Court file Set I

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M. No. 857/83

IN THE MATTER of the Land Transfer Act 1952

A N D

IN THE MATTER of Section 145 thereof

A N D

IN THE MATTER of an Application that Caveat No. B.175290 do not lapse

BETWEEN GARY JAMES LEATHER of Auckland, Property Investor and TOYIA LEATHER his wife

Applicants

A N D THE CHURCH OF THE NAZARENE at Auckland

Respondent

Hearing: 4 August 1983

Counsel: R.J. Warburton for applicants
M.C. Bhanabhai for respondent

Judgment: 12th August 1983

JUDGMENT OF SAVAGE J.

The applicants, G.J. and T. Leather, applied for an order that the caveat they had lodged against the certificate of title of land owned by the respondent, the Church of the Nazarene, do not lapse. The application is made in terms of s 145 of the Land Transfer Act 1952.

The facts, so far as are necessary for determining this application, are as follows. The respondent church gave to

the applicants, by letter dated 18 January 1983, an option to purchase its property situated at Piha, which is referred to in the affidavits as the Nazarene Christian Youth Camp, for the sum of $135,000. The term of the option was 30 days. The letter giving the option stated that a Mr Maurice Thomas would be acting on behalf of the church. On 26 January the applicants and the respondent entered into a formal agreement for sale and purchase. The agreement provided for a deposit of $500, which was paid, and for the balance of the purchase price to be paid in full on or before 31 March 1983. The same clause of the agreement provided "purchaser to arrange finance by the above date", which date, it may be noted, was the Thursday immediately preceding Good Friday. On the Thursday the applicants sent a telegram to the Mr Thomas referred to in the original letter, who had, in fact, acted on the settling and signing of the agreement for sale and purchase. The telegram was in the following terms:

> "Sale and purchase agreement between Church of the Nazarene is unconditional at todays date settlement will be two and a half weeks late will give church a mortgage over my home Seaview Road property for $20,000 if required for the two and a half weeks time sincerely Toyia Leather"

Then followed some correspondence between the solicitors for the parties. The respondent's solicitors wrote saying that as the applicants had not complied with the terms as to finance they gave notice that the contract was at an end and the solicitors to the applicants replied contending that the agreement still subsisted and asking for a settlement statement. The respondent, however, refused to accept that the agreement was still binding and its solicitors wrote

saying that so far as it was concerned the agreement was at an end.

It appears that the applicants then lodged a caveat under s 137 of the Land Transfer Act 1952 against the title. This was apparently done on 16 May, or at least it was so stated by counsel and is referred to in the motion, but there is no affidavit evidence to establish it. Likewise I was informed that a notice was given by the District Land Registrar under s 145 on 13 July but there was no actual evidence as to that nor as to whether the applicants had notified the District Land Registrar that they had applied to this Court for an order. It is necessary that these matters be proved by evidence and this has been expressly held in Sturt & Anor v McInnes & Anor [1974] 1 NZLR 729. Mr Bhanabhai raised no point about these matters and so I accept that for the purposes of this judgment they are proved. However, in view of the order that I propose to make, it will be necessary for the applicants to file an affidavit that establishes them.

I now return to the facts. The applicants say that they now intend to commence an action for specific performance of the agreement for sale and purchase and therefore seek an order that the caveat do not lapse. They say that they understand that if the caveat does lapse the respondent will sell the property to a third party. An affidavit filed on behalf of the respondent shows that an agreement has, in fact, been entered into by the respondent to sell the land to the Auckland Boys Brigade and that the transaction is due for settlement on 12 August. Mr Warburton also told me that the proposed

action for specific performance had not been commenced because there would be no point in proceeding if the caveat was not extended as the property would have been sold by the respondent long before any such action could be heard. On behalf of the respondent Mr Thomas made an affidavit saying that his involvement in the transaction on behalf of the church was solely to attend to the execution of the agreement for sale and purchase and that once it was signed he was to have nothing further to do with the transaction. He said he explained his role explicitly to the applicant with whom he dealt, Mrs T. Leather, and that he explained his position in the matter very carefully to her. Mrs Leather, on the other hand, disputes this and says that he made no representation to her that he was not acting for the Board; indeed, she contended that she received a telephone call from Mr Leather at some stage enquiring whether or not the matter was proceeding in accordance with the agreement. A Mr Bennett, a minister of religion and a Pastor in the church, also made an affidavit in which he confirmed Mr Thomas's evidence as to the instructions given him by the church as to his role in the transaction and stated that the church did not receive advice on or before 31 March that the contract was unconditional; it accordingly never became unconditional and it lapsed. He also gave evidence as to the zoning of the land in terms of the City of Waitemata District Scheme, which is Recreation 2, which category includes farming as a predominant use. He went on to depose that in his belief the agreement was one to which the Land Settlement Promotion and Land Acquisition Act 1952 applied and accordingly either an application for consent to the transaction had to be made to the Land Valuation Tribunal or a declaration by the applicants

