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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.462/84

IN THE MATTER of the Land Transfer Act 1952

A N D

IN THE MATTER of an Application for removal of Caveat No. B277540.1 (North Auckland Registry)

BETWEEN WILLIAM NESBIT ARMSTRONG of Katikati, Farmer

Applicant

A N D

PETER WILLIAM O'BRYNNE of Auckland, Real Estate Agent and RODNEY MICHAEL PETRICEVIC of Auckland, Businessman

Respondents

Hearing: 6 June 1984

Counsel: Foote for Applicant
Edwards for Respondents

Judgment: 4 July 1984

JUDGMENT OF PRICHARD, J.

The Applicant moves under s.143 of the Land Transfer Act, 1956 for removal of caveats registered by the Respondents against the titles of 19 flats situated at 7 Claybrook Road, Parnell.

The Applicant is the registered proprietor of the strata title to each flat.

Each of the caveats claims an estate or interest in the land "as purchasers by virtue of agreements for sale and purchase dated 14 February 1984 and made between William Nesbit Armstrong of Katikati, farmer, as vendor and Peter William O'Brynne and Rodney Michael Petricevic as purchasers".

In respect of each flat there is a form of agreement for sale and purchase prepared by the vendor's agent on the form currently approved by the Real Estate Institute of New Zealand and the Auckland District Law Society in which the Respondents are named as purchaser. All the agreements are signed by the Applicant as vendor and by Peter William O'Brynne, one of the purchasers. None of the agreements is signed by Rodney Michael Petricevic.

Mr O'Brynne says - and this is confirmed by Mr Petricevic - that he had the authority of Mr Petricevic to sign on his behalf. But there is nothing on the face of the documents to show that Mr O'Brynne purported to sign on behalf of Mr Petricevic. Mr O'Brynne deposes that at the time when the agreement was signed (by himself and the Applicant), he explained that he was authorised to sign for both purchasers. The salesman who had arranged the transaction and who was present when the agreements were

signed, confirms Mr O'Brynne's statement in this regard. Mr Armstrong's affidavit does not dispute this.

The transaction was by way of exchange. A separate agreement form, also signed by Mr O'Brynne and Mr Armstrong but not by Mr Petricevic, provides that Mr Armstrong will purchase from Messrs O'Brynne and Petricevic a property at Kawau Island, three sections at Oakura Bay and a 43ft. ferro-cement boat, "The Ocean Heir" for a total consideration of $129,000.

Both Mr Petricevic and Mr O'Brynne depose that at a meeting between Messrs Petricevic and O'Brynne on 10 February 1984 Mr O'Brynne was given authority to finalise the negotiations and sign the contracts. At that meeting, according to the affidavit of Mr Petricevic, Mr Petricevic recorded in writing his discussion with Mr O'Brynne, the minute concluding as follows:-

> "Agreed if Armstrong likes boat O'Brynne to finalise negotiations and sign contracts with my authority."

On 13 February 1984, having prepared all twenty agreements, the real estate agent travelled to Tutukaka with Mr Armstrong who wished to inspect the boat. There they met Mr O'Brynne. On 14 February, following a trial run in the boat all the agreements were signed at Tutukaka by Mr Armstrong and by Mr O'Brynne.

On the date when the agreements were signed, Mr Armstrong wrote to the agents who had been collecting the rents from the flats as follows:-

"The Principle (sic)
Ponsonby Real Estate
College Hill
Ponsonby
AUCKLAND

Dear Sir,

Re Claybrook Flats Parnell

Would you please note, that as from today, Peter O'Brynne is to handle all rents on my flats at 7 Claybrook Road, Parnel, as he is now the current owner.

Further more, I require you to forward to me a full statement of rents received by your firm. The situation is totally unsatisfactory, and should I not receive a full accounting by the 21st of this month, I will have to seek other remedies.

Yours faithfully,

(signed W.N. Armstrong)

W.N. Armstrong"

Thereupon Mr O'Brynne proceeded to collect the rents. He also to carried out renovations and improvements to the flats spending, he says, about $1200 in replacing broken windows and in excess of $2000 in interior paintwork.

On 23 February 1984, the Applicant handed to the real estate agent a cheque for $10,980 as payment of commission on the sale of the flats with a request that this not be

presented until settlement, which was to take place on 1 April 1984. He also gave instructions to the real estate agent to resell the sections which he was to acquire by way of exchange for the flats.

