desmond John Davis for a term of 21 years from 1 April 1959, at a rent of £15 per year. This was recorded in a registered lease dated 27 June 1960. The lease included terms to the effect that:

- (a) the lessee would punctually pay the rent under the lease at the times provided as well as all rates, taxes and other outgoings in respect of the property as they fell due;
- (b) the rent was payable half-yearly in advance;
- (c) if the lessee wished to build upon the land, it would do so in strict accordance with the plans and specifications submitted to and approved by the lessor;
- (d) the lessee would, during the term, keep, maintain and yield up the premises upon termination of the lease in good, clean and substantial order, condition and repair;
- (e) the lessee was granted three rights of renewal for further terms of 21 years, and a final renewal of 14 years, for a total of 98 years;

- (f) if the lessee did not wish to renew the lease it could give notice requiring the lessor to put the lease up for public auction subject to a condition that, in the event of any person other than the lessee becoming entitled to a new lease, they would pay to the lessee the whole of the then value of buildings and improvements, whether erected or made by the lessee or any former lessee; and
- (g) granting rights over Lots 13 and 14 in order to access the public road.

[10] There was nothing in the lease granting the lessee either an option to purchase the fee simple estate or a right of first refusal in respect of any sale of it.

[11] On 1 May 1975, the lease was transferred to Kenneth Stills and Mrs Stills, the parents of Mr Stills. The lease was renewed for a further term of 21 years from 1 April 1980.

[12] On 11 December 1996, the lease was transferred to Mr Stills and his brothers, Julian and Michael, as tenants in common in equal shares. Neither Julian nor Michael have taken any part in this proceeding.

[13] The lease was renewed for a further term of 21 years from 1 April 2001. This was given effect to by CPT and the Stills brothers entering into a new registered lease on essentially the same terms, save that it did not contain any mention of Lot 2 having rights of access over Lots 13 and 14. Whether Lot 2 continued to enjoy such rights of access became a major issue of dispute between the McCormacks and Mr Stills when the McCormacks, at least initially, refused to recognise those rights.⁴

[14] In around 2000, Mrs Stills undertook renovations and additions to the dwelling on Lot 2. She continued to live on the property until her death in 2018. Mr Stills says this work was done with CPT's consent.

⁴ The dispute over whether Lot 2 enjoys rights of access and services over Lots 13 and 14 has been resolved by registration of an easement in favour of Lot 2. The issue is not directly relevant to the case now advanced by Mr Stills, but the dispute was one of several matters that he considers show an intention by CPT/the McCormacks to cheat the Stills family of their rights in respect to Lot 2.

[15] In mid-2018, the Stills family was considering selling the lease of Lot 2. Michael and his wife (Rhonda) obtained a valuation of the lessees' interest in Lot 2 for sale purposes and, in October 2018, an enquiry was made to CPT from a potential buyer who had been speaking to Mr Stills. CPT responded to the prospective buyer's enquiry that it presently had no interest in selling Lot 2 but would be open to a transfer of the lease.

[16] The sale of Lot 2 and 36A Lukes Road (then leased by the McCormacks) was considered at the annual general meeting of the Parish on 7 April 2019. It was resolved to sell both properties in consultation with CPT. The minutes record that one person present said she would like to see lessees offered the opportunity to buy the properties, while another attendee said she thought CPT was best placed to handle that issue.

[17] On 5 June 2019, the Standing Committee of the Diocese passed a resolution for the sale of the two properties. The minutes of the meeting record:

8.3 *Parish of Akaroa – approval for sale of land in Little Akaloa.

Moved that Standing Committee agrees to the sale of two properties at 36A and 36D Luke's Road, Little Akaloa and also agrees to the formation of a subcommittee which is to be given the authority to complete the sale in consultation with CPT.

*Lyndsey/Byron
Carried*

[18] On 9 July 2020, Celia Quinnell, a property manager for CPT, wrote to the Stills family seeking confirmation of their wishes because of conflicting requests on what they would like to see happen to the property. The email asked:

Do you wish to:

- Purchase the freehold? If so you are welcome to put in a formal offer.
- Sell the leasehold to CPT/Parish
- Sell the leasehold to a Third Party?
- Remain with your current lease and with a renewal and review due 1 April 2022

Your decision will assist and give us clarity whilst we resolve the issues around the access and other matters.

[19] The reference in the email to “access and other matters” appears to relate to the dispute over access and services to Lot 2.

[20] Stills family members discussed the matter. Mr Stills’s brothers were open to a sale of the lease, but had no interest in buying Lot 2 from CPT. Mr Stills wanted CPT to make an offer to buy the lease but would consider buying Lot 2 for on-sale to a third party. There is an email on 9 July 2020, from the email address of Mr Stills’s partner (which Mr Stills used) stating as follows:

YES I would like them to make us an offer for the bach first? but second to that if [their] offer isn’t good we need to look at our options which could be buying the section as we have two possible buyers who would both want to buy the land and house package...one of whom has said he would compete with the best offer.

[21] In an email of 10 July 2020, the Stills family advised CPT they were interested in selling the lease as their preferred option.

[22] In July 2020, CPT obtained a valuation report from Colliers assessing the market rent of Lot 2 for rent review purposes. In September 2020, CPT obtained a further valuation report from Colliers of the market value of the lessees’ interest in Lot 2 for sale purposes. The latter report concluded the freehold market value of the property, including improvements, was \$460,000, and valued the lessees’ interest and improvements at \$140,000, both including GST. On 8 October 2020, Gary Sellars of Colliers sent final valuation reports advising that the land value and ground rent assessments for Lot 2 had been increased following a full inspection of the site and: “The land value is **\$360,000** and the ground rent assessment is **\$23,400 pa**”.

[23] The final rent review valuation report was forwarded to the Stills family on 20 October 2020, along with advice that an offer to purchase Lot 2 would not be considered by CPT at that time. Gavin Holley, the general manager of CPT, says CPT did not want to deal with the sale process while other issues relating to the right of way and services were being resolved.

