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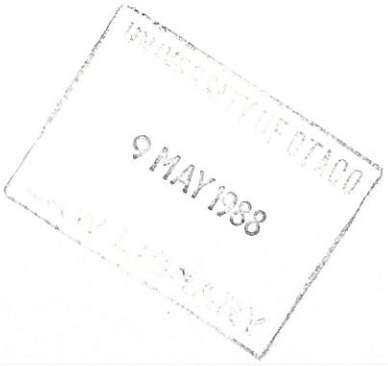
IN THE COURT OF APPEAL OF NEW ZEALAND CA 206/87



BETWEEN: C R FIELD AND OTHERS

Appellants

AND: D A FITTON AND ANOTHER

First Respondents

AND: B PAULIN

Second Respondent

Coram: McMullin J (Presiding)
Bisson J
Gallen J

Hearing: 11 February 1988

Counsel: P T Cavanagh for appellants
D R I Gay for first respondent
Second respondent abides judgment of the Court

Judgment: 22 March 1988

JUDGMENT OF THE COURT DELIVERED BY BISSON J

This is an appeal from a judgment of Master Towle in the High Court at Auckland in which he granted an application by the first respondents for an order under s.145 of the Land Transfer Act 1952 that a caveat lodged by the first respondents against the appellants' house property at 32 King Edward Avenue, Epsom should not lapse.

The second respondent was not represented at the hearing in the High Court, nor was he represented at the hearing in this Court but he has conveyed through other counsel to this

Court as he did by letter in the High Court that he is prepared to abide by the finding of the Court.

The lodging of the caveat in question arose in the following way. The appellants are trustees of an estate which listed on 11 July 1987 the house property already mentioned for sale with the real estate firm of Scholes Oakley (Mt Eden) Ltd (referred to as "Scholes Oakley") for sale at $215,000. Scholes Oakley introduced the second respondent as a purchaser at a price of $200,000. This offer to purchase was accepted and an agreement for sale and purchase in the form approved by the Real Estate Institute of New Zealand and by the New Zealand Law Society was signed by both parties and dated 20 July 1987. The purchaser was shown in the agreement as "Brent Paulin or nominee". The purchase price of $200,000 was payable as to a deposit of $20,000, $8,000 of which was to be paid forthwith and the balance of the deposit on 7 August 1987 leaving the balance of the purchase price to be paid in cash in one sum on possession being given and taken, the possession date being 30 September 1987.

Two days after the date of this agreement for sale and purchase Mr Paulin, the second respondent, and the first respondents signed a document headed "Memorandum of Assignment of Agreement" by which the second respondent agreed in consideration of the sum of $15,000 to nominate the first respondents as his nominee. The document referred

to Scholes Oakley holding a deposit of $8,000 in their trust account and required the nominee to settle the sale in one sum in cash on possession date, the 30 September 1987 and to pay Scholes Oakley $8,000 for which they would receive "an assignment of the Trust Receipt and credit for the $8,000 already paid to the vendors credit." I set out this document in full which appears to be in a standard printed form into which names and amounts had been hand-written.

"MEMORANDUM OF ASSIGNMENT OF AGREEMENT

on the property situate at and known as

32 King Edward Avenue, Epsom

Date of Agreement 20th July 1987

BETWEEN

VENDOR R. N. Field, Estate

AND

PURCHASER Brent Paulin OR NOMINEE.

Purchase Price: $200,000.00 (Two hundred THOUSAND DOLLARS).

Deposit held in Scholes Oakley Real Estate Trust Account - $8,000.0

It is agreed between the herein parties that in consideration of the sum of $15,000 (Fifteen THOUSAND DOLLARS) the purchasers in the above agreement, Brent Paulin, shall nominate D.A. Fitton and K.B.M. Fitton of Auckland as their nominee and D.A. Fitton and K.B.M. Fitton shall settle the transaction in one sum in cash on the possession date the 30th September 1987. As the deposit of $8,000.00 is held to the vendors credit in the Scholes Oakley Trust Account, D.A. Fitton and K.B.M. Fitton shall herewith pay Scholes Oakley the further sum of $8,000.00 (Eight THOUSAND DOLLARS) and shall receive an assignment of the Trust Receipt and credit for the $8,000.00 already paid to the vendors credit.

