

**HIGH
PRIORITY**

BETWEEN THE ATTORNEY GENERAL FOR
HONG KONG suing for and on behalf of
the Government of Hong Kong

Appellant

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A N D CHARLES WARWICK REID of Hong
Kong, Prisoner, and JUDITH MARGARET
REID of Tauranga, his wife

First Respondent

AND MARC MOLLOY of Tauranga,
Solicitor

Second Respondent

Coram: Richardson J
Hardie Boys J
Gault J

Hearing: 27 February 1992

Counsel: J.S. Kos for appellant
Fiona Bolwell for respondents

Judgment: 4 March 1992

JUDGMENT OF THE COURT DELIVERED BY RICHARDSON J

This is an application for conditional leave to appeal to Her Majesty in Council from the judgment of this Court delivered on 19 December 1991. There is an associated application for orders designed to protect the subject matter of the appellant's claim pending the determination of the appeal.

On application to the High Court at Hamilton under s145 of the Land Transfer Act for orders that caveats lodged by the Attorney General for Hong Kong against the titles to three properties at Tauranga not lapse, Penlington J held that there was an arguable case or a serious issue to be tried (i) that Mr Reid funded the purchase of each of the subject properties in whole or in part with bribes received by him while discharging his official duties as a Crown servant in Hong Kong; and (ii) that Mrs Reid, at the least, had constructive knowledge of the wrongful source of those funds and of the source of the moneys in the three properties. The Hong Kong Government claims that Mr Reid was a constructive trustee for his employer, the Hong Kong Government, of the bribes received and accordingly the government had a proprietary interest in the bribes and any substituted assets, and a caveatable interest in the lands in issue. Penlington J held on the authority of *Lister & Co v. Stubbs* (1890) 45 Ch.D 1 that the relationship between the Hong Kong Government and Mr Reid in that regard was that of creditor/debtor and no such trust had arisen. On that finding he held that the Hong Kong Government could not establish its claim against the registered proprietors of the three properties, and refused to extend the caveats.

Subsequent to that judgment one property was sold and the caveat withdrawn. The net proceeds are held in a solicitor's trust account. The remaining properties with which the protective application is concerned are an orchard property purchased for \$125,000 held by Mr and Mrs Reid as tenants in common in equal shares and a residential property purchased for \$191,000 of which Mr Molloy, a Tauranga solicitor acting as trustee for Mr Reid and Mrs Reid is the registered proprietor.

In our judgment of 19 December 1991 we held, applying *Lister & Co v. Stubbs*, that the Hong Kong Government did not have any proprietary interest in the two caveated lands. We rejected a further argument advanced for the Hong Kong Government that because Mrs Reid and Mr Molloy were volunteers not purchasers for

value, and now have notice that the moneys used to pay for the property in their names were the profits of breaches of fiduciary duty to the Hong Kong Government, it would be unreasonable for them to retain the properties and so a constructive trust in favour of the Hong Kong Government fastens on their interests in those properties.

Mr Kos submitted that an appeal to Her Majesty in Council lies as of right in terms of the second limb of R2(a) of the Privy Council (Judicial Committee) Rules or alternatively that leave should be granted under R2(b). The judgment of 19 December is a final judgment and the claim or question involved clearly amounts in value to more than \$5,000. Opposing the grant of leave to appeal Ms Bolwell submitted that the proceedings were for judicial review of the administrative act of the District Land Registrar in receiving the caveat and not a civil claim, and further that the subject matter was not an indirect claim or question to or respecting property.

We are satisfied there is no substance in Ms Bolwell's arguments. While in one sense, as McMullin J observed in *Holt v. Anchorage Management Ltd* [1987] 1 NZLR 108 at 115, s145 of the Land Transfer Act 1952 enables the Court to review judicially the Registrar's administrative act in receiving the caveat in the first place, the proceedings are not in form or substance an application for judicial review. The underlying question is whether the caveator had a caveatable interest in the land. In the caveats in question the Attorney General for Hong Kong asserted an interest in the lands as beneficiary under a constructive trust. The whole basis of his claim is that the bribes were impressed with a trust which on tracing immediately attached to the lands themselves. That claim to that interest in those lands necessarily involves a question respecting that property and falls squarely within R2(a). Had we taken a different view we would have granted leave under R2(b). In that regard it will be evident from our judgment of 19 December that we considered that the continuing application of *Lister & Co v. Stubbs* is an important question for appropriate consideration by Their Lordships.