[24] In an email to CPT on 22 October 2020, Mr Stills challenged the valuation report and said that without reasonable physical and legal access Lot 2 was not worth what Colliers had concluded. Mr Stills also accused CPT of fraud over the access

issues, which he said was “emphasised” by its advice that it would not consider offers from the Stills family to purchase Lot 2.

[25] There was a meeting between Stills family members and CPT in late November 2020. It is referred to in an email of 1 December 2020 from Rhonda to CPT and others. That email contained an offer from the Stills family to purchase Lot 2 from CPT for \$160,000. Ms Quinnell responded on behalf of CPT on 7 December 2020, noting that, as was mentioned at the meeting, CPT did not wish to sell Lot 2 to the Stills family.

[26] It is not clear when the McCormacks first expressed their interest in purchasing Lot 2. According to Mr Holley, the McCormacks were negotiating with CPT for the purchase of 36A Lukes Road and had expressed their interest in also purchasing Lot 2. The Stills family were aware of the McCormacks’ interest in Lot 2 from at least 2020. Mr McCormack’s evidence, which is not disputed in this particular respect, is that Rhonda contacted him in 2020 and indicated that Michael and Julian were potentially prepared to sell their interest in the lease to the McCormacks. On 9 December 2020, Mr Stills sent an email to CPT asking whether it had corresponded with Mr McCormack or those associated with him about the possibility of selling Lot 2.

[27] There was correspondence between Mr Stills, CPT, and the Anglican Bishop (the Bishop) over the following months. Importantly, on 20 July 2021, Mr Holley wrote to the Stills family advising that CPT had lodged an easement for the benefit of Lot 2 to formalise the right of way and that the only barrier to registration of the easement was a caveat lodged by Colin Stokes, a co-owner of a neighbouring property. Mr Holley also advised CPT did not want to revisit sale discussions with the Stills family “at this point” as CPT was focused on resolving the access issues. Mr Stills wrote to the Bishop on 22 July 2021 in response to Mr Holley’s email and said, among other things, he did not accept the Church’s decision not to revisit the sale discussions.

[28] On 11 August 2021, Colliers provided an update to its valuation of Lot 2, noting there had been an increase in value of around 20 per cent since September 2020. Colliers considered the value of the land and improvements was \$532,000 (including GST) and the land value was \$432,000. The updated rental assessment was \$28,080 per annum.

[29] In September 2021, there was an email from the Bishop to the Stills family noting the right of way issue was still some distance from being resolved, but that a CPT property manager would be in touch that week concerning their interest in acquiring Lot 2.

[30] On 1 October 2021, CPT wrote to the Stills family, providing them with a form of agreement for sale and purchase that they could use if they wished to make an offer to buy Lot 2. The letter stated:

2. As you know, there are a number of unconsented works on the property. CPT is only prepared to sell the property on an 'as is, where is' basis as it is not able to provide any warranty or guarantee as to the condition of any improvements and seeks an indemnity for these matters as part of the template terms.
3. ... any offer is subject to our final acceptance in our complete discretion in all respects. There shall be no valid contract for sale until there is a fully signed agreement.
4. As we have previously advised, you should make your best offer for the purchase of the freehold property.
- ...
6. We look forward to receiving your offer for consideration by Church Property Trustees on or before 15 October 2021. If we do not receive an offer before 4.00pm on that date, we will assume that you do not wish to place an offer.

[31] CPT says the McCormacks were also given the opportunity to make an offer to buy Lot 2 on the same terms and with the same deadline as the Stills family.⁵ CPT considered that as a trustee of Lot 2 it was obliged to obtain the best price for it, and the McCormacks had expressed their interest in buying the property.

[32] Mr Stills sent emails to the Bishop and CPT (which were copied to others) on 13 and 15 October 2021. In the correspondence, Mr Stills asserted the Stills family had legal and moral rights to purchase Lot 2. He referred to the Stills family's offer to buy the land for \$160,000, and said they wanted CPT to respond with a counter-offer. Relevantly, in his email of 15 October 2021, Mr Stills wrote:

⁵ Mr Stills does not accept the Stills family was given the same opportunity to buy Lot 2 as the McCormacks because, among other things, the issues relating to access and services had not been finally resolved. I need not decide whether that is so.

What has been presented to us with this false claim, is not an opportunity to purchase the property, but rather a stratagem to make it look as if we've been provided a fair opportunity, while continuing to facilitate the sale of the land we have an equitable and moral interest in from under us, and without negotiation, to Mr McCormack.

We again advise, that we have already made an "as is, where is offer". And request that the CPT trustees, or others than CPT staff, come back to us with your equitable counteroffer or asking price to us as the moral persons with first right of refusal. Or in lieu, for the trustees to please agree to meet in good faith to discuss the above and the purchase. We do not accept that CPT can deny us the opportunity to negotiate an equitable private purchase for Lot 2 as CPT afforded Mr McCormack for Lot 14, and possibly also Lot 2 given CPT staffs 1 December 2020 email. We would also record and would request more time in any event to take advice on the unusual conditions in CPT's proposed terms.

[33] Mr Stills also sought the support of the local Vicar, the Reverend Edrick Corban-Banks, who met with Mr Stills. In an email of 15 October 2021 to CPT trustees, Reverend Corban-Banks said Mr Stills would like to put an offer in for Lot 2 but could not compete with the McCormacks. He also expressed the view that, given the period the Stills family had occupied Lot 2, they should be given every opportunity to purchase it, and "[a]t face value there appears to be a moral dilemma here."

[34] The Stills family did not make a further offer to purchase Lot 2 by 15 October 2022, or at all. The McCormacks did make an offer, and CPT entered into negotiations with them.