On 29 February 1984, Mr Petricevic applied to the United Building Society, first mortgagee of the Claybrook Road flats, asking for approval of the transfer of the flats to himself and Mr O'Brynne subject to the existing mortgage and received a letter from the Building Society confirming that, subject to the information provided on a loan application form being acceptable, the Society would entertain a transfer of the existing mortgage for $350,000 to Mr Petricevic and his partner.

On 7 March 1984, Mr Armstrong's solicitor advised Mr O'Brynne that Mr Armstrong was $60,000 short of the amount he required to complete the transaction and it was suggested that Messrs O'Brynne and Petricevic leave $60,000 on mortgage. Mr O'Brynne then approached Marac Finance to see whether that company would arrange a loan of $60,000 for Mr Armstrong. He received a favourable response.

On 29 March 1984, the Applicant's solicitors wrote to the solicitors for the Respondents to the effect that Mr Armstrong withdrew his "offer" to sell to the Respondents and intended selling to another purchaser.

On 11 May 1984, the Respondents issued proceedings claiming specific performance of the agreements.

The leading case on this topic is Catchpole v. Burke (1974) 1 N.Z.L.R. 620. I am in respectful agreement with the observation of Holland, J. in Wyllie Investments Ltd v. Lane Abel Holdings Ltd (1981) 1 N.Z.C.P.R. 268 to the effect that the decision of the Privy Council in Eng Mee Yong v. Letchumanan (1980) A.C. 331; (1979) 3 W.L.R. 373 does not detract from what was said by the Court of Appeal of New Zealand in Catchpole v. Burke (supra). The first enquiry must be as to whether the caveator has an arguable case. If that is established then it is practically inevitable that the balance of convenience will favour the maintenance of the caveat.

The affidavits of both Mr O'Brynne and Mr Lawn, the real estate salesman, are clearly to the effect that an oral agreement in terms of the written documents was concluded at the meeting at Tutukaka on 14 February 1984, that Mr Armstrong was well aware that Mr O'Brynne was acting as Mr Petricevic's agent and that Mr O'Brynne and Mr Armstrong "formally shook hands" on it. The affidavit of Mr Lawn contains the following paragraph:-

> "11. THAT on the 14th February 1984 after the trial run in my presence the Applicant and O'Brynne then agreed to the transaction and formally shook hands. In the presence of the Applicant I then raised with O'Brynne the fact

> that the agreements included Petricevic who was not at Tutukaka on that date. In reply O'Brynne said that he had authority to bind Petricevic to all of the agreements and sign them on Petricevic's behalf. The Applicant and O'Brynne then signed all 20 agreements in my presence.

This account has not been disputed by the Applicant's affidavit. He relies on the fact that there is no written agreement actually signed by Mr Petricevic.

As to this, Mr Edwards submitted that the formation of the contract is established and that even if it is not evidenced in writing, there is an arguable case that it is enforceable by the respondents on various grounds, including the doctrine of part performance.

The agreement contains the following provision:-

> "13.0 The vendor shall grant to the Purchaser and or his Agents, Workmen or Invitee's all reasonable access to the aforementioned property and its surrounds for the purpose of upgrading and reletting if required the said appartment. The purchaser warrants to the Vendor that the Vendor will not incurr any financial loss by way of loss of rentals as per the schedule provided by the vendor to the purchaser due to the activities of the Purchasers Agents Workmen or Invitee's."

The expenditure incurred and the work done by Mr O'Brynne is clearly referable to the contract. Mr Edwards submits that this must be part performance; (Broughton v. Snook (1938) 1 All. E.R. 411). Mr Foote submits that even so,

it was not part performance by Mr Petricevic. However, the evidence of the relationship between Mr O'Brynne and Mr Petricevic shows that the expenditure must have been undertaken on behalf of both the Respondents. The doctrine of part performance is invoked in cases where a vendor of land who has not signed a "sufficient memorandum" seeks to rely on the Contracts Enforcement Act. In the present case, the vendor has signed the documents but contends that they do not amount to a sufficient memorandum. In my view the Respondents must have, at least, an arguable case in equity for an enforceable contract if only on the basis that the Applicant has stood by while they committed expenditure and labour to the furtherance of the agreement; (See Tapper v. Lapwood (1979) 1 N.Z.C.P.R. 83).

