IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2021-004-003481
[2022] NZDC 12002

NEW ZEALAND COMMERCIAL LAW CORP LIMITED
Prosecutor

v

LEPIONKA & COMPANY INVESTMENTS LTD
Defendant

Hearing:	10 May 2022 (with further submissions from the prosecutor dated 16 May 2022 and from the defendant dated 3 June 2022)
Appearances:	D Hayes for the Prosecutor (Respondent) B Keown and S Leslie for the Defendant (Applicant)
Judgment:	1 July 2022

RESERVED DECISION OF JUDGE A M MANUEL
(Under s 147 of the Criminal Procedure Act 2011)

Introduction

[1] The defendant Lepionka and Company Investments Ltd (Lepionka Investments) has applied for an order either dismissing a charge or staying proceedings. It claims that the evidence is insufficient and the prosecution is an abuse of process. The application is made under s 147 of the Criminal Procedure Act 2011 (CPA) and in reliance on the Courts' inherent power to regulate its own processes.

[2] The prosecutor New Zealand Commercial Law Corp Limited (Law Corp) alleges that the defendant committed theft as a person in a special relationship contrary

to s 220 of the Crimes Act 1961 (CA). The maximum penalty on conviction is imprisonment for a term not exceeding 7 years.

[3] This is a private criminal prosecution. It is the latest development in extensive litigation brought by Garth Paterson (and other entities associated with him) against Stefan Lepionka (and other entities associated with him). From about September 2015 to August 2021 the litigation played out in the civil jurisdiction. In April 2021 this charge was filed in the criminal jurisdiction.

[4] Mr Paterson's lawyer Mr Hayes is the sole director and shareholder of the prosecutor Law Corp. The evidence relied on by the prosecution is a formal statement from Mr Paterson. The complainant is 47 Fairfax Road Pty Limited (Fairfax) an Australian company with Mr Paterson's partner, Nadia Dapas, as a director and Mr Paterson as a former director. Mr Paterson says Fairfax is a trustee of a family trust, the Garth Paterson Family Trust (the Paterson Family Trust). The complainant alleges that the Paterson Family Trust has an interest in two lots of land (lots 10 and 11) in a development on the banks of the Tukituki River near Havelock North. In November 2019 the complainant Fairfax lodged caveats against the titles to the two lots.

[5] The defendant Lepionka Investments is mortgagee in possession of the two lots of land and has been mortgagee in possession of all or most of the Tukituki development since April 2015.

[6] Under s 155(1) of the Property Law Act 2007 (PLA) a mortgagee in possession must account to the current mortgagor and to every person holding a subsequent encumbrance over the land for all income received for the land and for its application or payment. The current mortgagor is Mr Paterson's company GWL Group Limited (GWL Group), which has been in liquidation since July 2018.

[7] Under s 160 of the PLA a mortgagee in possession must keep accounting records that correctly record and explain the receipts, expenditure and other transactions relating to the land. Sections 162 and 163 set out the intervals at which reports must be prepared.

[8] Under s 165 of the PLA a mortgagee in possession must send a copy of the reports to every person who has lodged a caveat[1] and, within 15 working days after receiving a written request, to any other person with an interest in all or part of the land."[2]

[9] If a mortgagee in possession fails to comply with reporting duties they commit an offence under the PLA and may be liable on conviction to a fine not exceeding $10,000.[3]

[10] The complainant alleges that on about 27 November 2020, 5 January 2021 and 19 March 2021, the defendant was served with requests that "the defendant account to the trustee of the Garth Paterson Family Trust." The defendant failed to provide an accounting.

[11] Reporting should not be conflated with accounting. Section 155 of the PLA may have provided a duty to account to the GLW Group, but the liquidator has no complaint about any failure to account because in 2018 a settlement was reached with the defendant Lepionka Investments, with extant proceedings discontinued and an appeal abandoned.

[12] Section 155 of the PLA also provides a duty to account to every person holding a subsequent encumbrance order over the land. "Encumbrance" is defined at s 4 of the PLA as including "a mortgage, a trust securing the payment of money, or a lien." To establish a duty to account the complainant Fairfax must show it holds a subsequent encumbrance. For reasons explained at [49] - [54] it has not done so.