22nd July 1987"

"B. Paulin"
"D. Fitton"
"K. Fitton"

Allied to that contract was the following direction signed by Mr Paulin in favour of Scholes Oakley. This document was handwritten except for the heading "Brent Paulin Investments".

"BRENT PAULIN INVESTMENTS

To Scholes Oakley Mt Eden Ltd, MREINZ

In consideration of you effecting a Memorandum of Assignment of Agreement dated 22nd July 1987 on the property situated at and known as 32 King Edward Avenue, Epsom, between the vendor R.N. Field Estate and Brent Paulin or nominee, I shall pay you the sum of $7,000.00 plus GST if any (seven thousand dollars plus GST if any) from the fee of $15,000.00 which you must collect on my behalf.

'B. Paulin'

22/7/87"

It appears that Mr Paulin is an investor who made a cash offer for the property of the appellants at $15,000 below the listed price and then through the same real estate agent two days later in effect on-sold the property at the listed price of $215,000 making a profit of $8,000 for himself and enabling the real estate agents to secure a further commission of $7,000 on the re-sale of the property. As this dealing may be the subject of a complaint to the appropriate authority, we refrain from comment.

According to the affidavit of Mr J I Field, one of the appellants, Mrs Porteous of Scholes Oakley telephoned him on about 2 August 1987 and advised him that Mr Paulin had quite unexpectedly sold the property on to a third party but she did not disclose the name of the third party, nor the terms of this further transaction.

On 7 August 1987 Mr Norton of Wadsworth Norton, Solicitors for Mr and Mrs Fitton wrote to Mrs I M S Field (the wife of the Trustee Mr J I Field) the solicitor acting for the appellants as follows,

> "re: Sale 32 King Edward - Field Estate to Paulin or Nominee - our client Mr and Mrs D.A. Fitton
>
> We confirm that we act for the ultimate purchaser."

The extraordinary brevity of this letter devoid of any explanation and without any proposals for settlement not surprisingly caused Mrs Field some concern in the interests of her husband and his co-trustees. She discussed the position with her husband, who is also a solicitor, and after checking the position with the Duties Division of the Inland Revenue Department, she decided that it would not be lawful to settle the transaction simply as a sale by the appellants to the first respondents in a manner which did not disclose the intermediate transaction between the second respondent and the first respondents. She was concerned that the appellants should not become liable to pay stamp duty in default of payment by Mr Paulin or exposed to the penal consequences if the Trustees executed a transfer which did not contain the recital required by s.16(2) of the Stamp and Cheque Duties Act 1971. Section 16 is as follows,

> "16. Conveyance by direction of intermediary - (1) This section applies to every instrument of conveyance whereby property is conveyed -

(a) By the direction, at the request, or with the consent of an intermediary who by any means whatsoever has the right to call for a conveyance of the property to himself or to any other person; or
(b) Pursuant to any derivative title obtained by the person to whom the property is conveyed from or through an intermediary by any means whatsoever.

(2) Every instrument of conveyance to which this section applies shall recite the fact of the direction, request, consent, or derivative title.

(3) Every instrument of conveyance to which this section applies shall, for the purposes of assessing conveyance duty, be deemed to be an instrument of conveyance of the property from the person conveying the property to the intermediary and to be also an instrument of conveyance of the property from the intermediary to the person to whom the property is conveyed.

(4) Every person who executes an instrument of conveyance to which this section applies, but which does not contain the recital required by subsection (2) of this section, commits an offence and is liable on summary conviction to a fine not exceeding $2,000."

