19/12

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.405/84

IN THE MATTER OF An Application for Extension of Caveat No. H.530969

1568

BETWEEN ROBERT McLAREN
of Hinuera, Farmer
Applicant

A N D THOMAS ALAN ROBERTSON
of Matamata, Farmer
First Respondent

AND GRAEME COURTNEY TROWER
of Matamata, Farmer
and JEWELL ANN TROWER
his wife
Second Respondents

Hearing: 7 December 1984

Counsel: R.A. Houston Q.C. for Applicant
R.J. Craddock Q.C. and M.A. Muir for Respondents

Judgment: 12 - 12 - 84

JUDGMENT OF GALLEN J.

The first respondent is the registered proprietor of a farm property near Matamata, the legal description of which

is part Lot 1 on Deposited Plan 30418 and being all the land comprised and described in Certificate of Title Volume 889 Folio 223 (South Auckland Registry).

On 15 April 1981, the first respondent as lessor, entered into a Memorandum of Lease with the applicant as lessee in respect of the land so described. The lease was for a term of 3 years commencing on 1 June 1981. The Memorandum of Lease contained, inter alia, 2 clauses which at first sight appear to be in usual form, but on closer inspection are in very unusual form indeed. The first of these is clause 3 (g) which is in the following terms:-

> "(g) THAT if the Lessee shall during the term hereby granted pay the rental hereby reserved and observe and perform the covenants and conditions on the part of the Lessee herein contained and implied up to the expiration of the said term and shall have given notice in writing to the Lessor at least three calendar months before the expiration of the said term of his desire to take a renewed Lease of the premises hereby demised then the Lessor if he desires to continue to lease the premises will at the cost of the Lessee grant to the Lessee a renewed Lease of the said premises for a further term of three years at a rental to be mutually agreed upon between the parties and failing agreement to be settled and fixed by the arbitration of two arbitrators and an umpire in accordance with the Arbitration Act 1908 and its amendments and in any event the rental shall not be less than SIX THOUSAND EIGHT HUNDRED DOLLARS ($6,800.00) per annum and upon and subject to the same covenants and conditions as are herein contained and implied except this present covenant for renewal."

The second is clause 3 (h) which is in the following terms:-

> "(h) THAT the Lessee shall upon the expiry of the term hereof or upon giving six months notice in writing to the Lessor during the renewed term hereof of his desire to purchase the fee simple of the whole of the land hereby demised including the said dwelling and surrounding grounds then the Lessor shall on the expiration of the said term or notice as the case may be and upon payment to him by the Lessee of the sum of ONE HUNDRED AND TWENTY THOUSAND DOLLARS ($120,000.00) and of all rent then due or accruing due convey the said premises to the Lessee for an estate in fee simple free from encumbrances."

It will be seen from the above that clause 3 (g) is not a right of renewal as normally understood, since a renewal is dependent upon the lessor desiring to continue to lease the premises. The clause could best be described as a right of first refusal, but if the lessor decides not to continue to lease the premises, then the lessee has no right to a further term. Clause 3 (h) is even more difficult. The respondent contends that it is an option to purchase and can reasonably be construed as such if the word "if" is inserted after the word "that" in the first line. The applicant on the other hand, contends that it is a compulsory purchase clause, the only element of option being that if a renewed term is granted, the applicant may choose to purchase during that term instead of on the expiry of the term of the Memorandum.

The applicant contends that he gave notice in accordance with the Memorandum of Lease of his desire to take a renewal for a further term of 3 years and further contends that

the first respondent agreed to grant such a renewal, but did so orally only. No particulars are given. The first respondent says that on 9 February 1981, he received a telephone call from the applicant's solicitor, advising that a letter would be shortly received, indicating that the applicant sought to exercise a right of renewal under the lease. One unfortunate feature of this dispute was that the same firm of solicitors acted for both parties at this stage, the first respondent being represented by a partner in the firm; the applicant being represented by an employee of the firm. The first respondent denies that he agreed to a renewal and in fact asserts that he informed the applicant's solicitor that the lease would only be renewed if he chose to agree and that he was not inclined to agree. The first respondent says that he was reluctant to continue to lease the property because the existence of the rent freeeze regulations meant he would be unable to obtain a reasonable return on the capital interest so leased.