[13] The complainant Fairfax alleges a failure to account under s 165 of the PLA, but s 165 provides only a duty to report to certain persons. The charge as laid by the prosecutor goes even further, alleging not only a failure to account but the misappropriation of funds from the sale of some lots and the sale of other lots under value.

---

[1] Section 165(1)(b)(iv) of the Act.
[2] Section 165(2)(c) of the PLA.
[3] Section 165(4) of the PLA.

[14] The evidence relied on by the prosecutor includes the formal statement by Mr Paterson[4] and two tranches of disclosure, one made in about May 2021 and the other in May 2022. A summary of facts has also been provided.

[15] Mr Lepionka has made a formal statement and provided documents in support.

[16] No plea by the defendant Lepionka Investments has been entered and no election has been made.

Background

[17] In 2009 Mr Paterson, via the GLW Group, purchased the land and began the Tukituki development. The GLW Group sold five lots to entities associated with Mr Lepionka in January 2014. Soon afterwards it became clear that the GLW Group was insolvent and in early 2015 it was served with PLA notices by Westpac, the first mortgagee. In April 2015 the defendant Lepionka Investments acquired the first mortgage over the land from Westpac and promptly adopted the sales to the Lepionka entities. Shortly before it had emerged that an Australian company, AFI Management Pty Ltd (AFI), held an unregistered second mortgage. After taking possession the defendant undertook completion of the development. In the years which followed all but two of the 11 lots under development were sold, with the last sale settling in August 2019. The GLW Group remains the registered proprietor of lots 10 and 11 with the defendant Lepionka Investments the mortgagee in possession.

[18] In September 2015, Mr Paterson and the GLW Group issued proceedings against Mr Lepionka and other entities associated with him, including the defendant Lepionka Investments, a second Lepionka company and the Lepionka Family Trust (the main proceedings).

[4] Three further formal statements dated 7 June 2022 were filed after the application had been heard. They do not establish any standing which would give rise to a duty to either account or report under the PLA.

[19] Mr Paterson was adjudicated bankrupt in April 2016 and the Official Assignee disclaimed any rights in the main proceedings. Mr Paterson applied to the High Court to have the rights vested in him, but his application was declined.

[20] Mr Paterson's core allegations – that the defendant had breached its duties as mortgagee in possession – were tested at a High Court trial in 2017. Some allegations were dismissed and others were upheld. Settlement was reached with AFI in August 2018 and the GLW Group's liquidator in December 2018.

[21] The dispute could have been expected to end there, but it did not. Far from it.

[22] Mr Paterson (and other entities associated with him) commenced multiple proceedings against the defendant Lepionka Investments and others (including the Registrar-General of Land). They were either withdrawn or found to be without merit. A series of caveats were lodged against the land which were removed by Court order. A statutory demand was issued against the defendant company, which was found to be an abuse of process. Five increased costs orders were made in favour of the defendant company, none of which have been paid. In August 2020 the High Court made an order under s 166 of the Senior Courts Act 2016 restraining Mr Paterson in any capacity from commencing or continuing any civil proceedings relating to the land without leave for a period of three years. Effectively he was declared a vexatious litigant. The prohibition remains in effect.[5]

[23] In December 2020, Mr Paterson was bankrupted for a second time and is still a bankrupt.

[24] Mr Paterson however remains aggrieved by the alleged action or inaction of the defendant Lepionka Investments as mortgagee in possession.

[25] The defendant submits that, since the 2017 decision and 2018 settlement of the main proceedings, Mr Paterson and other entities associated with him have claimed

[5] This is merely a summary of the Paterson/Lepionka proceedings. The details are far more extensive.

to have previously undisclosed interests in the land in an attempt to revisit the outcome. The interests alleged have not been substantiated.

[26] Proceedings issued by Mr Paterson in 2019, purportedly as a trustee of the Paterson Family Trust against the defendant Lepionka Investments, illustrate this. The 2019 proceedings relied on claims that are very similar to those made in this proceeding, that is:

(a) that Mr Paterson was trustee of the Paterson Family Trust;

(b) that the Paterson Family Trust advanced $800,000 towards the initial purchase of the land by the GLW Group pursuant to an agreement to mortgage;[6] and

(c) that the defendant Lepionka Investments was required to account to the Paterson Family Trust.