Mrs Field deposed that she received instructions from Mr J I Field on behalf of the Trustees to proceed upon the basis that there were two transactions, which were to be settled involving either two transfers (one from the Trustees to Mr Paulin and another transfer from him to Mr and Mrs Fitton) or one transfer by the direction of Mr Paulin to Mr and Mrs Fitton. In her affidavit Mrs Field deposed,

"10. FROM 6 August, just before the $12,000 balance of the deposit fell due, I made strenuous endeavours in the course of my instructions to ensure not only that the deposit payable by Mr Paulin was duly paid by him, but also that Scholes, Wynyard Wood as solicitors for Mr Paulin, and also Wadsworth Norton as solicitors for the Fittons, were fully alive to the true nature of the transaction, and understood:

(a) That the trustees regarded the sale to Mr Paulin, and the further sale by him on to the Fittons, as two, separate, transactions, each liable to stamp duty, and that when settlement came, it should be effected either by way of a transfer from the trustees to Mr Paulin and a further transfer by him, or by way of a transfer by direction to the Fittons, reciting Mr Paulin's direction that title be conveyed to them.

(b) That the trustees looked to Mr Paulin as their purchaser and would certainly not accept the Fittons as substitute purchasers."

Mrs Field had further cause for concern that the balance of $12,000 of the deposit due for payment on 7 August 1987 had not been paid. She telephoned the agents on at least six occasions to 21 August seeking payment of the deposit and making clear that the Trustees looked to Mr Paulin for payment in terms of his contract. Finally on 21 August 1987 when the balance of the deposit was 14 days overdue Mrs Field orally gave three days notice to Scholes Oakley of cancellation of the sale agreement if the deposit was not paid by Mr Paulin by 5.00 pm on Monday 24 August. She also informed Mr Brown, a legal executive, in the absence of Mr Garbett, the solicitor acting for Mr Paulin in the firm of Wynyard Wood, Solicitors, Auckland, that the vendors had through Scholes Oakley set a deadline for payment of the deposit by Mr Paulin. Also on that date, 21 August, Mrs Field telephoned Mr Norton's associate and advised him as a matter of courtesy of the deadline she had imposed on Mr Paulin for payment of the balance of the deposit. Such a notice of cancellation should have been in writing to comply

with Clause 2.1 of the contract but we set out these facts to instance the highly unsatisfactory situation in which the appellants were placed.

The balance of the deposit was finally received on 2 September 1987. On 3 September 1987 Mrs Field wrote to Wynyard Wood, solicitors for Mr Paulin, as follows,

"Dear Sirs,

re: Field Estate to Paulin

I enclose herein a note of the amount required to settle this transaction as at 30th September. I confirm that the deposit has finally come to hand --- 26 days after it was due.

I look forward to receiving your form of Transfer for perusal and execution in due course. I have been advised by the Agents that the Contract has been sold on to Mr Fitton. Blanchard at para. 516 advises:

'If a nominee arrangement in fact involves two contracts stamp duty will be payable in respect of each .....'

The Inland Revenue Department have given me a similar ruling. Hence, to comply with the law I wonder if it would be desirable to either have two Transfers or a Transfer by Direction, so that both Agreements can be noted. My clients are not willing to do anything which contravenes the tax laws. In other words, a Transfer direct to Fitton may not be a genuine nomination as two Agreements are involved."

By letter dated 17 September 1987 Wynyard Wood replied to Mrs Field as follows,

"Dear Madam,

re: FIELD ESTATE TO PAULIN

We thank you for your letter dated 3rd September 1987.

Our client has assigned his rights in the Agreement to D.A. & K.B. Fitton for whom Mr. M. Norton of Wadsworth Norton acts and we have no further participation in the matter."

This letter is significant as it was the first notice to the appellants' solicitor of an assignment of the purchaser's rights under the contract. Wynyard Wood also wrote to Wadsworth Norton in similar terms. Mrs Field responded to Wynyard Wood by letter dated 19 September in which she said,

> "Whatever the position between your client and Messrs Wadsworth Norton's client may be, (and incidentally my clients have received no request for consent to any assignment, nor any duly operative instrument of assignment), your client remains liable to perform his obligations as purchaser under the agreement for sale and purchase. I am prepared to correspond with Messrs Wadsworth Norton concerning settlement, provided that this is acknowledged, but I am instructed that the vendors will not in any circumstances forego their right to require your client to perform the contract.
>
> It appears to me that the proper course is for the vendors to transfer to your client, or by his direction in terms of proper documentation which confirms his continuing liability as purchaser. Whatever course is adopted, the circumstances will require me to protect my clients in respect of their duty to see to the payment of stamp duty on their sale."