that they had no existing interest in farm land had to be made and deposited with the District Land Registrar; further, that neither requirement had been satisfied and the time for compliance had expired. There was also evidence in reply for the applicants by Mrs Leather and by an Auckland valuer, a Mr Herbert Blincoe, to the effect that the land was not used for farming and was not suitable for farming.

The principles on which the Court acts on an application for an order that a caveat not lapse have been discussed in several cases. I have already referred to Sturt & Anor v McInnes & Anor (supra) but there are several others and these are referred to in Land Law by Hinde, McMorland & Sim, vol 1 p 258 para 2.158 et seq. In Catchpole v Burke [1974] 1 NZLR 620 the Court of Appeal referred to earlier cases and held that where the caveator had an arguable case the caveat ought to be extended until the conflicting claims of the parties were determined in an action brought for that purpose. McCarthy J. expressed the view that if it was plain that the caveator could not possibly succeed in establishing his claim then it would be proper to refuse to extend the caveat. I think that in reading these cases regard must now be had to the judgment of the Privy Council in Eng Mee Yong v V. Letchumanan [1980] AC 331. That was an appeal from Malaysia relating to the removal of caveats from a title under a statutory provision which is rather different from our s 145, though the case related to land the title to which was held under a Torrens system of land registration. However, though the statutory provision is different from ours, in my view the observations of the Judicial Committee are clearly applicable to cases under our section. Lord Diplock at p 335 said this:

> "The caveat under the Torrens system has often been likened to a statutory injunction of an interlocutory nature restraining the caveatee from dealing with the land pending the determination by the court of the caveator's claim to title to the land, in an ordinary action brought by the caveator against the caveatee for that purpose. Their Lordships accept this as an apt analogy with its corollary that caveats are available in appropriate cases, for the interim protection of rights to title to land or registrable interest in land that are alleged by the caveator but not yet proved."

He then went on at p 337 to say this:

> "In the case of a refusal by the vendor to complete a contract for the sale of land the normal remedy of the purchaser as plaintiff in an action is an order for specific performance of the contract; and in the absence of special circumstances, if it were shown that the vendor threatened to dispose of the land while the action was still pending, the balance of convenience would be in favour of granting an interlocutory injunction to prevent his doing so, provided that the plaintiff would be in a position to satisfy his undertaking as to damages if the action should fail at trial. So too in an application by the caveatee under section 327 for removal of a caveat, once the caveator has met the first requirement of satisfying the court that the claim on which his caveat is based does raise a serious question to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence until proceedings, brought and prosecuted timeously by the caveator, for specific performance of the contract of sale which he alleges had been tried."

The learned authors of Land Law (supra) suggest at p 260 that there is probably no jurisdiction to require an

undertaking as to damages as a condition of an order for the extension of a caveat and cite Ex Parte Seaford Coal Co. Ltd (1909) 12 GLR 400 in support of the view, adding that a person sustaining damage may be left to his rights under s 146 of the Act. That section gives a right to recover compensation to any person who may have sustained damage as a consequence of any person lodging a caveat without reasonable cause. I do not think that provision is adequate to cover all cases where compensation or damages ought to be available. The person lodging a caveat may have reasonable cause and yet fail in an action to sustain the basis of his claim. The other persons who suffer loss in those circumstances should not be left to bear it themselves; the person with a reasonable cause for lodging the caveat but which in the event proves not to be a valid legal ground should ordinarily have to meet the loss. In Ex Parte Seaford Coal Co. Ltd (supra) Edwards J. said that the statute did not give power to make such a condition as was asked for and it did not seem to be contemplated. He went on to say that the then equivalent of s 145 was effectual for the protection of the rights of persons sustaining damage if a caveat was lodged without reasonable cause. He added he did not feel confident that he had jurisdiction to impose such a condition but that if he had he did not think that in the circumstances it was necessary to exercise it.