As to this, Mr Foote submits that whether there is an oral agreement which is enforceable on this (or any other ground) is irrelevant because the caveat is expressly directed to the protection of an estate or interest claimed by the caveators as purchasers under a written agreement. Section 138 of the Land Transfer Act, 1952 requires that every caveat shall state "with sufficient certainty the nature of the estate or interest claimed by the caveator, with such other information and evidence as may be required by regulations under this Act". Reg.24 of the Land Transfer Regulations, 1966 (S.R. 1966/25) reads:-

> "In addition to the particulars required by section 138 of the Act, every caveat against dealings shall show how the estate or interest claimed is derived from the registered proprietor..."

Mr Foote referred, in particular, to the judgment of Vautier, J. in N.Z. Mortgage Guarantee Co. Ltd v. Pye (1979) 2 N.Z.L.R. 188. In that case the caveators, who were unsuccessful in maintaining their caveat, had claimed an estate or interest by virtue of an unregistered Deed of Second Mortgage. They did not specify the nature of the estate or interest claimed and, in point of fact, the document to which they referred was not a deed, it was not a second mortgage, did not create a charge or mortgage over anything, and was not made between the parties named in the caveat.

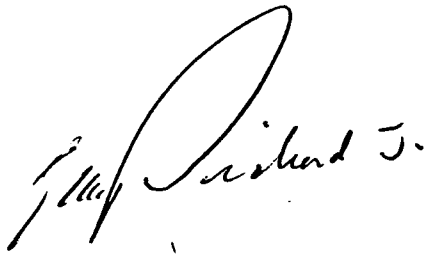
However the caveat in the present case does specify the nature of the interest claimed and does not in fact refer in specific terms to a written agreement - merely to "an agreement dated 14 February 1984". In my view this describes with reasonable certainty how the interest is claimed by the caveators to be derived from the registered proprietor.

In Buddle v. Russell (M.391/83 Auckland Registry, 25 August 1983) Casey, J. considered that there is a danger of losing the simplicity and speedy protection afforded by

the caveat procedure if too strict a view is adopted as to what constitutes a sufficient description of the interest claimed and that this would be contrary to the whole philosophy of the Act. With that view I am in respectful agreement - and I would apply a similar standard to the description of the transaction by which the caveator claims to have derived that interest.

It is the Respondents' case that, on 14 February 1984, the Applicant agreed to sell the flats to the Respondents and that he then accepted it to be the position that Mr O'Brynne was acting both for himself and for Mr Petricevic and that no further signature was required. The ascertainment of the intention of the parties as to when and how they would be bound by contract is a matter of evidence which ought not to be resolved in a summary way. It is clear that for some six weeks (until 29 March 1984) Mr Armstrong continued to act in a manner which could only be consistent with the existence of a concluded agreement. In particular he stood by while the Respondents incurred expenditure in upgrading the flats and, given the fact that an agreement was formed on 14 February 1984, this circumstance alone is, in my view, sufficient to found an arguable case that the Respondents are entitled to enforce that agreement notwithstanding the absence of Mr Petricevic's signature on the documents.

I think the proper course in these circumstances is to maintain the caveat until the claims of the parties are determined in the action already commenced for that purpose. Accordingly, this application is dismissed with costs to the Respondents which I fix at $250, plus disbursements as fixed by the Registrar.



Solicitors:

Messrs Kendall Sturm & Strong, Auckland, Solicitors for Applicant;

Messrs McVeagh Fleming Goldwater & Partners, Auckland, Solicitors for Respondents.

Land file

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BETWEEN WILLIAM NESBIT ARMS
of Katikati, Farmer

Applicant

A N D PETER WILLIAM O'BRY
of Auckland, Real E
Agent and RODNEY MI
PETRICEVIC of Aucklа
Businessman

Respondents

Reserved decision delivered by
me this 9th day of July 1984
at 10 am.

G.A. MORTIM
Deputy Registrar

~~ORAL~~ JUDGMENT OF PRICHARD, J.

Received copies to counse
~~3/7/84~~

Mr Foote for Applic. 9/

Mr Edwards for resp 9/