Mrs Field sent a copy of this letter to Wadsworth Norton saying,

> "As put to Messrs Wynyard Wood, it appears to me that, if their client wishes to assign his rights, the property should be transferred by his direction in terms of proper documentation which preserves his liability under the agreement between him and my clients."

One can understand Mrs Field's concern to preserve Mr Paulin's liability under the contract. She did not wish to fall between two stools. Furthermore, on 12 September 1987 Mr and Mrs Fitton in conversation with Mr J I Field, according to his affidavit, referred to having "gone broke"

in respect of another property. However, instead of pressing Wadsworth Norton to submit a transfer to Mr and Mrs Fitton by way of direction of Mr Paulin, Mrs Field wrote again on 23 September 1987 to Wynyard Wood asking for a transfer to Mr Paulin to be forwarded urgently.

Mr Norton as solicitor for the first respondents adopted the same approach with regard to settlement of the transaction writing on 25 September 1987 to Wynyard Wood as follows,

> "re: Field Estate - Paulin and Fitton
>
> Mrs Field acting for the estate requires there to be a Transfer to your client and then a Transfer from your client to ours. Under the circumstances it would appear to the writer that the correct procedure is for us to take our Transfer from you and to look to you for a settlement statement.
>
> We of course have no wish to become involved in any argument involving your client and the original Vendor and possible conveyancing or stamp duty charges. As we understand it we are paying a total sum of $200,000.00 for the property which includes chattels valued at $18,000.00. We enclose a Transfer based on this from your client to ours and would be pleased to receive a settlement statement."

The stance taken by Mr Paulin was stated by his solicitors in their letter of 28 September 1987 to Wadsworth Norton as follows,

> "re: FIELD ESTATE - PAULIN - FITTON
>
> We have your letter dated 25th September 1987.
>
> As our client has appointed yours as his nominee under the Agreement dated 20th July 1987 it is our view that two sets of Transfers and settlement statements is inappropriate.

> Your client accepted this nomination by a nomination agreement dated 20th July 1987 on the basis that our client was to be involved no more either legally or by way of further costs and expenses.
>
> Accordingly we must leave it in your hands to settle with Mrs. Field direct with no further communication with us."

The unfortunate outcome was that the appellants did not receive any memorandum of transfer for execution prior to the date for settlement and on that date no tender of the balance according to the settlement statement was made to the appellants or their solicitor.

Mrs Field then took the step of forwarding a settlement notice under clause 8 of the Agreement for Sale and Purchase to Mr Paulin care of his solicitors requiring him to complete settlement on or before the 19th October 1987, time being of the essence and stating that unless he did so the vendors would under clause 8.4 of the agreement cancel and or rescind the contract and forfeit and retain for their own benefit the deposit and resell the property. This notice which was dated the first day of October 1987 was duly served and was promptly forwarded by Wynyard Wood to Wadsworth Norton under cover of their letter dated 1 October 1987. On the same day Wynyard Wood forwarded to Messrs Wadsworth Norton the letter dated 3 September 1987 together with the settlement statement they had received from Mrs Field. On that same date, the 1st of October 1987, Wadsworth Norton as solicitors and duly authorised agents for Mr and Mrs Fitton sent a settlement notice to Mr Paulin

care of his solicitors calling on him to complete or settle the assignment which he had entered into within seven days from the date of receipt of this notice.

It is not disputed that on 30 September 1987 the vendors were ready able and willing to settle, having obtained vacant possession from tenants, save only, that neither Mr Paulin nor his assignees had submitted a transfer for execution as required pursuant to clause 3.5 of the agreement.

Mrs Field had made every effort by telephone communications and letters to have settlement completed on due date and indeed had herself prepared a transfer in favour of Mr Paulin and had it executed by one of the Trustees who was then in Auckland for the day, as a step forwards facilitating settlement.