[35] On 11 November 2021, CPT agreed to sell Lot 2 to the McCormacks for \$400,000. The sale and purchase agreement recognised the Stills family's lease. Clause 2.1 of the agreement reads as follows:

- 2.1 The property is sold subject to registered lease 5632956.1 (**Lease**). The Vendor does not provide any warranty as to the Lease and the Purchaser acknowledges and accepts that the Lessee may be in breach of the terms of the Lease.
- 2.2 The Purchaser acknowledges that the Lessee under the Lease has provided written notice to the Vendor that it wishes to renew its leasehold interest in the Property.
- 2.3 The Vendor will initiate the first stages of the Lease renewal process and will obtain a valuation for the purpose of determining the market rental figure for the leasehold interest. When the Vendor has received its valuation of the leasehold rental amount, the Vendor shall provide a copy of that Valuation to the lessee and the Purchaser.

2.4 From the Settlement Date the Lease renewal process will become the Purchaser's responsibility and the Vendor will not be involved in any matters relating to the Lease.

[36] On 20 December 2021, Mr Stills lodged his caveat.

[37] CPT and the McCormacks settled the sale and purchase of Lot 2 on 1 February 2022, but the McCormacks have not been able to obtain title due to the caveat.

The Court's approach

[38] The relevant principles that apply to an application of this kind were summarised in *Philpott v Noble Investments Ltd* as follows:⁶

- (a) The onus is on the applicants to demonstrate that they hold an interest in the land that is sufficient to support the caveat, but they need not establish that definitively;
- (b) It is enough if the applicants put forward a reasonably arguable case to support the interest they claim;
- (c) The summary procedures involved in applications of this nature are not suited to the determination of disputed questions of fact. An order for the removal of a caveat will only be made if it is patently clear that the caveat cannot be maintained – either because there is no valid ground for lodging it in the first place, or because such a ground no longer exists; and
- (d) When an applicant has discharged the burden upon it, the Court retains discretion to remove the caveat which it exercises on a cautious basis. Before it does so the Court must be satisfied that the caveator's legitimate interest would not be prejudiced by removal.

(footnotes omitted)

[39] Mr Davis referred me to *Green & McCahill Holdings Ltd v Ara Weiti Development Ltd*, where the Court of Appeal allowed an appeal from an order of the High Court refusing to sustain caveats where the case was not unarguable, merely "weak".⁷ The Court confirmed what it said in *Philpott v Noble Investments Ltd*, that

⁶ *Philpott v Noble Investments Ltd* [2015] NZCA 342 at [26].

⁷ *Green & McCahill Holdings Ltd v Ara Weiti Development Ltd* [2022] NZCA 218, (2022) 23 NZCPR 259 at [98].

an application to sustain a caveat is not a place to resolve bona fide disputed issues of fact.⁸ However, relevant to this case, the Court of Appeal also said:⁹

Although summary process does not permit close engagement with contested facts, the court must still assess the arguability of the asserted case of a proprietary right realistically and interrogate the documentary record. ...

[40] Further, while it is the case that where there is a conflict the Court will generally prefer the evidence of the caveator, it is not bound to accept uncritically statements in an affidavit that are equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable.¹⁰

Caveatable interests

[41] Section 138 of the LTA provides:

Caveats against dealings with land

- (1) A person may lodge a caveat against dealings with an estate or interest in land (a **caveat against dealings**) on the basis that the person—
 - (a) claims an estate or interest in the land, whether capable of registration or not; or
 - (b) has a beneficial estate or interest in the land under an express, implied, resulting, or constructive trust; or
 - (c) is transferring the estate or interest in the land to another person to be held on trust; or
 - (d) is the registered owner of the estate or interest in the land and—
 - (i) has an interest that is distinct from that of registered owner; or
 - (ii) establishes to the satisfaction of the Registrar that at the time the caveat is lodged there is a risk that the estate or interest may be lost through fraud.

...

⁸ *Philpott v Noble Investments Ltd*, above n 6, at [26(c)].

⁹ At [83].

¹⁰ At [83]. See also *Luo v Jin* [2021] NZHC 709 at [21].

[42] Mr Stills relies on s 138(1)(b). To sustain a caveat on this basis a beneficiary's interest must be a specific proprietary right or interest in the land.¹¹ As noted in *Staples & Co Ltd v Corby*:¹²

... Before a person can *caveat* under this section he must be a person who claims to be entitled to the land, or any estate or interest in the land, or to be "beneficially interested" in the land, or in any estate or interest in the land, and the person in either event must claim "by virtue of any unregistered agreement, or other instrument or transmission" ... "or of any trust express or implied, or otherwise howsoever." ...

[43] To illustrate the point, in *Napier City Council v Residual Health Management Limited* the Council lodged a caveat, purporting to do so on behalf of its constituents who it asserted were beneficiaries of the land under statutory trusts.¹³ Master Gendall held that the beneficial interest claimed was alleged to arise under what could only be regarded as a statutory charitable trust and, although beneficiaries under a charitable trust concerning the use of land had a "beneficial interest in one sense", they did not have any proprietary rights in respect of that land.¹⁴ The caveat was allowed to lapse.

The interest claimed in this case

[44] Mr Davis argues the interest claimed by Mr Stills is "to be offered [Lot 2] by way of private sale for a fair price if the Church decided to sell it", and that interest arises by way of a reasonable expectation or common intention institutional constructive trust.

[45] Constructive trusts may arise in disparate circumstances which tend to share the common factor of:¹⁵

...the unconscionability of the defendant in denying the plaintiff an equitable interest in the relevant property because of a previous understanding, whether

¹¹ *Guardian Trust and Executors Co of New Zealand Ltd v Hall* [1938] NZLR 1020 (CA); *Re Savage's Caveat* [1956] NZLR 118 (SC) at 120–121; *Holt v Anchorage Management Ltd* [1987] 1 NZLR 108 (CA) at [114]; and *Rutherford v Rutherford* [2015] NZHC 878, [2015] NZAR 1303 at [18].

¹² *Staples & Co Ltd v Corby* (1900) 19 NZLR 517 (CA) at 536–537 in relation to the predecessor of s 138. See also *Philpott v NZI Bank Ltd* (1989) 1 NZ ConvC 190,246 (CA), where the Court noted "mere potentialities" are insufficient to found a caveat.