The respondent asserts that he informed the applicant of his decision not to renew the lease, on 24 April 1984. He claims that he was then informed by the applicant that the applicant had no intention of renewing the lease as he hoped to arrange finance to purchase the property and that a proportion of this sum was already available from the applicant's bankers. The first respondent claims that on 25 May 1984 the applicant and his father visited the first respondent at the

first respondent's home. He claims that he was then informed that the option to purchase could not be exercised as the applicant had been unable to raise more than $50,000 from his bank. He claims he was asked whether he would be prepared to leave money in. The first respondent claims that he advised the applicant that he would not leave money in if the purchase price was the $120,000 contemplated in the Memorandum of Lease, but that if the applicant was prepared to pay the Government Valuation of the land which was in the vicinity of $175,000, then subject to the first respondent's solicitor's approval, he would probably be prepared to do so.

The first respondent alleges that on 29 May he again discussed the matter with the applicant and his father and was informed that the applicant was not able to buy the property on the basis discussed and he asked whether the first respondent would consider a renewal of lease. The first respondent claims that following that approach, he inspected the farm and considered that it had not been adequately farmed, coming to the conclusion that he would not be prepared to renew the lease on any terms.

On 30 May, the first respondent claims to have offered the farm to the applicant on the basis of a purchase price of $185,000, the full purchase price to be financed by way of a vendor first mortgage - the period of the mortgage, 2 years from 1 June 1984 at an interest rate of 7.6% p.a. which would

produce an annual income of $14,000 for the first respondent and the whole to be supported by a guarantee from the applicant's father, secured by 3rd mortgage over his farm. The first respondent claims that the applicant and his father indicated their wish to accept the proposal.

The first respondent claims then to have got in touch with his solicitor and requested him to prepare a contract for signature, on Friday 1 June. The first respondent claims that on Friday, 1 June, he telephoned his solicitor to confirm the arrangements and was then informed that the applicant had informed the first respondent's solicitor, that the contract would not be proceeding. The first respondent resolved to discuss the matter with the applicant. Before doing so however, he discussed it with his neighbour, Graeme Courtney Trower, one of the second respondents. He claims that Mr Trower advised him that the second respondents might be prepared to buy the property if the first respondent would offer it to them on the same terms he claims to have done to the applicant. The first respondent said that he would be prepared to do this, provided the second respondents were prepared to take over at once.

The first respondent states he then went to the home of the applicant's father and expressed his disappointment. He claims to have been told by the applicant's father that he could not jeopardise his future by guaranteeing the loan and

mortgaging his own farm. The first respondent said there were then discussions about the applicant's stock. The applicant is said to have asked whether the stock could remain on the farm for 2 months. The first respondent says that Mr Trower then arrived and joined in the discussion. He advised that having discussed the matter with his wife, he wished to buy the farm and would be prepared to take over immediately. The first respondent says that Mr Trower and the applicant and his father then proceeded to discuss arrangements for the removal of the stock. He says that no suggestion was made by either the applicant or his father that the first respondent had any continuing commitment to them either by lease or agreement for sale and purchase.

The first respondent maintains that the applicant removed his stock - in particular some 500 ewes that were grazing on the property on 6 June and 2 days later, 120 fat lambs were trucked away.

The first respondents took possession of the property and claim to have spent $31,000 by way of improvements since so doing. In particular, they maintain that the applicant or his father cut off the joint water supply and it was necessary to spend a considerable sum on installing a replacement water supply.

On 22 June 1984, the solicitor by then instructed by the applicant, wrote to the first respondent, setting out what he said was the applicant's account of negotiations and in particular, asserting that there had been a renewal of the lease in accordance with clause 3 (g), going on to say that if the lease was not to be renewed, then the applicant elected to purchase the property in accordance with the provision of clause 3 (h). He indicated that the applicant required the property to be vacated and made available to him and if this did not occur, then a writ would be issued. A letter was also sent to Mr Trower and a copy of the letter to the first respondent was enclosed.