[27] The High Court struck out the proceeding finding that Mr Paterson was behind it and it was an attempt to re-litigate issues that had already been definitively resolved against him in the main proceedings:[7]

> I therefore find that the parties in the current mortgagee proceeding are either identical to those in the 2017 proceeding, or are their privies.
>
> In conclusion, there is sufficient union of interest in the subject matter of the 2017 proceeding, and the relationship with the parties to that proceeding that it is just that the Paterson Family Trust should be bound by the outcome in the Main Judgment.

[28] Mr Paterson appealed the High Court's decision and, in his notice of appeal, said that the Judge had erred by "failing to recognise that myself and parties associated with me are entitled to an accounting from [the defendant] as mortgagee in possession." He also applied for orders "convicting and fining [the defendant] and its

---

[6] No agreement to mortgage is alleged in this proceeding.
[7] *Paterson v Lepionka & Co Investment Ltds & Ors* [2020] NZHC 2184 at [64] and [65].

director, Stefan Lepionka, for offences pursuant to s 163(4) (sic) of the Property Law Act 2007."

[29] The defendant succeeded in striking out the appeal, with the Court of Appeal holding that:[8]

> We are satisfied that the second mortgagee proceeding and the malicious prosecution proceeding are wholly untenable, frivolous, vexatious and an abuse of the process of the Court. Those proceedings were properly struck out by [the High Court] for the reasons given.

[30] The Court of Appeal also rejected the suggestion that the defendant was guilty of failing as mortgagee in possession to account to Mr Paterson and entities associated with him:[9]

> …
>
> Mr Paterson seeks orders … directing [the defendant] to provide "a full set of mortgagee in possession accounts" pursuant to s 155 of the PLA.
>
> It can be seen that Mr Paterson seeks to ventilate on this appeal the same underlying issues that were determined in the liability judgment and compromised in the settlement. Mr Paterson's claims …. cannot be entertained. It is clearly an abuse of process and the appeal must be struck out.
>
> …
>
> There is plainly no basis for the fourth order sought, namely an order convicting and fining [the defendant] and Mr Lepionka for alleged offences under the PLA. Mr Paterson's application for such orders merely serves to underscore the frivolous, vexatious and abusive nature of these appeals…

[31] The history of the caveats lodged against the land by Mr Paterson and other entities associated with him also illustrates Mr Paterson's attempts to pursue his grievances. A summary is set out below.

---

[8] *Paterson v Lepionka & Co Investments Ltd* [2021] NZCA 364 at [42].
[9] See n8 above at [51]-[53].

Date	Caveator and alleged interest	Result
March 2016	Horseshoe Bend Hawkes Bay Limited (Horseshoe) a company controlled by Ms Dapas and Mr Paterson's former wife Elizabeth O'Neil. Alleged interest - under sales to Lepionka entities.	Removed by the High Court in December 2016 with increased costs ordered against Horseshoe and Ms O'Neil as a non-party
January 2018	Mr Paterson Alleged interest - contractual rights held on trust for Mr Paterson's family.	Removed by order of the High Court in July 2018 with orders made restraining Mr Paterson and the GLW Group from lodging caveats over the land and accepting undertakings in a similar vein from Ms O'Neil and Ms Dapas
November and December 2018	Naldapat Limited (Naldapat), a company whose directors were Ms Dapas and Mr Paterson's brother-in-law, Mr Bowkett. Alleged interest under a sale and purchase agreement dated May 2018 which was never produced. LW354 Limited (LW354), a company whose director was Ms O'Neil with Mr Paterson and Mr Bowkett subsequently being appointed as directors. Alleged interest as a trustee following the retirement of Naldapat in November 2018 despite Naldapat not having claimed any interest in its own caveat.	Naldapat caveat voluntarily withdrawn shortly before the High Court hearing. LW354 caveat removed by the High Court. Findings made that Ms O'Neil and Ms Dapas were in contempt of Court. Increased costs awarded against LW354 and Ms O'Neil as a non-party.
Late 2018/early 2019	Ms Dapas and Mr Bowkett attempt to lodge further caveats on behalf of Fairfax and Ms Dapas. Alleged to mortgage dated September 2009 and 2017 and a relationship property interest by virtue of Ms Dapas' relationship with Mr Paterson.	N/A (attempt to lodge only)
November 2019	The complainant Fairfax Alleged interest in land held by the Paterson Family Trust.	Caveats remain in place. No application has been made to remove them as yet.

