IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

M.No. 117/84 (Whangarei)

13/11

N2LR

1385

IN THE MATTER of Section 145 Land Transfer Act, 1952

- AND -

IN THE MATTER of Caveat No. B.311442.1 North Auckland Land Registry

BETWEEN THEODORE ERNOE KYRIAK of Opua, Company Director, and ANGELIKA SONJA KYRIAK his wife

Applicants

A N D RONALD RENSHAW HEPWORTH of Auckland, Company Director, and GWENETH HEPWORTH his wife

Respondents

Hearing: 31st October, 1984.

Counsel: D. S. Hislop for Applicants.
A. J. Gluestein for Respondents.

Judgment: - 2 NOV 1984

JUDGMENT OF TOMPKINS, J.

The Applicants have moved for an order pursuant to s.145 of the Land Transfer Act, 1952, that a caveat not lapse.

The Applicants are the owners of all the share capital in Bay Holdings Ltd., a company that owns a motel near Paihia in the Bay of Islands. In June, 1984, they were desirous of selling their shares in the company. Following negotiations between them and the Respondents, a document called "Memorandum of understanding and contract for sale and purchase of shares" was signed by the Applicants and the first named Respondent. The memorandum recorded "the understanding and agreement" between them concerning the sale of the shares in Bay Holdings Ltd. The

price is $75,000. Of particular relevance to the present application is clause 4:-

> " 4. The parties agree that the terms of payment for the above shares shall be as follows:-
>
> (a) $20,000 shall be paid on or before the 20th of June 1984 to the solicitors of the seller, Mr. Bruce McGregor, of the firm Thorne Dallas & Partners, Whangarei; time being the essence;
>
> (b) The remaining amount of $55,000.00 shall be satisfied by the purchaser producing on or before the 20th of July 1984, time being the essence, a registrable first mortgage over his property situated at 825 Beach Road, Browns Bay, or by satisfying the payment of $55,000.00, being the remaining balance due, in cash on or before the 20th of July 1984. The mortgage or the cash payment is to be presented or made to the sellers solicitors. "

There is typed above the heading of the memorandum a further clause initialled by the parties that reads:-

> " This Memorandum reflects the agreement of the parties on the basic conditions of the sale and purchase of the subject share capital and is conditional upon the terms thereof being perused and substantially approved by the Parties' respective solicitors. "

The deposit of $20,000 due by clause 4 on the 20th June, 1984, has not been paid. On the 27th June, 1984, the solicitor for the Respondents advised the solicitor for the Applicants that he would not approve the agreement on the grounds that the Respondents had an existing first mortgage on their Browns Bay property and that there had been certain factual misrepresentations. On the 28th June, 1984, the Applicants' solicitors wrote to the Respondents' solicitors confirming their telephone advice that they considered the agreement made between their respective clients to be binding upon both of them. In the ensuing correspondence these attitudes remained unaltered, the Respondents claiming that they were not bound by the agreement,

the Applicants claiming that they were.

The land referred to in clause 4(b) of the memorandum is owned by both Respondents, although it will be noted that only the first named Respondent was a party to the memorandum.

By caveat dated 23rd July, 1984, and lodged in the Land Transfer Office on the same day, the Applicants claimed an estate or interest in the Browns Bay property -

> " . . . . as mortgagees by virtue of an agreement made between RONALD RENSHAW HEPWORTH of Auckland, Company Director and GWENETH HEPWORTH his wife (hereinafter called "the mortgagors") of the one part and the caveators of the other part whereby the mortgagors agreed to grant a registerable first mortgage over the land hereinafter described to secure the principal sum of $55,000.00 principal which agreement was evidenced by a Memorandum between the parties thereto dated the 17th day of June 1984 "

Consequent upon a document being presented for registration against the title, the District Land Registrar, on the 20th September, 1984, gave notice to the Applicants that the caveat would lapse unless an order to the contrary were made by this Court within fourteen days. This motion was then filed and brought on for hearing within the time limits required by s.145.

On the hearing of the motion Mr. Gluestein, for the Respondents, made no submissions on the effect of the solicitors' approval clause and the absence of approval by the Respondents' solicitors. He was prepared to accept, but for the purposes of this argument only, that the memorandum constituted a binding agreement between the parties to it. He made two principal submissions. First, that the Applicants have no caveatable interest in the land. Secondly, that even if they did an order extending the caveat should still not be made.

Mr. Hislop, for the Applicants, made detailed submissions concerning the effect of the solicitors' approval clause, but because of Mr. Gluestein's acceptance of the binding nature of the memorandum for the purposes of this argument, that is a question that I do not need to determine. Then he submitted that the memorandum, and in particular clause 4(b), resulted in the Applicants having a beneficial interest in the Browns Bay property sufficient to support a caveat.