On 22 June 1984, the applicant registered a caveat against the land. This is in the following terms:-

"Take notice that I ROBERT McLAREN of Matamata, Farmer, claiming estate or interest in the following land

Schedule A

Registry Office: South Auckland

C.T. or Document Ref.	Estate	Area	Lot No. & D.P. or other Legal Description
889/223 (SAR)	Fee Simple	68.9810 ha.	Block XII Cambridge Survey District part Lot 1 Deposited Plan 30418 part of Hinuera No.2 Block

Encumbrances, liens, interests and appurtenances

SUBJECT TO Statutory Land Charge S.32380

by virtue of a Memorandum of Lease bearing date the 15th day of April 1981 and an option to purchase the above-described land as contained therein, and made between the abovenamed ROBERT McLAREN as Lessee and the registered proprietor of the above land THOMAS ALLAN ROBERTSON of Matamata, Farmer, as Lessor,

forbid the registration of any memorandum of transfer or other instrument affecting the said land until this caveat is withdrawn by me or by order of the High Court, or until the same has lapsed under the provisions in that behalf contained in section 145 of the Land Transfer Act 1952."

The applicant has issued proceedings for specific performance. An amended statement of claim has been filed but this has not yet been pleaded to by the first or second respondents because they have sought particulars of certain allegations contained in it. It is therefore clear that the substantive action is by no means ready for hearing.

On 5 November 1984, the parties consented to an order that the caveat do not lapse or expire until 14 December 1984, but this order was specifically stated to be without prejudice to the position of either party. The applicant now moves for an order that the caveat be extended and deemed not to lapse. This is opposed by the first and second respondents.

Against that background, Mr Houston submits that provided his client, the applicant, is able to show that the claim on which the caveat is based raises a serious question to

be tried then there should be an order that the caveat not lapse and the substantive questions in issue be resolved at the hearing of the claim itself. The pleadings in the substantive claim are not yet complete, but the applicant for the purposes of this application, claims to have two caveatable interests in the land, the subject of the caveat, which he is entitled to protect in terms of the Statute.

The first of these is that the first respondent orally agreed to a renewal of the lease in terms of clause 3 (g) of the Memorandum of Lease. He therefore has an interest as lessee which he is entitled to protect. He further contends that the provisions of clause 3 (h) of the lease, amount to a compulsory purchase clause and by virtue of that, he has an interest in the land also arising from the Memorandum of Lease; that both issues give rise to a serious question to be tried and that the caveat should not lapse so that the position is protected until such time as the substantive questions in issue between the parties can be properly resolved.

Mr Craddock for the first and second respondents, submits first, that the caveat does not comply with the technical requirements of the Act and Regulations and for that reason alone, should lapse. He further goes on to submit that even if that were not so, there is no serious question to be tried revealed by the papers which would justify the retention of the caveat and that as a matter of law, the applicant's

contentions are not soundly based but in any event, on the factual material disclosed by the affidavits, there is insufficient to support the retention of the caveat having regard to the way in which these applications are to be considered bearing in mind the very serious affect which a caveat has on the rights of the land owner.

This claim raises matters of considerable difficulty. I should have preferred to have had an opportunity to consider some of these questions at length, but the constraints of time mean that the matter must be dealt with urgently. If the caveat is not to lapse, a decision must be made by Friday of this week.

Mr Craddock's first submission is that the form of caveat is unsatisfactory. The approach of the Courts to the formalities required is dealt with in the decision of Vautier J. in New Zealand Mortgage Guarantee Company Limited v. Pye (1979) 2 N.Z.L.R. 188. In that case, the learned Judge referred to all the relevant earlier authorities and in particular to a line of Australian authorities. The first principle is that the right to register a caveat depends upon the statutory authorisation. It is therefore necessary to comply with the provisions imposed by the Statute and the Regulations. Vautier J. held that while it is not necessary to follow slavishly the forms provided, there are certain fundamental matters contemplated by the Act and Regulations