Section 166 Senior Courts Act 2016 (SCA) and S 50 Evidence Act 2006 (EA)

[32] Section 166 of the SCA relevantly provides as follows:

> **Restriction on commencing or continuing proceeding**
>
> **S 166 Judge may make order restricting commencement or continuation of proceeding**
>
> (1) A Judge of the High Court may make an order restricting a person from commencing or continuing a civil proceeding**.**
>
> (2) The order may have—
>
> (a) a limited effect (a **limited order**); or
>
> (b) an extended effect (an **extended order**); or
>
> (c) a general effect (a **general order**).
>
> (3) A limited order restrains a party from commencing or continuing civil proceedings on a particular matter in a senior court, another court, or a tribunal.
>
> (4) An extended order restrains a party from commencing or continuing civil proceedings on a particular or related matter in a senior court, another court, or a tribunal.
>
> (5) A general order restrains a party from commencing or continuing civil proceedings in a senior court, another court, or a tribunal.
>
> (6) Nothing in this section limits the court's inherent power to control its own proceedings

[33] Section 166 of the SCA does not prevent a litigant making a criminal complaint to the police. Nor does it prevent a private prosecution on the same subject matter.

[34] In May 2021 this Court directed that the charging document in this proceeding be accepted for filing pursuant to s 26(2) of the CPA. The defendant Lepionka Investments responded by alerting the Court to the existence of the s 166 SCA order in place against Mr Paterson and submitted that, given the subject matter of the prosecution was essentially the same as that involved in previous civil proceedings, the charging document should not have been accepted for filing on the grounds of abuse of process.

[35] In July 2021, this Court confirmed that the decision to accept the charging document had already been made and there was no power to revisit it under s 26 of the CPA.[10] It was left open for the Court to later dismiss the charge or stay the proceeding.[11]

[36] Section 50 of the EA provides that:

> **Civil judgment as evidence in civil or criminal proceedings**
>
> (1) Evidence of a judgment or a finding of fact in a civil proceeding is not admissible in a criminal proceeding or another civil proceeding to prove the existence of a fact that was in issue in the proceeding in which the judgment was given.
>
> (1A) Evidence of a decision or a finding of fact by a tribunal is not admissible in any proceeding to prove the existence of a fact that was in issue in the matter before the tribunal.
>
> (2) This section does not affect the operation of—
>
> (a) a judgment *in rem*; or
>
> (b) the law relating to *res judicata* or issue estoppel; or
>
> (c) the law relating to an action on, or the enforcement of, a judgment.

[37] A recent decision of the High Court, *Attorney-General v Seimer*,[12] comprehensively reviewed s 50 of the EA. This was in the context of an effort by the Attorney-General to produce judgments and other documents relating to previous litigation in order to have an order made under s 166 of the SCA against the defendant Mr Seimer.

[38] The issue was whether judgments or findings of fact in earlier civil proceedings involving Mr Seimer and third parties were admissible in later civil proceedings involving Mr Seimer and the Attorney General. Because the proceedings did not involve the same parties or their privies, res judicata or issue estoppel did not apply.

---

[10] *47 Fairfax Road Pty Ltd (as trustee of the Garth Paterson Family Trust) v Lepionka Co Investments Ltd* [2021] NZDC 13751.
[11] See n 10 above at [17].
[12] *Attorney-General v Seimer* [2022] NZHC 917.

[39] The High Court held that the starting point must be the relevance test under s 7 of the EA. Then a consideration of the distinction between a judgment, and the reasons for the judgment, must be made. A judgment was admissible evidence of the outcome in a particular case under s 139 of the EA, however in subsequent proceedings not involving the same parties or their privies, the reasons for the judgment could not be admissible evidence of any facts found therein. The High Court also found that the reasons for a judgment were hearsay under s 17 of the EA and if such reasons were to be used they must pass through the hearsay test under ss 23 to 25 of the EA.

[40] The High Court concluded by finding:[13]

> … findings of fact in earlier litigation involving Mr Seimer and third parties showing his claims totally lacked merit, were vexatious, an abuse of process or any other descriptor that is typically applied to hopeless litigation warranting a five year general restraint order, cannot be relied upon by the Attorney General in the consolidated proceeding to prove the existence and truthful accuracy of those earlier factual findings.