In my view, on the authorities, where the caveator shows he has an arguable case or, to put it another way, there is a serious issue to be tried, the Court should ordinarily extend the caveat until the conflicting claims are determined in an action brought for that purpose; but, further, in the light of Eng Mee Yong v V. Letchumanan, the Court may in appropriate cases require the caveator to give an undertaking as to damages

as a condition of the extension. It is interesting to note in passing that this, in effect, was the approach adopted in the first reported case in New Zealand. In re Ede (1882) NZLR 1 SC 258 Williams J. said at 259:

> "I think the same course ought to be pursued now as would be followed if Ede had obtained an interlocutory injunction until the 15th of June, viz. - that the caveat remain; that Ede should give an undertaking as to any damages the Court may hereafter consider the other side to have sustained; ..."

I turn now to the question of whether the applicants have shown that they have an arguable case or there is a serious issue to be tried. It is clear that if the agreement for sale and purchase of the land is valid and subsisting then of course the applicants have a good ground for their caveat. The respondent, however, says that there are two grounds for contending that the applicants do not have an arguable case, either of which would be fatal to them, and I propose to deal with those grounds in the reverse order to that adopted by Mr Bhanabhai in his submissions. They are, first, that Mr Thomas was not authorised to act for the respondent and, accordingly, the applicants' telegram of 31 March was ineffective, the contract never ceased to be conditional, and accordingly it lapsed. The second was the Land Settlement Promotion and Land Acquisition Act 1952 point referred to earlier.

So far as the first ground is concerned, the evidence shows a clear clash between Mrs Leather and Mr Thomas. In Eng Mee Yong v V. Letchumanan Lord Diplock said that although a conflict of evidence usually indicates that there is a serious question to be tried it does not follow that the

Judge is bound to accept uncritically as raising a dispute of fact which calls for further investigation every statement in an affidavit. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth. In that case the Judge at first instance had found that the caveator's evidence lacked credibility and he held that the caveator had not shown there was a serious issue to be tried. In my view, it certainly has not been shown that the applicants' evidence on the question of Mr Thomas's authority in relation to the respondent so lacks plausibility that there is no serious question to be tried. I therefore reject this ground.

The second ground is the Land Settlement Promotion and Land Acquisition Act 1952 point. The basis of this contention is that the land involved is land to which the Act applies and accordingly such a transaction as the one between the applicants and the respondent was deemed to be entered into in contravention of Part II of the Act unless made subject to the consent of the Land Valuation Tribunal and an application for consent to the transaction was made to the Tribunal within one month after the date of the transaction or a declaration was made by the applicants as purchasers in terms of s 24 and deposited within one month of the date of the transaction with the District Land Registrar. A transaction in contravention of Part II of the Act is deemed by s 25(4) to be unlawful and shall have no effect. Mr Bhanabhai in his careful submissions developed his argument on the following basis: that in terms of s 23(1) Part II of the Act applied to this transaction as farm land to which none of the exemptions in subs (3) applied; the

transaction had not been entered into subject to the consent of the land Valuation Tribunal in terms of s 25(1)(a) nor had a declaration been made by the applicants in terms of s 25(1)(b); the time under both paragraphs of the subsection for compliance had expired; and accordingly the agreement was unlawful and had no effect. He relied on Harding v Coburn [1976] 2 NZLR 577. For this argument to apply at all, it must, in my view, be shown by the person relying upon it that the land involved was, in fact, farm land at the time the agreement was entered into. What is farm land? The Act defines farm land in s 2(1) as land that in the opinion of the Land Valuation Tribunal is or should be used exclusively or principally for agricultural purposes, and there is a proviso to the definition to the effect that where land is being used for agricultural purposes but could in the opinion of the Tribunal be used with greater advantage for non-agricultural purposes it shall be deemed not to be farm land. Section 2(3) then goes on to provide that for the purposes of the Act an application may be made to a Land Valuation Tribunal for an order declaring whether or not any land is farm land and the Tribunal may make such an order whether or not there is before the Tribunal any objection or application for consent to a transaction in respect of that land. Mr Warburton submitted that on the face of the agreement for sale and purchase the land was urban land, because the agreement was headed "Agreement for Sale and Purchase of Urban Land", the land itself was described in the affidavits as a holiday camp, it had not been shown to be used exclusively or principally for agricultural purposes, and the valuer expressed the view that it was not suitable for farming and, indeed, the greatest part of it is southern hillside covered in bush.