which must be complied with. It is easy to see why this must be so. The rights of a land owner to deal with his property are substantially and seriously affected by the procedure of registering a caveat against the title and at least initially, the action of registration is administrative in nature being performed by the Registrar without a judicial inquiry. For that reason alone it is imperative that the information which the Act and Regulations contemplate should be contained in the application, be available both for the information of the Registrar and also for the information of the person whose title is affected. He is entitled to know not only the interest which is claimed, but also the extent to which his right to deal with that interest has been affected. The caveator is therefore obliged to state with sufficient certainty the nature of the estate or interest claimed; how the estate or interest claimed is derived from the registered proprietor and whether it is intended to forbid the registration of instruments affecting the title altogether, or with exceptions. In the case of New Zealand Mortgage Guarantee Company Limited v. Pye (supra), the caveators claimed an estate or interest in the land described by virtue of an unregistered deed of second mortgage which was in fact entered into at a time when the owners of the land did not own the land sought to be affected. The learned Judge was of the view that the document concerned was neither a deed, nor a second mortgage so that the basis upon which the claim rested was itself unsound.

In this case, the estate or interest claimed is in a defined area of land said to arise by virtue of a Memorandum of Lease and an option to purchase contained therein. Mr Craddock says that the caveat does not adequately describe the estate or interest which is the basis of the application. He says that it is not possible to tell whether it refers to an interest as lessee, or as purchaser by virtue of an exercise of option; that accordingly the strict conditions which it is now accepted are appropriate, have not been complied with. With some hesitation, I think that the interest so described by the caveat may be just sufficient. So far as it refers to the applicant as the lessee, taken in conjunction with the reference to the Memorandum of Lease, it could I think be reasonably said to indicate that the applicant is claiming by virtue of his interest as lessee and that it is that interest he seeks to protect.

The reference to the option to purchase is more difficult. Realistically however, I think the wording is sufficient to convey, both to the Registrar and to the registered proprietor that the applicant as lessee under the provisions of the lease, claims also an option to purchase which is contained within that lease. I think that the document indicates that the applicant is claiming two estates or interests arising out of the one document of lease and that it is sufficiently clear that it is not only the leasehold interest which is at stake, but also the right to dispose of

the fee simple. It is true that in the authorities to which Mr Craddock referred, the emphasis is upon the need to delineate the estate or interest which is claimed and the estate or interest which is affected with particularity. In the case already referred to of the New Zealand Mortgage Guarantee Company Limited v. Pye, in spite of the wording of the headnote, I think that it is clear that the learned Judge is concerned with the need to avoid a situation where the failure of the caveator to particularise leaves the person whose land is affected, at a disadvantage since it is not clear precisely what is claimed. This is consistent with the Australian authorities referred to of which Vandyke v. Vandyke (1976) 12 A.L.R. 621, may be cited as an example. In that case, the estate or interest was claimed to be pursuant to divorce settlement. Clearly enough such wording is quite ambiguous. It could refer for example, to a right to occupy as distinct from a right to the fee simple. In In re Paul (1902) 19 W.N. (N.S.W.) 114, a caveat forbidding dealing with the whole of the land when the claim was to an easement affecting only a small portion of it, was held to be too large. The same basis is again apparent. The extent to which the caveatable interest properly affects the land, must be clearly defined. Here the applicant claims an interest as lessee and as potential purchaer. While there is much to be said for a caveat containing greater detail than is the case here, I do not think that authority constrains me to hold that the form is so defective that that determines the matter.

Mr Craddock also submitted however, that there was no argueable case and that even if the caveat as registered was in an acceptable form, it should lapse for that reason. In Catchpole v. Burke (1974) 1 N.Z.L.R. 620, the Court of Appeal in New Zealand considered the approach which should be adopted to applications made under s.145 of the Land Transfer Act 1952. It was held that substantive disputes should not be determined in a summary way, but that the effect of the caveat should be extended to permit the rights of the parties to be determined by action in the normal course. The Court referred to the decision in Re Ede (1882) N.Z.L.R. 1 SC 258, the first reported case in New Zealand which itself drew attention to the analogy with interlocutory injunction procedures.