[41] The issue which arises in this case is whether judgments or findings of fact in earlier civil proceedings between the same parties or their privies are admissible in these subsequent criminal proceedings. Because the earlier proceedings were civil proceedings, and these proceedings are criminal proceedings, res judicata or issue estoppel does not apply.

[42] The effect of s 50 of the EA is that while the earlier civil judgments are relevant as background, the fact that similar claims have been held to be without merit is proof that such findings were made, but not necessarily proof of the truth of the findings. This Court has an independent obligation to assess the evidence furnished by the prosecutor and cannot discharge that obligation by accepting the findings of another Court.

---

[13] See n 12 above at [65].

Should the charge be dismissed under s 147 of the CPA because the evidence is insufficient?

[43] Section 147 of the CPA provides that:

> **Dismissal of charge**
>
> (1) The court may dismiss a charge at any time before or during the trial, but before the defendant is found guilty or not guilty, or enters a plea of guilty.
>
> (2) The court may dismiss the charge on its own motion or on the application of the prosecutor or the defendant.
>
> (3) A decision to dismiss a charge may be made on the basis of any formal statements, any oral evidence taken in accordance with an order made under section 92, and any other evidence and information that is provided by the prosecutor or the defendant.
>
> (4) Without limiting subsection (1), the court may dismiss a charge if—
>
> > (a) the prosecutor has not offered evidence at trial; or
> >
> > (b) in relation to a charge for which the trial procedure is the Judge-alone procedure, the court is satisfied that there is no case to answer; or
> >
> > (c) in relation to a charge to be tried, or being tried, by a jury, the Judge is satisfied that, as a matter of law, a properly directed jury could not reasonably convict the defendant.
>
> (5) A decision to dismiss a charge must be given in open court.
>
> (6) If a charge is dismissed under this section the defendant is deemed to be acquitted on that charge.
>
> (7) Nothing in this section affects the power of the court to convict and discharge any person.

[44] The concepts of burden and standard of proof do not apply to s 147 of the CPA, but the Court must be satisfied before any order is made.[14]

[45] In *R v Flyger*, the Court of Appeal held that:[15]

> … The evidence in support of a charge may be barely adequate and so tenuous as to lead a Judge to the view that the jury could not properly convict and accordingly the interests of justice require an order for discharge. The evidence in a case may be adequate, if accepted, but witnesses may appear so manifestly discredited or unreliable that it would be unjust for a trial to

[14] *Gifford v District Court of New Zealand* [2022] NZHC 851.
[15] *R v Flyger* [2001] 2 NZLR 721 at [15].

> continue. It may be that in such circumstances the jury would be unlikely to convict, but the rationale for an order to discharge is not the likelihood of an acquittal but the unsafeness of a conviction having regard to the evidence.

[46] The same test applies when the submission is one of no case to answer.[16] A Judge sitting alone must determine whether there is some evidence (not inherently incredible) which, if accepted as accurate, would establish each element of the offence.[17]

[47] Section 220 of the CA provides that:

> **Theft by person in special relationship**
>
> (1) This section applies to any person who has received or is in possession of, or has control over, any property on terms or in circumstances that the person knows require the person—
>
> > (a) to account to any other person for the property, or for any proceeds arising from the property; or
> >
> > (b) to deal with the property, or any proceeds arising from the property, in accordance with the requirements of any other person.
>
> (2) Every one to whom subsection (1) applies commits theft who intentionally fails to account to the other person as so required or intentionally deals with the property, or any proceeds of the property, otherwise than in accordance with those requirements.
>
> (3) This section applies whether or not the person was required to deliver over the identical property received or in the person's possession or control.
>
> (4) For the purposes of subsection (1), it is a question of law whether the circumstances required any person to account or to act in accordance with any requirements.

[48] Essentially s 220 of the CA requires the prosecution to prove that:

> (a) the defendant received property on terms that required it to act in accordance with the requirements of another person; and
>
> (b) the defendant knew of those terms and intentionally departed from them

---

[16] See n 15 above at [16].
[17] See n 15 above at [16],[17],[18] and [25].

A special relationship?