¹³ *Napier City Council v Residual Health Management Limited* HC Napier CIV-2004-441-35, 30 March 2004.

¹⁴ At [20].

¹⁵ Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2013) at 338, referred to in *Almond v Read* [2019] NZCA 26, (2019) 5 NZTR 29-036 at [65].

subjectively agreed upon between the parties or more commonly deemed by the law to have been appropriate in the circumstances. It is the element of consent or intention (or lack of either of these, as the case may be) that triggers the institutional constructive trust which arises to reverse the defendant's unconscionability.

[46] Mr Stills relies upon the category of constructive trust that arises where contributions have been made to the acquisition, improvement or maintenance of a property, or its value, by someone other than the registered owner.¹⁶

[47] In *Lankow v Rose* the essential elements of this type of constructive trust were set out as follows:¹⁷

- (a) contributions, direct or indirect, to the property in question;
- (b) the expectation of an interest therein;
- (c) such an expectation is a reasonable one; and
- (d) the defendant should reasonably expect to yield the claimant an interest.

[48] Mr Davis undertook an analysis of the *Lankow v Rose* criteria. He submitted that the Stills family made significant contributions to Lot 2 over many years. He emphasised the renovations/additions to the dwelling made by Mrs Stills in around 2000 and also unspecified "improvements to the land".

[49] Mr Davis argued the Stills family had an expectation to be offered Lot 2 by way of a private sale for a fair price if the Church decided to sell it. He relied on evidence of conversations Mrs Stills was said to have had with Mr Stills, Mr Stills's partner, Janie McCulloch, and Mr Stokes, about there being a right to purchase Lot 2. Mr Davis argued there is further support for the existence of the expectation in correspondence sent by Mr Stills to CPT and the Bishop.

[50] The existence of such an expectation was reasonable, Mr Davis argued, because Mrs Stills made improvements to Lot 2, and because it is consistent with the

¹⁶ *Almond v Read*, above n 15, at [66].

¹⁷ *Lankow v Rose*, above n 3, at 294.

conduct of the Church offering properties to other lessees by way of private sale. He submitted it is consistent also with Reverend Corban-Banks' view that the Stills family should be given the opportunity to purchase Lot 2, and Mr McCormack's evidence that CPT was at pains to ensure the Stills family were given every opportunity to acquire the property.

[51] Mr Davis submitted it is reasonable to expect CPT to yield the claimed interest because Mrs Stills undertook improvements in reliance on the expectation the Stills family had a right of first refusal, and also as members of the Church expressed their support for the Stills family in Church minutes (to which I have earlier referred at [16]).

[52] Mr Davis also submitted CPT failed to provide the Stills family with an objectively reasonable opportunity to purchase Lot 2, as the offered terms were unfavourable. He submitted that until the access issues were resolved, Lot 2 was effectively landlocked with "no legal access to water" and that, instead of offering the property at a "very fair" price, CPT created a bidding war between the Stills family and the McCormacks.

[53] Mr Davis also referred to there being a distinction between a reasonable expectation constructive trust and a common intention constructive trust, and submitted that either pathway provides a basis to prevent an unconscionable result.¹⁸ He submitted there is some evidence of a common intention to provide the Stills family with the first right to purchase Lot 2.¹⁹ He said the common intention was confirmed most recently through the conversations with Reverend Corban-Banks.

[54] CPT does not accept Mrs Stills was ever granted a right of first refusal, and regards the evidence of Mr Stills, Ms McCulloch and Mr Stokes as hearsay which should be given little, if any, weight.²⁰ It says there is nothing in writing or in the

¹⁸ *Mills v Laboyrie* [2021] NZCA 450, [2022] 2 NZLR 258 at [54].

¹⁹ *Almond v Read*, above n 15.

²⁰ The objection to this evidence is that it is inadmissible hearsay (for which see the Evidence Act 2006, ss4, 16, 17 and 18 and High Court Rules 2016, r 9.76(1)(d)). The evidence is tendered to prove the truth of Mrs Stills's statements where the circumstances relating to the statements do not provide reasonable assurance that they are reliable. Mr Evans did not ask that I exclude the evidence, but that I do not give it any weight.

conduct of CPT to support Mr Stills's case and, indeed, the documentary evidence establishes no right of first refusal was ever granted.

My analysis

Mr Stills's approach

[55] I start by referring to first principles. A trust is the imposition of an equitable obligation on the legal owner of property (the trustee), requiring that person to deal with it in good conscience in favour of another (the beneficiary) and to carry out the purposes for which the property was vested in him, or which the law imposes upon him by reason of his or her unconscionable conduct.²¹

[56] For there to be a trust there must be trust property that is certain and can be ascertained,²² and the legal title in the trust property vested in the trustee, or in the name of another on behalf of the trustee.²³ A trust is "an institution which is concerned with the allocation of rights in property and is not simply an institution connected with obligations".²⁴

[57] All property, real or personal, legal or equitable may be the subject of a trust provided neither the policy of the law nor statute prevents the settlor of the trust from parting with the beneficial interest in the property in favour of the intended beneficiary.²⁵ It follows a trust may be created as to the benefit of a contract (whether as a contracting party or the fruits of the contract).²⁶ I accept a right of first refusal is property that may be the subject matter of a trust.

²¹ Geraint Thomas and Alastair Hudson *The Law of Trusts* (2nd ed, Oxford University Press, Oxford, 2010) at [1.01].

²² In *Westdeutsche Bank v Islington LBC* [1996] AC 669 at 705, Lord Browne-Wilkinson recognised an exception to this in the case of a constructive trust imposed on a person who dishonestly assists in a breach of trust.

²³ Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) vol 1 at [1-001].

²⁴ *The Law of Trusts*, above n 21, at [1.08].