In Eng Mee Young and Others v. Letchumanan s/o Velayutham 1980 A.C. 331 the Privy Council considered a case relating to a caveat. The case originated from the Torrens system operating in Malaysia. Their Lordships placed an emphasis on the analogy between the caveat procedure contemplated under the Torrens system and the applications for interlocutory injunctions, both being designed to achieve the same purpose - that is, to hold the position until such time as the substantive matters in issue between the parties could be resolved in the ordinary way. While their Lordships recognised that there were some differences (in particular the caveat could be registered as the result of administrative action on the part of the Registrar without being supported by any

evidence at all), speaking generally however, the same basic principles were held to apply to either kind of application. In any event, while the preliminary action of the Registrar is administrative, the hearing which takes place in order to prevent lapse under the statutory procedure, may reasonably be regarded as the equivalent of the hearing which occurs when an application for an interlocutory injunction is dealt with. Their Lordships specifically adopted the same general approach which was established by American Cyanamid Company v. Ethicon Limited 1975 A.C. 396, both in relation to the threshhold question that there is a serious question to be tried but equally significantly that those factors which reflect upon the balance of convenience become relevant if the first question is answered in favour of the applicant. Their Lordships also considered the extent to which the question relating to whether or not there is a serious question to be tried, may be resolved on a factual basis. In most cases of course, the interlocutory procedure is quite inappropriate to resolve disputed questions of fact and if there is a factual issue to be resolved, which if resolved in favour of the applicant would be sufficient to support the remedy sought, that is normally an end of the matter. Their Lordships indicated that while on the one hand it was putting the obligation too high to suggest that an applicant needed to satisfy the Court that on the balance of probabilities his claim would succeed; on the other, it was putting it too low to suggest it was enough to make a bare assertion in an affidavit that the caveator was entitled to the

interest claimed unsupported by any disclosure and verification upon oath of the facts upon which his claim was based. In the case of Enq Mee Younq v. Letchumanan (supra), the affidavit contained assertions which were directly contrary to the written material contained in the agreements out of which the disputes arose. There were indications that an extension of time had been agreed to, but no details were given as to how, when, where or between who, that agreement was made or what was its terms or what was the consideration for it. Any such agreement was flatly denied by the caveatees. Their Lordships held that there was a discretion to be exercised judicially. While the wording of the Malaysian provision is slightly different from that which appears in s.143 of the Land Transfer Act 1952, I think it is clear that that section also contemplates that the Court has a discretion since the order which may be made, is such as seems meet. Their Lordships held that in the exercise of that discretion, a Judge's first responsibility was to determine in the first instance whether the statements contained in the affidavits that were relied upon as raising a conflict of evidence upon a relevant fact, had sufficient prima facie plausibility to merit further investigation as to their truth.

Mr Houston says that the assertion of the applicant in his affidavit that the first repondent had orally agreed to the renewal of lease, is sufficient to establish that there is a serious question to be tried.

Mr Craddock says in this case that there is insufficient evidence to satisfy the minimum criteria. The applicant has filed only one affidavit, that in support of the application. In that he makes the statement "having given notice in writing as contemplated by the agreement to lease, the lessor agreed orally to renew the lease." No further particulars are given; no indication is given as to the rental or any other particulars. This assertion is completely denied by the first respondent who says there was no such agreement. He gives in his affidavit a detailed account of the negotiations and effectively asserts that the applicant and the first respondent reached agreement on a substitute proposal for sale and purchase of the land, but that the applicant was unable to finance this or to meet the terms which the first respondent considered appropriate and that no final agreement was reached. He says that faced effectively with a complete breakdown of negotiations, he entered into an agreement to dispose of the land to the second respondents. His account of the negotiations between the parties is to a large extent supported by an affidavit filed by the second respondents and is to some extent supported by and certainly not inconsistent with, an affidavit filed by his solicitor as to the course of negotiations. If the factual material put forward by the first and second respondents in their affidavits were to be accepted, then the applicant could not succeed. The applicant has not chosen to file affidavits controverting the material contained in the affidavits filed by the first and second respondents.

Mr Houston says that he is under no obligation to do so; that to file such affidavits would be in effect endeavouring to deal with the matters which are appropriately to be dealt with at the substantive hearing and that such affidavits could not have resolved the matter before the Court.