[49] At the heart of an offence against s 220 of the CA is the existence of a fiduciary element or the earmarking of property in the hands of the defendant.[18] The prosecutor must present evidence which establishes a legal requirement obliging the defendant to deal with the property in a particular way.[19] A duty to report is insufficient. The requirement may arise from contractual documents or a fiduciary relationship.[20] The nature and scope of the obligation which establishes a special relationship and that amounts to a criminal offence must be identified. However, no special relationship has been identified between the defendant Lepionka Investments and the complainant Fairfax. No contractual documents have been produced. There is no evidence of Fairfax or the Paterson Family Trust holding a mortgage or any form of subsequent encumbrance over the land.

[50] The only evidence offered in support of the defendant allegedly owing any obligation to Fairfax is the caveat registered in the name of Fairfax in November 2019, and three letters sent by Mr Paterson and his brother-in-law, Mr Bowkett, to the defendant. The letters purport to demand that the defendant as mortgagee in possession account to several entities associated with Mr Paterson, including Mr Paterson himself "in my multiple capacities" and to Fairfax.

[51] These self-generated documents are not evidence of any interest in the land which gives rise to a duty to account or a special relationship. The documents were all created after most of the land had been sold in August 2019 following the removal of the caveats lodged by entities associated with Mr Paterson. The caveats relied on by the prosecution were lodged in breach of an order of the High Court in July 2018 restraining Mr Paterson from lodging or attempting to lodge any caveats against the land or instructing, directing or causing another person or entity to lodge any caveats against the title to the land.[21]

---

[18] *R v Scale* [1977] 1 NZLR 178 (CA).
[19] *Nisbitt v R* [2011] NZCA 285 at [32].
[20] See n 19 above at [13], [14], [32] and [33].
[21] *GLW Group Ltd v LCIL* [2018] NZHC 1658 at [90].

A valid trust? An advance? A mortgage or subsequent encumbrance?

[52] The difficulties with the evidence go further and include:

(a) insufficient documents to establish the existence of the Paterson Family Trust as a valid legal entity (only three pages of a trust deed comprising a cover page, first page and the final page were disclosed);

(b) insufficient documents to establish an advance of $800,000 from the Paterson Family Trust towards the purchase of the land by the GLW Group. (the only evidence is in Mr Paterson's sworn statement and a copy of an email which purports to ask a bank officer to transfer money from an unnamed account);

(c) a lack of evidence to establish that the Paterson Family Trust has a mortgage or subsequent encumbrance such as an agreement to mortgage, for example. (Mr Paterson's statement does not mention any mortgage or encumbrance and no documents have been disclosed).

[53] In fact, the documents available contradict the suggestion that Fairfax or any other entity relating to the Paterson Family Trust has any interest in the land. In September 2009, Mr Paterson consented on behalf of the GLW Group to the registration of the Westpac mortgage which contained the following provisions:

(a) a warranty that no undisclosed interest in the land existed;

(b) a prohibition on granting any new interest on the land; and

(c) a prohibition on granting any security or mortgage over the land.

[54] Mr Paterson also personally signed a director's certificate in December 2012 which stated:

> The company is entering into the documents solely for its own benefit and not as trustee or nominee arranged by any third party.

This is in addition to another director's certificate couched in similar terms dated 10 January 2014.

Any theft?

[55] As mortgagee in possession the defendant was required to distribute proceeds of any sale in accordance with s 185 of the PLA, which includes paying any surplus to any subsequent mortgagee or encumbrancer if the mortgagee had actual notice.

[56] However the prosecution cannot establish any such obligation because there is no evidence of any surplus.

[57] In his statement of evidence Mr Paterson alleges that the defendant received no more than $8,366,250 in sale proceeds. It is a matter of record that the defendant acquired the mortgage from Westpac for $2,682,345 and that a second mortgagee (whose interest an entity associated with Mr Lepionka acquired in the settlement in August 2018) secured AUD $4,109,280 in advances. These amounts do not include interest, costs incurred in completing the development and legal costs properly chargeable to the mortgage. Penalty interest at 20% payable under the second mortgage would have entitled the second mortgagee to AUD $8,000,000 in principal and interest in 2018.

Knowledge of an obligation or deliberate breach?