²⁵ In *Lord Strathcona Steamship Company, Ltd v Dominion Coal Company Ltd* [1926] AC 108, at 124, Lord Shaw said "The scope of the trusts recognised in equity is unlimited. There can be a trust of a chattel or of a chose in action, or of a right or obligation under an ordinary legal contract, just as much as a trust of land."

²⁶ *Lewin on Trusts*, above n 23, at [2-034].

[58] As noted above, a party relying on the principles in *Lankow v Rose* is making a claim to share in property vested in another based on contributions, direct or indirect, to the property of that person.²⁷ The “property” in which Mr Stills asserts an interest is a right of first refusal to purchase Lot 2, founded on an assertion that is what CPT granted Mrs Stills.

[59] Assuming there was a grant of a right of first refusal to Mrs Stills, CPT is not the legal owner of that right and never has been. Any such right was vested in Mrs Stills and not CPT. CPT cannot be a trustee of property that is neither vested in it, nor vested in another on its behalf.

[60] The case Mr Stills advances also fails to draw the fundamental distinction between obligations arising under a contract and those arising by virtue of a trust. The nature of the obligations owed between contracting parties and between a trustee and beneficiaries are markedly different, as are the remedies available for breach of contract and breach of obligation as a trustee.²⁸

[61] A bare right of first refusal is a contractual right and does not create an interest in the land in respect of which the right is given.²⁹ If CPT granted Mrs Stills a right of first refusal to acquire Lot 2 that was, as between Mrs Stills and CPT, purely a matter of contract. There is nothing to suggest the existence of a trust relationship in respect of the grant, and there is no reason or basis for the Court to imply one. Mr Stills’s case, as advanced, must therefore necessarily fail.

²⁷ *Lankow v Rose*, above n 3, at 282. See also the judgment of Tipping J at 293-294. In all the cases Mr Davis referred me to where the principles in *Lankow v Rose* were applied, the applicant claimed an ownership interest in land. These cases were *Patterson v Alsloom* [2020] NZHC 2307, (2020) 21 NZCPR 361; *Ali v West Village Capital Partners Ltd* [2021] NZHC 3090; *Mills v Laboyrie*, above n 18; *Almond v Read*, above n 15; and *Gormack v Scott* [1995] NZFLR 289. See also *Wakenshaw v Wakenshaw* [2017] NZCA 252, [2018] NZAR 532 at [25] where the Court of Appeal adopted the High Court’s statement of principle that it is necessary to establish that a more than minor contribution was made to the acquisition, preservation or enhancement of the defendant’s assets.

²⁸ For a discussion of which see *The Law of Trusts*, above n 21, at [1.60]–[1.65].

²⁹ Neil Campbell *Campbell on Caveats* (3rd ed, LexisNexis, Wellington, 2019), at [10.009(k)] citing cases including *Re Rutherford* [1977] 1 NZLR 504 (HC); *Botany Land Development Ltd v Auckland Council* [2014] NZCA 61, (2014) 14 NZCPR 813 (CA); *Gainford v Stinson* (1994) 2 NZ ConvC 191,768 (CA) at 191,771; *Kanji v Athene Nominees Ltd* HC Auckland CP 319/98, 23 July 1998; and *24 Mansfield Avenue Ltd v Glass* (2010) 12 NZCPR 319.

An orthodox approach

[62] The result would be no different, in my view, had Mr Stills presented his case on the orthodox basis that he was entitled to an ownership share in Lot 2 pursuant to a constructive trust based on contributions or common intention.

[63] Mr Stills has not shown any relevant contribution to Lot 2 beyond what is required by the terms of the lease. It is not sufficient, in my view, that contributions were made by another. While I accept it is arguable Mrs Stills made relevant contributions to Lot 2, Mr Stills has failed to identify any mechanism by which he is entitled to take the benefit of any claim Mrs Stills may have had to share in the property.³⁰ Further, Mr Stills has for many years benefitted from the work undertaken by Mrs Stills and will continue to do so while he occupies the property.

[64] Mr Davis raised the possibility the facts of this case might establish a common intention constructive trust. That does not advance Mr Stills position. I consider Mr Stills would still need to show relevant contributions to the property. The issue was discussed, although I accept not finally decided, in *Harvey v Beveridge*, where the Court of Appeal said:³¹

It is well-established that constructive trusts based on the “reasonable expectations” of the parties do require evidence of some contribution, direct or indirect, to the property at issue. We are not at all sure that in this context the Associate Judge was right to suggest that a distinction should be drawn between constructive trusts based on “reasonable expectations” and “common intention” constructive trusts in order to avoid the need for evidence of contribution justifying an order for the transfer of ownership of the Unit to Mr Beveridge.

(footnotes omitted)

³⁰ In *Wakenshaw v Wakenshaw*, above n 27, it was held that a widow did not have an arguable case to a caveatable interest in property on the basis of contributions made to the property by her late husband. She claimed to have inherited her husband’s claims but it was held she had no standing to lodge the caveat as either the administrator of her husband’s estate or as a prospective beneficiary of his intestate estate.

³¹ *Harvey v Beveridge* [2014] NZCA 72, [2014] NZAR 677 at [46]. See also *Mills v Laboyrie*, above n 18, at [55] where the Court of Appeal said: “Suffice to say we share the doubts expressed by this Court in *Harvey v Beveridge* about the avoidance of the need for evidence of contribution as a rationale for the distinction between reasonable expectations and common intention constructive trusts.”

[65] Second, there was no expectation that Mr Stills would share in Lot 2. He has never asserted he had such an expectation. The only interest he asserts (apart from his rights under the lease) is a first right to buy the property if the Church wishes to sell it.

[66] Third, if Mr Stills had an expectation to share in Lot 2, it would not have been a reasonable expectation given the absence of any relevant contributions by him to the property, and the absence of any evidence that CPT, by its words or conduct, suggested Mr Stills (or any member of his family) would share in the property. At its highest, Mr Stills's case is that he should have the opportunity to purchase the property.