Mr Warburton also pointed out that the parties had not envisaged it as farm land at the time the agreement was entered into and, indeed, this issue had only been raised by the respondent a few days before the hearing of this application. He submitted it was open to the applicants to apply to the Tribunal under s 2(3) for an order declaring the land not to be farm land but that if it was declared to be farm land then they could apply under s 25(1)(a) and (b) for an extension of time within which to apply for consent; further, and in any event, it was open to the applicants to apply to the Court for relief under s 7 of the Illegal Contracts Act 1970. Mr Warburton, too, relied upon Harding v Coburn (supra), which is a case where relief was granted under s 7 of the Illegal Contracts Act 1970 where an agreement for sale and purchase was entered into in respect of land which was admittedly farm land but it had not been made subject to the consent of the Land Valuation Tribunal. Mr Bhanabhai replied to these submissions first by arguing that the land should be treated, prima facie, as farm land until the Tribunal should declare it not to be farm land and second by pointing out that it was not open to the applicants to apply for an extension of time because the contract had not been entered into subject to the consent of the Tribunal as required by s 25(1)(a) and that was a defect which could not be remedied. I think Mr Bhanabhai is correct in his second submission. See Cooke J. in Harding v Coburn at pages 578 and 582. However, I see no reason for accepting his first. In my view, the question of whether the land is farm land or not can only be determined by the Tribunal and it certainly cannot be said that it is plainly farm land. Mr Bhanabhai accepted, so far as Mr Warburton's last point is concerned,

that relief under s 7 of the Illegal Contracts Act was open to the applicants in the discretion of the Court.

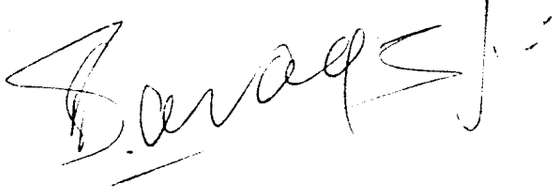
In my view, it is clear that if this land was not farm land when the contract was entered into then the Land Settlement Promotion and Land Acquisition Act 1952 has no application at all to this transaction: Biggs v Mercantile Development [1976] 2 NZLR 329 at 332. The only way in which it can be determined whether it is farm land or not, since the issue is contested, is by way of an application to the Tribunal for an order and in my view the applicants are entitled to make an application for an order in terms of s 2(3); I reject Mr Bhanabhai's submission to the contrary as, in my view, there is no time limitation for such applications under the subsection. If the Tribunal holds that the land is not farm land that is the end of this objection; on the other hand, if it holds it is farm land then the applicants certainly have an arguable case for invoking the Illegal Contracts Act. In result I reject this ground also.

I am satisfied that the applicants have an arguable case and there is a serious issue to be tried. On the matter of the balance of convenience no submissions were made but I am satisfied on such evidence as there is that it lies in favour of the applicants. It would appear to be the normal kind of case to which Lord Diplock referred in the Eng Mee Yong case .

It follows that in my view there should be an order that the caveat not lapse, provided, first, that an affidavit be filed covering the matters referred to earlier in this judgment relating to the lodging of the caveat and the giving of the notice by the District Land Registrar, and, second, that the

applicants give an undertaking as to damages in the form usually given in interim injunction cases. The applicants must be given a reasonable time to comply with these requirements if they choose to do so. In Superior Homes Ltd v Bartlett [1974] 2 NZLR 172 it was held that the 28 days allowed by s 145 within which the order extending the caveat must be obtained run from the date the notice that the application had been made to the Court was given by the caveator to the District Land Registrar. I therefore order, since that time has largely run, that the caveat be extended until 24 August. If before that date the necessary affidavit is filed, the undertaking as to damages is given and an action for specific performance is commenced, I will order that the caveat not lapse for a further period of three months. Leave will be reserved to the applicants to apply for further extensions, the granting of which will be dependent upon the progress they have made with the action for specific performance. The applicants will, of course, have to obtain formal sealed orders in terms of this judgment to lodge with the District Land Registrar and lodge them within the prescribed times or the caveat will lapse.

This judgment has proceeded on a basis somewhat different from the arguments of either counsel. In the circumstances there will be no order for costs.



Solicitors for applicants: Foley & Warburton (Auckland)

Solicitors for respondent: Dyer, Whitechurch & Bhanabhai (Auckland)