[58] While there is insufficient evidence that the defendant owed a relevant obligation to Fairfax there is no evidence that the defendant had actual knowledge of such an obligation or deliberately breached it. The available evidence rules out that possibility because:

(a) the Westpac mortgage contained the warranty that no undisclosed interest in the land existed and a prohibition on granting any new interest in the land;

(b) the prosecution has provided no evidence that the alleged interest of Fairfax was known to or consented to by Westpac or the defendant

given the mortgage terms prohibited the granting of any further interest in land without the mortgagee's consent;

(c) the documents purporting to evidence Fairfax's interest in the land were not produced until after the defendant had received the sale proceeds of the land; and

(d) in his sworn statement, Mr Lepionka gives unchallenged evidence to the effect that the defendant had no knowledge of any undisclosed interest in the land, relied on the warranties given by Mr Paterson that there was no undisclosed interest, and was never asked to consent to any other interest in the land;

[59] In conclusion, the prosecution evidence does not address the elements that must be proved in order to safely secure a conviction under s 220 of the CA. I am satisfied that either there is no case to answer or that a properly directed jury could not reasonably convict the defendant. The charge is dismissed on the grounds of evidential insufficiency under s 147 of the CPA.

Is the prosecution an abuse of process?

[60] The Court has a wide discretion to dismiss a proceeding on the grounds of abuse of process, as well as an inherent jurisdiction to stay proceedings in order to prevent an abuse of process.

[61] In *Fox v Attorney-General* the Court of Appeal held that:[22]

> Conduct amounting to abuse of process is not confined to that which will preclude a fair trial. Outside of that category it will, however, be of a kind that is so inconsistent with the purposes of criminal justice that for a Court to proceed with the prosecution on its merits would tarnish the Court's own integrity or offend the Court's sense of justice and propriety.

[22] *Fox v Attorney-General* [2002] 3 NZLR 62 (CA) at [37].

[62] In *Moevao v the Department of Labour* the Court of Appeal added that the Court could also stay a criminal proceeding where the Court:[23]

> … concludes from the conduct of the prosecutor in relation to the prosecution that the Court processes are being employed for ulterior purposes or in such a way (for example through multiple or successive proceedings) as to cause improper vexation and oppression.

[63] The defendant referred to cases where the Courts had exercised their jurisdiction to stay or dismiss a private prosecution on grounds of abuse of process. In *Ratana v Tauranga District Court*, for example, a private prosecution was stayed on the grounds of abuse of process because the prosecutor failed to produce any evidence that would responsibly and reasonably support a criminal prosecution.[24] In *Denham v Clague* a private prosecution was found to have been brought primarily to destroy the defendant's career and reputation and was dismissed with full indemnity costs awarded against the prosecutor.[25]

[64] The defence further submits that the prosecution is:

(a) an attempt by Mr Paterson to relitigate the arguments that have already been rejected by the High Court and Court of Appeal and "perpetuate a wasteful personal campaign against Mr Lepionka";

(b) does not meet the test for prosecution provided in the Solicitor General guidelines;[26] and

(c) is not required in the public interest.

[65] The prosecution has failed to produce sufficient evidence to responsibly and reasonably support a prosecution but that deficiency has already been addressed by the finding at [59] above. A finding that the prosecution is an abuse of process on the grounds of evidential insufficiency and an attempt to relitigate issues already decided is open to this Court but unnecessary given the conclusions reached.

---

[23] *Moevao v the Department of Labour* [1980] 1 NZLR 464 at [481]-[482].
[24] *Ratana v Tauranga District Court* [2002] NZHC 1306 at [18].
[25] *Denham v Clague* [2015] NZDC 12703 at [3].
[26] Crown Law Solicitor-General's prosecution guidelines (1 July 2013) at [2.5] and [5.5]-[5.11].

[66] Finally, for completeness , I have addressed two points raised by the prosecutor in submissions:

(a) that the matter is res judicata given the decision already made by this Court in July 2021. That decision however dealt with acceptance of the proceedings for filing and did not preclude a later application under s 147 of the CPA. Rather the decision left that door open; and

(b) that an application under s 147 of the CPA cannot be brought until an election has been made. No authority was cited for this proposition and I do not read s 147 of the CPA in that way. Section 147(1) provides that the Court may dismiss a charge at any time before or during the trial.

[67] In compliance with s 147(5) of the CPA this decision has been given in open Court.

Dated at Auckland this 1st day of July 2022

A Manuel
District Court Judge