[67] The fact Mrs Stills made improvements to the property takes the matter no further as that is contemplated by the lease, which also sets out the parties' rights in respect to improvements upon the expiry of the lease. Further, the sale by CPT of other properties to lessees, the views expressed by Reverend Corban-Banks and others that the Stills family should be given the opportunity to purchase Lot 2, and Mr McCormack's evidence that CPT was at pains to allow the Stills family to purchase Lot 2 are all incongruent with the existence of any expectation on the part of Mr Stills to share in Lot 2.

[68] In circumstances where Mr Stills has not shown he made any relevant contribution to Lot 2, CPT has not represented that Mr Stills would share in the property, and the parties' rights in respect of the property are comprehensively set out in the lease, there can be no room for any suggestion that CPT should yield to Mr Stills an interest in Lot 2.

A right of first refusal?

[69] I will consider whether Mr Stills has an arguable case for an equitable interest in Lot 2 arising from an alleged right of first refusal. Although this was not the basis upon which Mr Stills's case was advanced, the arguments of counsel traversed the issues that arise.

[70] The issues are:

- (a) In what circumstances may a right of first refusal create a caveatable interest in land;
- (b) Whether, on the evidence, Mr Stills has raised an arguable case that Mrs Stills was granted a right of first refusal in respect of Lot 2;
- (c) Whether Mr Stills has any rights arising from any such grant; and
- (d) Whether any grant is unenforceable for non-compliance with s 24 of the Property Law Act 2007.

A caveatable interest?

[71] The traditional view is that a bare right of first refusal (or pre-emption) does not give the grantee an interest in land and will not support a caveat.³² The position may change when the grantor has made a decision to sell or some event has occurred requiring the grantor to offer the property for sale to the grantee.

[72] In *Motor Works Ltd v Westminster Auto Services*, Tipping J said that when considering whether a right of first refusal creates an interest in land it is convenient to analyse the point in four stages. These are:³³

- (a) where there is only a bare right of pre-emption (stage one);
- (b) when a triggering event occurs requiring an offer to be made to the person with the right of pre-emption (stage two);
- (c) where an offer has been made pursuant to the right of pre-emption (stage three); and
- (d) when a contract results from the acceptance of such an offer (stage four).

³² *Campbell on Caveats*, above n 29, at [10.010(m)] and the authorities cited therein.

³³ *Motor Works Ltd v Westminster Auto Services* [1997] 1 NZLR 762 (HC) at 765.

[73] Tipping J held that at stage one, before there was any suggestion of an event triggering the right, no interest in land is created.³⁴ At the other end of the spectrum, at stages three and four, an interest in the land is created in the purchaser. However, Tipping J recognised difficulty arose at stage two and concluded that at that stage the holder of the right of pre-emption will not have an interest in land unless and until the circumstances are such that specific performance can be ordered and the vendor thereby required to make an offer on sufficiently certain terms.³⁵

[74] Related to the issue of certainty of terms, a right of first refusal is a contractual right and is subject to the same prerequisites to formation as any other contract, namely an intention of the parties to be immediately bound, the provision of consideration and agreement to, or the means of achieving agreement on, all essential terms.³⁶

Is there sufficient evidence of the grant of a right of first refusal?

[75] CPT does not accept Mrs Stills was ever offered a first right to purchase Lot 2. CPT says I should place little weight on the affidavits of Mr Stills, Ms McCulloch and Mr Stokes, which is what Mr Stills substantially relies upon, and that there is nothing else to support Mr Stills's case that Mrs Stills was granted a right of first refusal in respect of Lot 2. I turn to consider those affidavits.

[76] In his affidavit of 30 May 2023, Mr Stills says:

2. I remember my parents speaking to the Stevens about purchasing the land in circa the late 1970's, and about a decade later when CPT made known to many lessees, including my parents and Merv Stevens, that when it suited them and the Parish, they could buy their leasehold land.
3. At that stage, they decided against buying the land and to instead continued [sic] paying rent, as did many other lessees. Our family (and the Stevens family) were aware that over time, other lessees, including the Stokes family at 36B, the Whittakers at 36C, the McCormacks at 36E, and the Sheriffs at 36 decided to purchase their leasehold land as opposed to renting it. This was done by way of private sale from CPT. My parents and Merv Stevens remained waiting for a future time when it suited them and the Parish to

³⁴ At 765, citing *Mackay v Wilson* (1947) 47 SR (NSW); *Re Rutherford*, above n 29; *Pritchard v Briggs* [1980] 1 All ER 294; *Anderson v Te Wharau Investments Ltd* [1992] ANZ ConvR 156; and *Gainford v Stinson*, above n 29.

³⁵ At 766.

³⁶ D W McMorland *Sale of Land* (4th ed, Cathcart Trust, Auckland, 2022) at [3.15].

purchase their land, or their families to purchase their leasehold land further in the future during the 98 year lease term when it was mutually suitable to both the church and our families. Or, alternatively, if the church definitively was going to sell the land.

4. This was their complete understanding, and the understanding of our families, that if the church wanted to sell the land, they, like before and to all other lessees, would be given first right to purchase their leasehold at a fair and equitable price by way of a private sale.

[77] In her affidavit of 30 May 2023, Ms McCulloch refers to conversations she says she had with Mrs Stills after 2007 as follows:

4. ... She advised us that the Church periodically sold off their sections to their long-term lessees when both parties were wanting to sell and buy. She told me that the church had offered to sell the Stills section to them when they were ready to buy. She was very keen and encouraging in us being able to purchase the land due to the investment and time that she and her family had put into it, and recognition of her time and support she had given the church.
5. Shirley was aware and discussed with Andrew and myself that neighbours of hers that shared the right of way access had already bought their land off the church. This including the Stokes family at 36B, the Whittaker's at 36C, the McCormack's at 36E and the Sheriff's at 36. And that only the Stevens at 36A and Stills at 36D had not yet been ready or able to purchase their land under their houses – had both been advised they could purchase their land when they were ready, and if the church was going to sell, the church would offer it to them first.