The second application invokes the inherent jurisdiction of the Court to make such orders as are appropriate to preserve the subject matter of the litigation pending determination of the appeal. Rule 6 of the Privy Council (Judicial Committee) Rules does not apply where, as here, the judgment under appeal does not require the appellant to pay money or perform a duty. What is sought is not a stay of execution in that sense. But it is well settled that the Court has jurisdiction on dismissal of an appeal to make an order preserving the rights claimed by the unsuccessful appellant pending an appeal to the Privy Council (*Staples & Co v. Corby* (No. 2) (1900) 19 NZLR 539; *Ex Parte Frethey* (1902) 22 NZLR 517). In this regard Cotton LJ, speaking of an appeal from the Court of Appeal to the House of Lords in *Wilson v. Church* (No. 2) (1879) 12 Ch.D 454 at 458, said:

When a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory.

(See also *Erinford Properties Ltd v. Cheshire County Council* [1974] 1 Ch 261 and *Paringa Mining & Exploration Co Plc v. North Flinders Mines Ltd* (1988) 81 ALR 501). The principles governing the grant of a stay of execution are equally applicable to the exercise of the jurisdiction. Accordingly considerations of the overall justice of the case will have regard to the ordinary entitlement of a successful party to the immediate benefit of the judgment in his or her favour, to the appellant's need for such a protective order, to any injurious effects on the respondent of the granting of the order and to any other considerations relevant in the particular case.

It is apparent from the affidavits filed that if no restraining order is made one or both of the properties are likely to be sold. It is not suggested that independently of the properties themselves or any sale proceeds Mr and Mrs Reid would be able to satisfy a judgment for the value of the properties, and Mr Molloy is a trustee only. If the properties are sold and the net proceeds of sale dissipated, the appellant will have no

fund to which he can have recourse if he succeeds in his appeal and is held entitled to trace the bribes into substituted assets. Clearly the Hong Kong Government may be irreparably prejudiced if no order is granted.

For reasons which it is not necessary to elaborate, Mr and Mrs Reid have been anxious to have the residential property sold and the proceeds applied towards the purchase of another home for Mrs Reid and the children. In his affidavit Mr Reid also deposes to offers made by the respondents to the appellant intended to preserve the status quo pending a resolution of the proceedings. It was proposed that the properties be sold, the proceeds of sale of the orchard be held in trust and the residential property be replaced by another of equivalent value and security. In that way the Hong Kong Government would have equivalent protection in respect of the substituted assets. However at that time the Hong Kong Government was not agreeable to that middle ground solution. Now it is, and the appellant made it clear through counsel that if the proposed orders to be set out shortly were made it would agree in terms of the reservation of leave in para 4 to the discharge of any caveat if granted suitable alternative security in respect of substituted assets. It is now the respondents, and in particular Mrs Reid from her instructions to counsel, who oppose the making of such orders. Ms Bolwell was unable to advance any justification on the facts for that opposition which she said was based on principle, essentially it seems on the short ground that after two hearings of the substantive proceedings in the New Zealand courts the respondents were entitled to the fruits of the judgment in their favour. There was, too, some suggestion, not supported by any affidavits, that Mrs Reid might need to draw on the proceeds for living expenses. Against that we were advised from the bar that Mrs Reid, and her children, have travelled on four occasions to Hong Kong to visit Mr Reid, the most recent occasion being in January of this year.

The inherent jurisdiction on which the appellant relies is exercised with a view to ensuring that if the appeal is successful it will not have been in vain. In the face of Mr Reid's affidavit willingness to have all the proceeds of any sales or assets purchased in substitution secured to protect the Hong Kong Government in the event that the appeal succeeds, and in the absence of any evidence from Mrs Reid as to her current financial position, it would not be safe to assume that any prejudice would be occasioned to the respondents by orders protecting the subject matter of the proceedings pending determination of the appeal.

Finally we should add that the appellant has by counsel undertaken to pay any damages sustained by the respondents in the event of his appeal being unsuccessful. For these reasons we are satisfied that it is equitable and just that the application for protective orders be granted. In the result it is ordered:

1. That conditional leave to appeal to Her Majesty in Council be granted to the appellant, upon terms set out in (3) below.

2. That the caveats the subject of the proceeding, viz:
 - (a) Caveat H949152.1 (CT 42D/562, South Auckland Land District);
 - (b) Caveat H949152.3 (CT 12D/888, South Auckland Land District);

shall not lapse pending determination of the appeal by the appellant to Her Majesty in Council, upon terms set out in (3) below, and subject to the further condition that the appellant shall within seven days undertake to pay any damages which the respondents sustain by reason of this order.

3. The appellant shall within 3 months hereof (a) enter security in the sum of \$2,000 and (b) take the necessary steps for the purpose of procuring the preparation of the Record and the despatch thereof to England.
4. Leave is reserved to the parties to apply to vary or discharge the order in (2) above.

A handwritten signature in black ink, appearing to be 'M. W. Bartlett', followed by a stylized flourish.

Solicitors:

Russell McVeagh McKenzie Bartlett & Co, Wellington, for appellant
Cooney Lees & Morgan, Tauranga, for respondents