The principles applicable to an application to extend a caveat pursuant to s.145, or to remove a caveat pursuant to s.143, are now well established. A caveat will be removed or not extended when it is plain to the Court that the caveator cannot possibly succeed in establishing his claim against the registered proprietor (Catchpole v. Burke (1974) 1 N.Z.L.R. 620, McCarthy, P. at 625). The onus is on the caveator first to satisfy the Court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried, and having done so he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action by preventing the caveatee from disposing of his land to some third party (Eng Mee Yong v. Letchumanan (1980) A.C. 331 (P.C.) at 337). The nature of the onus on a caveator in a case such as the present was thus described by Callan, J., when delivering the judgment of the Court of Appeal in Guardian Trust & Executors Co. of N.Z. Ltd. v. Hall (1938) N.Z.L.R. 1020:-

> " The summons for the removal of the caveat called upon the Respondent, who was there the Defendant, to show cause why his caveat should not be removed upon the ground that the Respondent did not possess any interest in the lands affected by the caveat which would entitled him to lodge it. A caveat is the creature of statute and may be lodged only by a person upon whom a right to lodge it has been conferred by the statute. It is not enough to show that the lodging and continued existence of the caveat would be in some way advantageous to the caveator. He must bring

> himself within s.146 (the predecessor to s.137) of the Land Transfer Act. In this case he must bring himself within para.(a) of that section - that is to say, he must show that he is a person "entitled to or beneficially interested in" the land against which he has caveated "by virtue of some unregistered agreement or other instrument or transmission or of a trust express or implied or otherwise howsever". "

It was not contested in the present case that an agreement to mortgage can result in an equitable mortgage that in turn creates in favour of the mortgagee an equitable interest in the land to which the agreement relates:-

> " In equity a mortgage is created by a contract evidenced in writing for valuable consideration to execute, when required, a legal mortgage or by a contract so evidenced and for valuable consideration that certain property is to stand as a security for a certain sum. "
> (32 Halsbury's Laws of England, 4th Ed., 437.)

So the issue is whether, on the evidence placed before the Court, the Applicants have established an arguable case to be entitled to or be beneficially interested in the Browns Bay property as the result of there being in existence a contractual obligation on the part of the Respondents to execute, when required, a legal mortgage of the Browns Bay property, or whether the Respondents have contracted that the Browns Bay property is to stand as a security for $55,000. Put more precisely, the issue is whether clause 4(b) of the memorandum creates an equitable mortgage in favour of the Applicants.

Clause 4(b) contains, in my view, a promise in the alternative. The first named Respondent has promised either to produce a registrable first mortgage over the Browns Bay property securing $55,000, or to pay $55,000, either alternative to be performed on or before the 20th July, 1984.

In Vol.1 of Chitty on Contract, 25th Ed. (1983) at

para. 1385, the learned author describes promises in the alternative in this way:-

> " Where a contractual promise is in the alternative, in that the promissor agrees to do one of two or more things, the legal effect of the promise depends on the kind of alternative involved: there may be a promise to perform in one of two or more alternative ways where the form of the promise requires an election to be made; or there may be a primary or basic obligation to perform in one way unless the party who holds the "option" chooses to substitute another way . . . . . Under the first kind of alternative promise there is no primary or basic obligation and there must be an election of an alternative by one of the parties. "

In my opinion the alternative promise contained in clause 4(b) of the memorandum is one of the first kind. It imposes on the promisee an obligation to do one of two alternatives. The option of determining which of those two alternatives is to be binding upon the promisee is an option to be exercised by the promisee. Thus until the first named Respondent elected which of the two alternatives he chooses to perform, there is not a binding contractual obligation on him to perform one or other of the alternatives. There is therefore, until that election is made, no primary or basic obligation on the first named Respondent to produce a registrable first mortgage of the Browns Bay property.

The Applicants have not yet commenced proceedings for specific performance of the memorandum, although Mr. Hislop indicated that such proceedings would be commenced in the immediate future. Even on an application for specific performance the Defendants, in the absence of an election, would not, in my opinion, be ordered to provide a mortgage of the Browns Bay property. If the contract were otherwise held to be enforceable and an order for specific performance appropriate, then the Respondents would be ordered to perform the memorandum in accordance with its terms. It would not be until the time

for performance that the Respondents would be obliged to elect which of the alternatives in clause 4(b) they would adopt.

Thus when the Applicants lodged their caveat and when this motion was heard, there was not in existence a contract requiring the Respondents to execute a legal mortgage or that the Browns Bay property was to stand as a security for the balance of the purchase price of $55,000. That contract will only come into existence if and when the Respondents elect to satisfy their obligations to pay the balance of the purchase price by providing such a mortgage. It follows that the Applicants have not established that their claim to an interest in the property raises, at this time, a serious question to be tried. So the Applicants' motion for an order that the caveat does not lapse fails.

The memorandum was signed only by the first named Respondent as purchaser. Both Respondents are the registered proprietors of the Browns Bay property. No argument was addressed to me on whether one of two registered proprietors can, without the apparent consent of the other, create a valid and enforceable agreement to execute a mortgage over that land. In view of the conclusion to which I have come, it is unnecessary for me to explore this aspect further.

The Respondents are entitled to costs on the motion, which I fix at $400, plus disbursements.

Solicitors:

Thorne Dallas & Partners, Whangarei, for Applicants.

Bruce Scott Stevens & Partridge, Auckland, for Respondents.