[78] Mr Stokes provided assistance to Mrs Stills in designing and preparing plans for Council approval for the renovations to the dwelling on Lot 2. He says in his affidavit of 30 May 2023:

11. I recall being advised by Shirley that she had a very limited budget to spend on her addition and improvements, and accordingly that it was still not an option for her to purchase the land as most other long-term Lessees were able to do. She made it clear that she wished her house would stay in the Stills family after her passing, and that they would take up the rights previously offered by the Parish to purchase the land, and that she understood as between her family and the Parish, that should the Parish ever decide to sell the land under the Stills family home, that her family would be offered the first opportunity to negotiate its sale like all Lessees have been offered before her.

[79] This evidence falls well short of establishing an arguable case that Mrs Stills was granted a right of first refusal in respect of Lot 2. While I note again this is a

summary procedure not suited to the resolution of genuinely disputed questions of fact, as the Court of Appeal said in a not dissimilar jurisdiction:³⁷

The Court is not required in cases of this character meekly to accept without question whatever unvarnished statements may happen to be made on affidavit. The Court is entitled to act in a more robust and commonsense manner ...

[80] The evidence in the affidavits of Mr Stills, Ms McCulloch and Mr Stokes is notable for the absence of any detail of matters such as who is said to have offered Mrs Stills a right of first refusal, the circumstances under which the offer was made, what authority that person had to make such an offer upon CPT's behalf, the consideration provided for the right of first refusal, and the terms upon which the right was to be exercised.

[81] While it was a major plank of Mr Stills's case that Mrs Stills had undertaken the renovations on the understanding she had been granted a right of first refusal, there is nothing in the evidence to suggest CPT was aware of that, and there is no evidence of any consideration having been given for the grant. It is clear from Mr Stills's evidence that, in his view, a grant was given in the late 1970's or 1980's, well before the renovations were carried out.

[82] Relevant to the terms of the alleged grant, Mr Davis submitted the Stills family would "be offered [Lot 2] by way of a private sale for a fair price if the Church decided to sell it". There is no evidence Mrs Stokes told anyone that CPT had granted her a first right to purchase the land at a "fair value" or at a "fair and equitable price" as Mr Stills puts it in his final affidavit. To the contrary, Mr Stokes says Mrs Stills advised him she understood her family would be offered the first opportunity to "negotiate its sale". That is consistent with what Mr Stills says later in his affidavit, that it was understood the Parish would "privately negotiate its fair and reasonable sale to the Stills...", and that CPT refused to meet and "negotiate with us the sale of the land". An agreement to negotiate terms is not sufficiently certain to be enforceable as a contract.

³⁷ *United Homes (1988) Ltd v Workman* [2001] NZLR 447 at [34].

[83] To my mind, there is no other evidence that supports Mr Stills's contention that Mrs Still was granted a right of first refusal. There is no record, contemporaneous or otherwise, of any conversations between her and CPT (or indeed, anyone else) referring to the grant of a right of first refusal. Despite the numerous correspondence that passed between Mr Stills and CPT he never, prior to the issue of this proceeding, asserted CPT had granted Mrs Stills a right of first refusal. The references in the evidence, and the submissions to there being, variously, an express, implied, legal or moral obligation upon CPT to negotiate with the Stills family for the sale of Lot 2, as well as assertions that CPT was required to act in a Christian manner, or in accordance with ecclesiastical law, reflects a marked dubiety as to the basis upon which the claimed interest could be founded.

[84] Contrary to Mr Davis's submissions, there is nothing in the minutes of the annual general meeting of the Parish of 7 April 2019 or the later minutes of the Standing Committee of the Diocese of 5 June 2019 that suggests CPT had granted Mrs Stills a right of first refusal. To the contrary, the discussions about the possibility of offering the property for sale to the lessees clearly indicates there was no existing obligation to do so.

[85] The view of Reverend Corban-Banks who was only "vaguely aware of the background", can say nothing about the existence of an enforceable right of first refusal either.

[86] It is relevant also, there is no evidence from Mr Stills's brothers as to the existence of an understanding that Mrs Stills or the Stills family had been granted a right of first refusal. There is also no evidence from any of Mr Stills's neighbours who actually acquired their properties from CPT that they did so by exercising a contractual right of first refusal. While CPT undoubtedly did sell properties to lessees, and in July 2020 invited the Stills family to make an offer to buy Lot 2, there is no evidence from any of the neighbours as to the basis or terms upon which they purchased their properties.

[87] Notwithstanding the low evidential threshold Mr Stills must cross, there is insufficient evidence of the grant of a right of first refusal.

Does Mr Stills have any rights arising from any such grant?

[88] If, contrary to my finding, Mrs Still was granted a right of first refusal, such right was personal to her. There is no evidence, nor any arguments advanced before me, as to the legal mechanism by which Mr Stills is now entitled to the benefit of such a right.

Whether any such grant is unenforceable for non-compliance with the ss 24 of the Property Law Act 2007.

[89] Again, if contrary to my findings Mrs Stills was granted a right of first refusal, to be enforceable against CPT there must be a record of it in writing to comply with s 24 of the Property Law Act, or otherwise a sufficient act of part performance.³⁸

[90] The author of *Sale of Land* states in the context of his discussion of rights of pre-emption and interests in land:³⁹

Because the concern is whether there is an interest in land, and there can be an interest in land only if there can be enforceability by court proceeding, there must be compliance either with s 24 of the [Property Law Act 2007] or the doctrine of part performance. As in any situation, compliance with s 24 may come about through a record in writing, perhaps consisting of more than one instrument, which came into existence at some later time and for some purpose other than to be a record of the contract. In the present context, the writing must presumably cover both the original grant of the right of preemption and the later offer, if there is one, that is, if stage three has been reached. If matters are at stage two, where there has not been an offer, but one should now be made, there may be a technical difficulty in enforcement by specific performance. It may be difficult to find appropriate writing to record the existence of the necessary facts. ...