As the settlement notice was not complied with, Mrs Field on 20 October 1987 gave notice of cancellation under clause 8 of the Agreement for Sale and Purchase to Mr Paulin. Such notice included the following,

> "PLEASE TAKE NOTICE that, whereas:
>
> 1. ...
>
> 2. Neither you, nor any person purporting or claiming to be entitled as your nominee, have or has at any time complied with any of the terms of the settlement notice.
>
> NOW WE DO HEREBY CANCEL the contract evidenced by the said agreement... AND FURTHER TAKE NOTICE that, in consequence of the cancellation of the contract as

> aforesaid, the said agreement and contract ARE NOW AT AN END, subject to our other rights and remedies as aforesaid, and you have no further right or interest whatsoever thereunder, or in connection with the property described herein."

The notice was hand-delivered with a letter of the same date to the solicitors for Mr Paulin who in turn on that date wrote to Wadsworth Norton enclosing a copy of the notice of cancellation and of the letter from Mrs Field, "for your information".

Wadsworth Norton responded by letter dated 20 October 1987 to Mrs Field as follows,

> "Dear Mrs Field
>
> re: Paulin - Fitton - Field Estate - King Edward Avenue
>
> We refer to your telephone conversation of Tuesday the 20th of October where in you advised that you had cancelled your contract with Mr Paulin. Mr Paulin's Solicitors have sent us a copy of the Notice of Cancellation. We will be consulting our client and seeking his instructions in the meantime we note that we have kept in constant communication with you: we are in a position to settle: and we have registered a caveat against the property. We also note that you were at all times aware that we were Mr Paulin's nominee. The effects of the above and consequence that will flow from this transaction will obviously take sometime to resolve so the purpose of this letter is merely to acknowledge the position as the writer sees at the present.
>
> P.S. We would be grateful if as the principals instructing the Real Estate firm concerned you could also advise them that if they are holding any monies they should not disburse them and at this stage are not entitled to deduct any commission."

By notice dated 6 November 1987 the Assistant Land Registrar at Auckland gave notice to the first respondents that application had been made to register a Memorandum

of Transfer from the appellants as executors to themselves as beneficiaries. This gave rise to the application by the first respondents for an order, which was made, that the caveat not lapse.

Before passing to consider the order made by Master Towle, one cannot but express surprise and concern that a sale by the appellants to the first respondents was not settled on 30 September 1987 when both parties claim to be ready willing and able to complete the transaction on that date. It appears that the stumbling block was the attitude taken by the second respondent, perhaps as represented to him by Mrs Porteous as alleged in paragraph 33 of the statement of claim, that no steps need be taken by him in the settlement of the transaction. No doubt the question of liability for stamp duty arising under s.16(3) of the Stamp and Cheque Duties Act, already cited, was a problem but was not an insurmountable one. A valuation of the property dated 16 September 1987 obtained from a registered valuer puts the fair market value, exclusive of chattels, at $240,000. Efforts by the first respondents to settle the transaction on 9 November 1987 with interest to date on the balance of $186,200.65 due on 30 September 1987 were rejected by the appellants.

The caveat registered against the title to the land of the appellants gives notice that the first respondents claim an estate or interest in that land as assignees by virtue of a,

> "Memorandum of Assignment of Agreement dated the 22nd July 1987 from BRENT PAULIN the purchaser under an Agreement for Sale and Purchase dated the 20th July 1987 and made with JONATHAN IVERACH FIELD, CHRISTOPHER ROBERT FIELD AND RICHARD DOUGLAS FIELD as Vendors being the registered proprietors"

It is not disputed that the first respondents were entitled to lodge and register their caveat on that ground. The question now is whether the first respondents have an arguable case that an interest which was sufficient to support a caveat at the time it was lodged, remains extant. (See Holt v Anchorage Management Ltd (1987) 1 NZLR 108 at 115). Master Towle held that,

> "On the papers before me I believe that the Plaintiffs have an arguable case in support of their claim for specific performance and that the opportunity to acquire title to the property would be lost if the caveat were removed. I believe that there are sufficient doubts concerning the whole matter for the status quo to be preserved until the conflicting claims of the parties can be determined in the action."