I accept that a contest on the facts cannot be resolved in these proceedings, but I think that the statements made in Eng Mee Yong v. Letchumanan make it clear that it is necessary for there to be a genuine contest established on the facts, but this will not be done by mere assertions completely unsupported. In this case, as in Eng Mee Yong's case, the applicant has asserted that an agreement was reached. He supports this assertion by a letter written on his instructions by his solicitor to the first respondent and exhibited to his affidavit, but the material contained in this letter originates entirely from the applicant and cannot be regarded as either independent or corroborative. There are no details contained in the affidavit as to the terms of any renewal and the letter is equivocal as to whether agreement was reached or on what terms.

Para.5 of the applicant's affidavit indicates his wish to purchase "if I am unable to obtain a renewal of the lease". This does not suggest confidence that there is an existing enforceable legal relationship.

The assertions of the respondent are also supported by the actions of the applicant who seems to have accepted the position and removed his stock without protest. He justifies this action by reference to the advice he claims to have received from his solicitor, but if this were so, it would not be sufficient to controvert the fact that his behaviour is more consistent with the account given by the respondents than the position he now asserts.

I think that the material filed by the first and second respondents called for an answer and in the absence of such an answer, I do not think the minimum facual basis contemplated by Eng Mee Yong's case exists to justify the continued life of the caveat in so far as it is based on the alleged renewal of lease.

Mr Houston however, also relies upon the provisions of clause 3 (h) of the agreement to lease. As I have already said, this is in very unusual terms. Mr Houston says that the paragraph represents a compulsory purchase clause.

Mr Muir on the other hand for the first and second respondents, argued that clause 3 (h) is an option to purchase and there is no evidence before the Court that any option has been exercised. Mr Houston made the submission that I do not need to resolve this question of interpretation. He submits, all that it is necessary for the applicant to do is to

"stablish that there is a serious question to be tried - in this case, a serious question of law and that once that question exists, the matter should await determination of the substantive hearing.

Generally speaking, the logical basis for reserving questions for determination to the substantive hearing is found in the impossibility of determining questions of fact on affidavits at a preliminary hearing. Such arguments do not in terms apply to a question which is wholly legal in nature. Mr Houston submits that the same considerations apply because the substantive questions of law, like the substantive questions of fact, are not normally resolved at the preliminary hearing and for that reason, full argument on them is neither expected nor tendered. This contention obtains some support from the observations in Catchpole v. Burke (supra) where members of the Court of Appeal were reluctant to express views on the question of law which the learned Judge in the Court below had considered decisive, but in this case there is a further aspect. While at first sight the question may appear to depend upon interpretation of the clause which would be a matter of law, I cannot overlook the possibility that interpretation might be affected by the admission of extrinsic evidence.

It is possible that extrinsic evidence might be admissible to explain what is certainly a very peculiar wording and this would involve those factual concepts which the

substantive hearing is designed to deal with. Mr Muir makes the point that if the clause is to be interpreted as an option to purchase, then those conditions which would be necessary to establish that the option had been exercised, had not been satisfied and that this could not form the basis of the applicant's claim. Mr Houston's point is that if the clause is to be interpreted as a compulsory purchase clause, then the applicant has an interest by virtue of the agreement. I think Mr Houston is right when he says that the matter is argueable and that because of the possibility that extrinsic evidence may be significant, the matter would be more appropriately dealt with at the substantive hearing. However, that does not end the matter.

In Eng Mee Yong's case, the Privy Council held that as in the case of the analogous interlocutory injunction procedure, the balance of convenience also falls to be considered when the caveat procedure is before the Courts. In Wyllie Investments Limited v. Lane Abel Holdings Limited (1981) 1 N.Z.C.P.R. 268, Holland J. considered this aspect of the decision and concluded that it was not necessary to import a consideration of the balance of convenience. He reached that conclusion by considering that there was nothing said in the Privy Council decision which reflected upon the earlier decision in the Court of Appeal of New Zealand of Catchpole v. Burke which was not referred to in the Eng Mee Yong's decision. With respect, I agree that the two decisions are not

