IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M.652/84

IN THE MATTER of the Land Transfer Act 1952

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A N D

IN THE MATTER of Caveat No 5119571/1 lodged by MARK NEWMAN OWERS of Christchurch, Company Director against dealings with all that parcel of land containing 2134m^2 or thereabouts being Lot 4 on D.P.47200 and being all the land contained in C.T.26F/6 (Canterbury Land Registration District) of which SKYLINE FINANCE LIMITED at Christchurch is registered as Proprietor.

Hearing: 12 December 1984

Counsel: B. Frampton in support
J.S. Fairclough to oppose

Judgment: 19 DEC 1984

JUDGMENT OF HARDIE BOYS J

On this motion for an order extending a caveat the registered proprietors have taken the unusual course of contending that the caveator has no arguable case and of course unless he can show that he has, no order should be made: N.Z. Limousin Cattle Breeders Society Inc v Robertson [1984] 1 NZLR 41, 43. However, if an arguable case is shown then it is clear that the Court ought not to embark upon an inquiry into the merits but rather allow the caveator time to assert his

rights in proceedings more appropriate for that purpose: Catchpole v Burke [1974] 1 NZLR 620.

The caveat in question, details of which are set out in the intitulement to the proceedings, was registered on 11 October 1984 to protect Mr Owers' interest as purchaser pursuant to an agreement he had entered into with Skyline Finance Limited on 9 December 1983 for the sale and purchase of a section in the Coronation Heights subdivision. The purchase price was named as $47,500 of which a deposit of 10% was to be paid in two instalments, one of $1,500 forthwith and the balance on 16 December 1983; a further deposit of 10% was payable on 15 February 1984; and the balance of the price on 15 February 1986. That balance was to carry interest from 15 February 1984. The vendor was required to accept payment of purchase monies in multiples of not less than $500 at any time and it was provided that should the purchase price be paid in full on or before 15 April 1984 then it should be reduced by 10% and any interest should be waived. It was also provided that upon payment of the purchase price and interest the vendor should execute a proper transfer of the property to the purchaser, but as the land was then in the course of subdivision it was agreed that the purchaser should not be required to call on the vendor for a transfer until the subdivisional plan had been deposited. There was also a provision that the purchaser should not register a caveat against the title but it appears that this requirement was waived and registration of the caveat now in issue is not to be regarded as a breach of it.

Mr Owers was slow in paying the second instalment of the initial deposit but on 7 March 1984 his solicitors wrote to the solicitors for Skyline Finance Ltd raising four queries about representations made at the time the contract was signed and then continuing with this paragraph:

> " We do advise however that our client has a confirmed sale of his own property with settlement on the 27th April and would be in a position to complete the purchase provided the title is available and the other outstanding matters can be clarified."

On 6 April the queries contained in this letter were answered but nothing was said about completion other than that it was anticipated that title would be available at the end of that month or the beginning of the following month. The next communication was a further letter from the vendor's solicitors dated 13 July stating that they expected the plan to be deposited on 20th July and enclosing a settlement statement showing the amount required to settle on 27 July "being seven days after the deposit of the Plan in accordance with the Agreement for Sale and Purchase" (I interpolate that the agreement did not contain any reference to settlement within seven days of deposit of the plan).

In reply to that letter, on 23 July Mr Owers' solicitors sent a transfer and notices of sale but drew attention to the fact that the contract did not require settlement within seven days of title having been available and concluded "We do however anticipate that our client will be in a position to settle later this year". The plan was finally deposited on 24 August but Mr Owers declined to settle within seven days of that date despite further demand by the vendor's solicitors

because he had decided to use the funds from the sale of his other property for another purpose. The vendor, however, having, according to the correspondence, relied on the representation that settlement would take place upon deposit and requiring the funds in order to meet commitments made in reliance upon settlement, concluded that Mr Owers was in breach of his contract and after giving notice requiring him to complete by 11 October by a letter of 11 December purported to cancel the contract. If that cancellation is effective then of course Mr Owers has no interest in the land capable of supporting his caveat.

Mr Fairclough's argument was that the original contract had been varied, and that a new settlement date had been agreed upon. This argument would treat the letter of 7 March as the offer of the new arrangement, and the letter of 13 July as the acceptance. But Mr Fairclough did not seek to contend that the new arrangement was in terms of the letter of 13 July, but rather that settlement would be within a reasonable time (and he submitted that seven days was a reasonable time) after the date of deposit of the plan. This demonstrates the difficulty of stating with the necessary certainty the new date of settlement if one had in fact been agreed upon. The same difficulty appears if the letter of 7 March is, as I am inclined to think is more appropriate, regarded as intimation of the purchaser's intention to exercise his right to repay in multiples of $500. And if that be the correct approach, then as at present advised I consider the vendor would have to establish an estoppel if the purchaser were to be held to that intimation.

However the letter of 7 March is to be regarded, it requires interpretation, and I do not interpret it as a statement of intention to settle whenever, after 27 April, the plan was deposited. In the events that have occurred, it could hardly have been contemplated by either party that the purchaser would have had to hold his cheque poised for payment for four months. The clear intention of the letter is that there should be settlement on 27 April if the plan were deposited by then. There is no intimation of what the purchaser would do if it were not.

I therefore consider that Mr Owers has made out an arguable case for retention of his caveat until he has been able to test the position more fully - should that be necessary - in such proceedings as he may be advised are appropriate for that purpose. I therefore order that the caveat do not lapse until 31 March 1985, and I reserve leave to Mr Owers to apply prior to that date for a further extension if the matter has not by then been resolved. It is of course implicit that he for his part acts expeditiously.

Solicitors:

Saunders & Co, CHRISTCHURCH, in support.
Cavell, Leitch, Pringle & Boyle, CHRISTCHURCH, to oppose.