Before Master Towle the appellants claimed that their cancellation of their agreement with the second respondent had put an end not only to their contract with Mr Paulin but also to any rights which the first respondents might have had either as nominees or assignees of Mr Paulin under the contract as purchasers. The first respondents contended that their rights to enforce the contract, whether as nominees, or as assignees in whose favour s.130 of the Property Law Act 1952 applied, or as "beneficiaries" for the purposes of ss. 4 and 8 of the Contracts (Privity) Act 1982,

subsisted in the absence of a settlement notice and a cancellation notice being served directly on them by the appellants. The first respondents further submit that although they had received through Mr Paulin's solicitors the said notices or copies of them they did not endeavour to settle with the appellants on 30 September 1987 because it would have been futile to have done so in view of the attitude adopted by the appellants. The same arguments were advanced on both sides in this Court with the additional ground raised by the appellants that the attitude they adopted was due to the actions of the first respondents so that the first respondents were estopped in the circumstances from denying the correctness of the attitude adopted by the appellants.

It has been said in some cases that the proceeding before the court under s.145 is not suited to a final determination of the validity of the caveator's claim. One example is Mall Finance & Investment Co Ltd v Slater (1976) 2 NZLR 685 in which an application under s.143 involved the legality of the mortgage protected by the caveat and whether the court should grant relief to either party under the Illegal Contracts Act 1970. Cooke J said at p.688,

> "A caveator may seek relief, for instance, by way of validation of the contract on which his interest depends. But when it is not patent what order should be made, as where disputed and possibly difficult questions of fact and discretion arise, the summary procedure under s.143 may well be inappropriate. Usually the whole dispute will then more appropriately be determined in an action with pleadings clearly defining the issues and on oral evidence. In my opinion, the present case

> is in that broad category. All questions as to illegality and relief should be capable of determination in such an action and are best left to be so determined."

However, the facts in this case are fully before the court and not in dispute. The law has been fully argued. The issue whether or not the caveators have an arguable case can be reduced to one question, namely, whether the cancellation of the contract between the appellants and the second respondent put an end to the rights of the first respondents under that contract whether as nominees or assignees of the named purchaser or as beneficiaries as that word is defined in the Contracts (Privity) Act 1982. If it did, the first respondents no longer have a right to maintain their caveat.

There is and can be no dispute of the fact that the second respondent failed to settle the transaction in accordance with the settlement statement with which he was served and that his contract with the appellants was duly cancelled by notice pursuant to the terms of the contract.

What then is the standing of the first respondents? The document headed "Memorandum of Assignment of Agreement" refers to the second respondent nominating the first respondents as his nominee. The operative words of the agreement are,

> "the purchasers in the above agreement, Brent Paulin, shall nominate D.A. Fitton and K.B.M. Fitton of Auckland as their nominee and D.A. Fitton and K.B.M. Fitton shall settle the transaction in one sum in cash on the possession date the 30th September 1987. As the

> deposit of $8,000.00 is held to the vendors credit in the Scholes Oakley Trust Account, D.A. Fitton and K.B.M. Fitton shall herewith pay Scholes Oakley the further sum of $8,000.00 (Eight THOUSAND DOLLARS) and shall receive an assignment of the Trust Receipt and credit for the $8,000.00 already paid to the vendors credit."

This document is in express terms and clear on the face of it that the first respondents were to complete the purchase as the nominee of the named purchaser. The agreement for sale and purchase named the purchaser as "Brent Paulin or nominee". If the standing of the first respondents be that of nominees then as held by this Court in Lambly v Silk Pemberton Ltd (1976) 2 NZLR 427 an action by the nominee alone to enforce the agreement will not lie. There was never any agreement that the purchaser could unilaterally substitute for himself his nominee as the contracting party. Indeed the appellants objected to such a course from the outset and did not consent to such a substitution effectively excluding any novation. On the footing of their being nominees of the purchaser the first respondents were not a party upon whom the settlement notice was required to be served pursuant to clause 8.1 of the contract. In default of settlement the appellants were entitled to cancel the contract which put an end to the rights of the purchaser and his nominees could be in no better position and thereafter they had no caveatable interest in the land.