inconsistent and it is true that in Catchpole v. Burke, the Court of Appeal did not discuss questions which normally fall to be considered under the heading of balance of convenience in relation to interlocutory injunction applications, but I do not read the decisions of any of the members of the Court as indicating that those considerations were irrelevant or excluded. There is simply no reference to them. The report indicates that in the first instance, Mahon J. concluded there was no argueable question and that he arrived at this conclusion on his view of the legal aspects of the matters before the Court. In Leather v. The Church of the Nazarene High Court, Auckland M.857/83, judgment delivered 12 August 1983, Savage J. accepted that the judgment of the Privy Council in Eng Mee Yong's case, now had a bearing on reading the earlier cases. He specifically accepted those observations of Lord Diplock which indicated that the balance of convenience fell to be considered once the Court had concluded there was a serious question to be tried. In that case, he was required to give consideration to that aspect of the balance of convenience which deals with an ability to pay damages and I accept that this is one of the aspects which requires special consideration because there is provision in the Land Transfer Act giving a right to recover compensation. That is a special application of the principles involved and was considered by Hillyer J. in an oral decision given in In the matter of an application by Prunella Ann Dick Whangarei Registry M.82/84, judgment delivered 1 August 1984. In that case, he considered that

there was no power to require an undertaking as to damages. The learned Judge did indicate that he had considered the decision of Holland J. in Wyllie Investments Limited v. Lane Abel Holdings Limited (supra) and particularly, noted that in that case, it had been concluded that it was not necesssry to import a consideration of the balance of convenience. Hillyer J. did not specifically follow that decision in that regard, but he was in any event concerned with the special situation which relates to an undertaking for damages and which as I have already said, must be considered sepearately because of the statutorty provisions. With respect, I agree with the view of Savage J. and in my view, the decision of the Privy Council in Eng Mee Yong's case, is applicable to cases under s.145 and indeed, s.143 of the Land Transfer Act in so far as it indicates that it is appropriate to consider those matters which collectively fall to be determined under the heading of balance of convenience. In doing so, I note particularly that the Privy Council arrived at this decision because of the discretionary aspect of the jurisdiction - a discretion which clearly appears in the different wording of the New Zealand statute. I think too, it is appropriate that the discretionary matters which fall to be considered under this head should be taken into account for precisely the same reasons as they fall to be considered in the analogous jurisdiction relating to interlocutory injunctions. The purpose of the procedure is to preserve the status quo until such time as the rights of the parties may be determined in the appropriate manner. This can

best be done if the various matters which have been accepted as relevant in the decisions given relating to interlocutory injunctions, can appropriately reflect in the exercise of the discretion which the Court has in applications under ss.145 or 143 of the Land Transfer Act. The balance of convenience in this case must be considered in relation to a background where the applicant removed stock from the land; gave up residence upon it and effectively left it to the second respondents when it is clear that he was aware that the second respondents were at least negotiating to obtain an interest. The second respondents have entered into possession of the property and have spent substantial sums upon it. The status quo therefore is that the applicant gave up possession and the second respondents entered into possession and the first respondent accepted obligations to them.

Furthermore, I think that this is the kind of case where if the applicant is ultimately successful in his proceedings, there should be no real difficulty in assessing the loss for the purposes of awarding damages. The position of the first and second respondents is likely to be seriously prejudiced by the continuation of the caveat. Is the applicant to require the second respondent to give up possession? Is he to give possession to the applicant? What can the second respondent do to recoup the amounts which he has spent on the land at a time when he had no notice of any interest by the applicant? If the respondents are ultimately successful, is

the applicant in a position to meet an award of damages? Certainly the evidence indicates that he was not in a position to take up an opportunity offered to him to purchase the land. In my view, all the criteria would suggest that on the balance of convenience the discretion should be execised against the applicant.

Having regard to the circumstances therefore, I do not think that this is a case where the caveat should not lapse. The application will therefore be refused. All costs are reserved.

Solicitors for Applicant: Messrs Annan, Kellaway and Company, Hamilton

Solicitors for Respondents: Messrs Holmden, Horrocks and Company, Auckland