[91] Section 24 of the Property Law Act provides as follows:

24 Contracts for disposition of land not enforceable unless in writing

- (1) A contract for the disposition of land is not enforceable by action unless—
- (a) the contract is in writing or its terms are recorded in writing; and
 - (b) the contract or written record is signed by the party against whom the contract is sought to be enforced.

³⁸ See for instance, *Wyllie v Firmin* [2022] NZHC 527 at [104].

³⁹ *Sale of Land*, above n 36, at 119–120.

....

[92] Section 25 of the Act relevantly provides:

25 Writing required for certain dispositions of interests in land

- (1) A disposition of any of the following must be in writing and signed by the person making the disposition:
- (a) an existing interest in land acquired by taking possession of the land;
 - (b) an existing legal or equitable interest in land;
 - (c) an existing equitable interest in a mixed fund consisting partly of land and partly of other property.

[93] Section 26 of the Act provides:

26 Doctrine of part performance not affected

Sections 24 and 25 do not affect the operation of the law relating to part performance.

[94] Here, there is no record in writing of a right of first refusal in favour of Mrs Stills, Mr Stills or any member of the Stills family. Mr Davis did not suggest otherwise, but submitted it was reasonably arguable that the doctrine of part performance applied.

[95] Mr Davis referred me to *T A Dellaca Ltd v PDL Industries* where, after a thorough examination of the authorities, Tipping J said that in a part performance case, the Court must consider three points as follows:⁴⁰

1. Was there a sufficient oral agreement such as would have been enforceable but for the Act?
2. Has there been part performance of that oral agreement by the doing of something which:
 - (a) clearly amounts to a step in the performance of a contractual obligation or the exercise of a contractual right under the oral contract; and
 - (b) when viewed independently of the oral contract was, on the probabilities, done on the footing that a contract relating to the land and such as that alleged was in existence.

⁴⁰ *T A Dellaca Ltd v PDL Industries* [1992] 3 NZLR 88 (HC) at 109.

3 Do the circumstances in which that part performance took place make it unconscionable (fraudulent in equity) for the defendant to rely on the Act?

[96] Mr Davis argued there were sufficient acts of part performance by virtue of the Stills family being good stewards of Lot 2 over many years, maintaining their support for the Church, and the undertaking of improvements to Lot 2.

[97] Mr Davis also referred me to *Wyllie v Firmin*, where executors of the will of the applicant's father applied to remove a caveat lodged claiming an interest in the land pursuant to an oral agreement granting the caveator a first right to purchase land at market value on the basis of a registered valuation.⁴¹ Associate Judge Sussock considered it reasonably arguable that such a right had been granted and that there were sufficient acts of part performance.⁴² However, *Wyllie v Firmin* is a very different case from this one. There, Associate Judge Sussock was satisfied that the terms upon which the right of first refusal would be exercised were sufficiently certain, stating:⁴³

... From the evidence of the siblings above, particularly the email correspondence between the siblings in September 2020, it appears reasonably arguable that the terms of the right of first refusal were that it would be triggered either when Tony chose to sell or on his death and it was to be at market value on the basis of a registered valuation.

[98] Further, the Associate Judge found it arguable there were sufficient acts of part performance such that it would be unconscionable for the executors to rely upon the requirements of the Property Law Act. Specifically, there had been registered valuations obtained and offers made to purchase the property based upon them.⁴⁴

[99] Here, in terms of the first requirement from *T A Dellaca Ltd v PDL Industries*, I have already noted that the evidence as to the existence of a right of first refusal is vague and does not address essential matters, such as who it is said made the grant, their authority to do so, what consideration was provided, and the terms upon which the grant would be exercised.

⁴¹ *Wyllie v Firmin*, above n 38.

⁴² At [102].

⁴³ At [111].

⁴⁴ At [108].

[100] As to the second requirement in *T A Dellaca Ltd v PDL Industries*, I do not accept Mr Davis's submission that there were sufficient acts of part performance. None of the matters Mr Davis referred to amount to either a step in the performance of a contractual obligation, or the exercise of a contractual right under an oral agreement granting Mrs Stills, or the Stills family, a right of first refusal. While he submitted the Stills family were good stewards of Lot 2 over many years and maintained their support for the Church, they were obliged to maintain the property under the lease, and there is no suggestion the grant of a right of first refusal was dependent upon their religious observance.

[101] As there were no act/s of part performance, the third requirement in *T A Dellaca Ltd v PDL Industries* cannot be satisfied either.

[102] I therefore find Mr Stills does not have an arguable case to an equitable interest in Lot 2 arising from a right of first refusal. He has failed to establish an arguable case as to the existence of any such right and, in any event, any such right would be unenforceable for non-compliance with s 24 of the Property Law Act and failure to engage the law of part performance.

[103] The kernel of Mr Stills's case is, in reality, that it is simply unfair in all the circumstances that CPT sell Lot 2 to the McCormacks. In *New Zealand Limousin Cattle Breeders Society Inc v Robertson*, the applicants claimed to have a caveatable interest over the respondent's home as he had embezzled funds from the Society and stated an intention to make restitution from the sale of his assets.⁴⁵ The Court of the Appeal rejected an argument that fairness, equity, justice, and good conscience required the imposition of a trust. The Court said, "Such a simple subjective test cannot found an equitable interest".⁴⁶ I take the same view here.

⁴⁵ *New Zealand Limousin Cattle Breeders Society Inc v Robertson* [1984] 1 NZLR 41 (CA).

⁴⁶ At 43.

Result

[104] Mr Stills has not established an arguable case to an interest in Lot 2 to support his caveat. His application is dismissed. I order the caveat should be lapsed by the Registrar.

[105] I reserve costs. If either party seeks costs, they may apply by memorandum within 21 days of the date of this judgment. Any reply submissions to be filed 14 days thereafter. I expect to determine costs on the papers.

O G Paulsen
Associate Judge

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