Should the first respondents be assignees of the second respondent is their position any different? It is to be

noted that the caveatable interest stated in the caveat itself is as assignees. Although the operative words in the Memorandum of Assignment were a nomination and not an assignment, the true nature of the agreement should be ascertained by a consideration of the arrangement between the second and first respondents. As Richardson J giving the judgment of this Court in Castle Hill Run Ltd v NZI Finance Ltd (1985) 2 NZLR 104 said at p.108,

> "The nomenclature and forms adopted are not decisive. It is a matter of ascertaining the substance of the bargain as disclosed in the contract itself. Regard may be had to the surrounding circumstances, but that is to provide the setting in which the agreement was made so that the agreement can be construed against that background having regard too to the genesis and objectively the aim of the transaction."

Having regard to the heading of the document, that the first respondents paid the second respondents a consideration of $15,000 for his rights as purchaser and also having regard to the further commission derived by Scholes Oakley, the true nature of the transaction was what has been called an "on-sale", that is to say, the second respondent resold the property to the first respondents for the stated consideration of $15,000, completion of the on-sale to be effected by the first respondents taking an assignment of the second respondent's rights under the original agreement for sale and purchase. Reference has already been made to the letter of 17 September 1987 from the second defendant's solicitors to Mrs Field which gave the appellants through their solicitor notice of an assignment by Mr Paulin of his

rights under the agreement. As stated in 42 Halsbury's Laws of England (4th Edn) para.207 p.150,

> "Unless the contract provides to the contrary either party may dispose of the benefit of the contract in favour of another person either by way of absolute assignment of the whole contract, or of partial assignment, where, for instance, the contract is charged in favour of another, or by an assignment of the contract as to part of the property. The assignee may enforce the contract against the other party to it in an action for specific performance, provided that he assumes the position of his assignor and either fulfils or secures the fulfilment of all his liabilities under the contract."

In this case the assignment was absolute in its terms, in writing under the hand of the assignor of all his rights as purchaser and express notice in writing was given to the vendors. It was therefore effectual whether in law or in equity to pass the equitable rights of the assignor to the assignees. Accordingly the first respondents had on registration of their caveat a caveatable interest in the land as the assignees of the second respondent's equitable interest in the land as purchaser under the agreement for sale and purchase. (This is in contrast to a subsale without an assignment in Catchpole v Burke (1974) 1 NZLR 266 and 620). However, the assignees must also accept the burdens of the contract along with its benefits. When the appellants gave the settlement notice to the second respondent and it was immediately passed on to the first respondents, they were obliged to "fulfil or secure the fulfilment" of all the assignor's liabilities under the contract. This they failed to do. No transfer was submitted for execution pursuant to clause 3.5 of the contract,

nor tender made of the amount due on settlement. That being the case, the appellants were entitled to cancel the contract which put an end to the equitable interest of the assignor and his assignees in the land so that the caveat could no longer be sustained.

At this point the submission of the first respondents that it would have been futile for the first respondent's solicitors to have forwarded a transfer or tendered settlement directly to the appellant's solicitor must be considered. Mr Gay cited the following passage from "A Handbook on Agreements for Sale and Purchase of Land" (3rd Edn) by Blanchard at p.59,

> "A purchaser seeking to enforce a contract or to cancel the contract by reason of the vendor's failure to settle must, as a general rule, be able to show that he has tendered the appropriate form of assurance. The vendor is not obliged to settle if the purchaser has not submitted a transfer, for this is a condition precedent to execution of a transfer document. Where transfer and payment are to be concurrent, the purchaser must generally show that he has tendered payment to the vendor, though if, in the particular circumstances, the tender of purchase money would be obviously futile, the purchaser need not go through the motions, as where the vendor has plainly and recently indicated that he will not convey the property, or has conveyed the property elsewhere. Despite this exception, it is normally prudent to carry out formal tender."

This submission of obvious futility in attempting to settle must fail. There could not be a clearer case of a vendor not only willing to settle, but eager to settle. There are grounds for the appellants' suspicion that the first respondents did not have the funds to tender but no finding is needed on this point.

The appellant's reliance on estoppel need not be considered but there remains the argument of the first respondents that they have rights as third parties which would support a caveatable interest under ss.4 and 8 of the Contracts (Privity) Act 1982 which provide,

> "4. **Deeds or contracts for the benefit of third parties** - Where a promise contained in a deed or contract confers, or purports to confer, a benefit on a person, designated by name, description, or reference to a class, who is not a party to the deed or contract (whether or not the person is in existence at the time when the deed or contract is made), the promisor shall be under an obligation, enforceable at the suit of that person, to perform that promise:
>
> Provided that this section shall not apply to a promise which, on the proper construction of the deed or contract, is not intended to create, in respect of the benefit, an obligation enforceable at the suit of that person."

> "8. **Enforcement by beneficiary** - The obligation imposed on a promisor by section 4 of this Act may be enforced at the suit of the beneficiary as if he were a party to the deed or contract, and relief in respect of the promise, including relief by way of damages, specific performance, or injunction, shall not be refused on the ground that the beneficiary is not a party to the deed or contract in which the promise is contained or that, as against the promisor, the beneficiary is a volunteer."

> By s.2 "beneficiary", in relation to a promise to which section 4 of this Act applies, means a person (other than the promisor or promisee) on whom the promise confers, or purports to confer, a benefit."

Legislation of this nature was recommended by the Contracts and Commercial Law Reform Committee in its Report presented on 29 May 1981 to relax the doctrine of privity of contract, the general rule being that only parties to a contract could sue or be sued upon the contract. (See

Tweddle v Atkinson (1861) 1 B&S 393). The Act has extended and accordingly repealed the limited provisions of s.7 of the Property Law Act 1952 which provided that any person may take an immediate benefit under a deed, although not named as a party thereto. An assignee by the very nature of an assignment is unlikely to be a person designated by name, description or reference to a class upon whom a benefit is conferred in the contract. Whether a nominee who is not a party to the contract might have the benefit of the Act will depend on the nominee being defined with sufficient particularity to come within the designation prescribed in s.4. As can be seen by the particular wording of s.4 and its proviso there are limitations to its application. There are two difficulties in the way of applying this section to the facts of this case. The first is that the person or persons upon whom the contract confers or purports to confer a benefit must be designated by name, description or reference to a class. It is difficult to treat a bare nominee not designated by name, as a person identified by description or as being within a designated class of persons. The nominee could be anyone at all. In the context of s.4 designated means specified or identified so that if the nominee is not named, the word nominee in the contract should be qualified by the addition of a descriptive phrase or the addition of the particular class within which the nominee falls so as to specify or identify the nominee in the manner required by s.4. The second difficulty is that the proviso to s.4 is fatal to the first

respondents as there is on the proper construction of this contract no intention to create an obligation on the appellants enforceable at the suit of the first respondents alone. The mere addition of the words "or nominee" without more, is not sufficient in this case (as also in Lambly, supra), on the proper construction of the agreement to impute an intention to the parties to create, in respect of the benefit to a named purchaser, an obligation on the part of the vendor enforceable at the suit of a bare nominee. The agreement does not include a clause or any wording which supports that intention. In any event the first respondent could not enforce the promise under the contract without first meeting the terms of the contract attaching to the promise. This they failed to do. This defence is open to the appellants under s.9(2) as "if the beneficiary (that is, the nominee) had been a party to the deed or contract in which the promise is contained;"

For these reasons the first respondents ceased to have a caveatable interest on cancellation of the contract by the appellants. The appeal is allowed and the order made in the High Court that Caveat No. B.731641.1 not lapse pending further order of the Court is revoked. The appellant is entitled to costs in this Court and in the High Court which we fix at the global sum of $1250.00 together with disbursements in both courts including the costs of

preparation of the case on appeal and reasonable travelling and accommodation expenses of counsel, to be fixed by the Registrar of this Court.

G.B. Bisson J.

Solicitors

I M S Field, Auckland for Appellants
Wadsworth Norton, Auckland for First Respondents
Wynyard Wood, Auckland for Second Respondent