3/12 NZLR

IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

A. 72/84

IN THE MATTER of the Land Transfer Act 1952, Section 145

1464

BETWEEN KENNETH DOUGLAS ULYATT
YVETTE MARIE ULYATT

Applicants

A N D PETER WINTON CARROLL
DALLAS MARCIA CARROLL

Respondents

Hearing: 28 November 1984

Counsel: J.M. von Dadelszen for Applicants
H.R. Grayson for Respondents

Judgment: 29 November 1984

JUDGMENT OF ONGLEY J.

This is an application under Section 145 of the Land Transfer Act 1952 for an order that a caveat against dealings in certain land owned by the respondents do not lapse.

The land affected by the caveat was agreed to be sold to the applicants under a written agreement for sale and purchase dated either 10 June 1983 or 19 July 1983, the uncertainty as to date not being material to the present application. The land in question was part of a residential subdivision and was being purchased by the applicants for the

erection of a dwelling house. One of the conditions to which the agreement was expressly subject was set out as Clause 20.0 in these terms:

> "This Agreement is conditional upon and the Vendors hereby covenant to take all necessary steps to provide a water supply for domestic purposes to the section and to comply with all legal requirements and bylaws necessary for such supply and the creation and documentation of any necessary easements, all such work being at the expense of the Vendors."

After the signing of the contract it became apparent that the supply of water as required by the condition would present difficulties. Discussions took place between the parties and correspondence was exchanged between their solicitors which resulted in a letter being written on 9th December 1983 by the solicitors then acting for the applicants to the respondents' solicitor. The letter was as follows:

"

Dowling & Co
Barristers and Solicitors

9th December 1983

Messrs Kelly McNeil & Co.,
Solicitors,
P.O.Box 1148,
HASTINGS

ATTENTION Mr Gresson

Dear Sirs,

Re - Ulyatt and Carroll

We have tried to telephone you a number of times but have been unsuccessful. On 8th December we were told by our client that he and Mr Carroll had agreed that Clause 20 be as follows:

(a) That Mr Carroll would first negotiate with Taruna for a domestic water supply for both parties.

(b) If Mr Carroll fails as above then he would at his expense put down one test bore on either his land or Ulyatts. If successful on either then both would share the supply. Mr Carroll is to pay the cost of drilling and incidental equipment to get the water from the well on either property to a holding tank.

(c) If Mr Carroll, having been unsuccessful, above, later successfully obtains water, (we expect this means either by well or some other source apart from rain water tanks) then he will share it with Mr Ulyatt by way of easement.

This does not seem to add anything much to what we have already said but at least it appears our respective clients have agreed. Could you please confirm at the earliest possible opportunity.

Yours faithfully,
DOWLING & CO

R.H.Hill"

The respondents had already put down a bore which had proved to be dry and the first point of dispute about the letter of 9 December 1983 is whether in recognition of the difficulties faced by the vendors it was intended by the parties to replace Clause 20 by the terms set out in the letter or whether the new terms were to be read in conjunction with the original provision. The second point is whether paragraph (c) if it came into operation by virtue of the failure to

obtain water under either of the two preceding paragraphs contemplated a supply being obtained as a pre-condition of settlement or whether if the methods proposed in paragraphs (a) and (b) were unsuccessful the purchasers were bound to complete and take their chance on water becoming available later. There is some dispute as to whether the respondents took all proper steps under paragraph (a) but that issue cannot be resolved on the information before me. It is clear however that water was not able to be supplied from Taruna. No further bore was put down in compliance with paragraph (b) and the extent of the respondents' obligation in that regard is clouded by the terms of a letter written by the applicants' solicitor on 30 May 1984.

The letter was as follows:

"

H. Hugh Gordon
Solicitor

30 May 1984

Messrs Kelly, McNeill & Co
Solicitors,
P.O. Box 1148,
HASTINGS.

Attention: Mr Gresson

Dear Sirs,

re: K.D. Ulyatt and Carol

The writer has spoken to your Mr Gresson on several occasions in connection with this matter.

The writer now has firm and final instructions to act for Mr Ulyatt in this regard having taken over this matter from Mr Hill of Dowling & Co. Of the most immediate importance is the matter referred to in Mr Hill's letter to your firm, of 7th May. The writer wishes to confirm that it is not Mr Ulyatt's instructions that a well be drilled upon your clients or the land to be purchased by Ulyatt. Mr Ulyatt is well aware that attempts have been made to drill on land higher up the Te Mata Peak Road from your client's property and also on the Tarauna property, both without success. An alternative method of water collection and supply for water to both sites, has been investigated. The writer is not absolutely sure whether the investigation is to take the form of a report but writes merely to correct the impression that his client does not wish a well to be drilled upon the land but still insists that water be supplied and believes that an alternative method of obtaining water in the circumstances, may be preferable.

We shall communicate with you further in this regard shortly.

Yours faithfully,

H.H. GORDON"

This letter also is construed differently by the parties. The respondents contend that a waiver of paragraph (b) of the letter of 9 December 1983 is contained in the words:

"The writer wishes to confirm that it is not Mr Ulyatt's instructions that a well be drilled upon your clients or the land to be purchased by Ulyatt."

On the other hand the applicants say that insistence by them on compliance with the covenant for supply of water whether paragraph (b) be interpreted as a replacement of or an amendment to the original clause 20 is apparent from the passage which reads as follows:

> "The writer ... writes merely to correct the impression that his client does not wish a well to be drilled upon the land but still insists that water be supplied and believes that an alternative method of obtaining water in the circumstances, may be preferable."

Mr Grayson suggests that the true intent of the writer is to be discerned by omitting the word "not" before "wish". If that were done then it would appear that the writer was confirming the earlier passage. I do not think that it would be permissible to do that unless parol evidence were heard as to the actual intent of the writer and as to his client's instructions on the point. The letter is confusing in its terms and appears to be contradictory in its different parts. I do not think that either party can rely upon it with any confidence in support of their respective cases in the present state of the evidence.

If this letter does not amount to a waiver of paragraph (b) of the letter of 9 December 1983 then whether the requirements of that paragraph have been satisfied becomes a central issue. As I understand the evidence they have not been.

The applicant has commenced an action in this Court seeking an order for specific performance of the contract or alternatively the return of sums amounting to $24,500 which he has paid on account of the purchase price. No statement of defence has been filed as yet but clearly the action will be defended. The applicants wish to prevent any dealing affecting the property until the question of their right to purchase the land has been decided. The respondents wish to offer the land for sale to other prospective purchasers which they cannot practically do so long as it is subject to the caveat.

Counsel agree that the basis upon which an application of this sort should be determined is as stated by McCarthy P in Catchpole v Burke /1974/ 1 NZLR 620, 625 in the passage of the judgment which reads as follows:

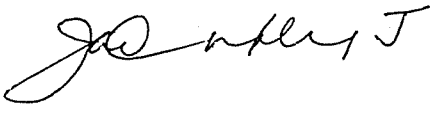
> "Doubtless when it is plain to the Court that the Caveator cannot possibly succeed in establishing his claim against the registered proprietor it is proper to refuse to extend the Caveat... But where there are doubts surrounding the rights of the Caveator, the cases quoted by the Chief Justice seem to me to establish that the proper course is to extend the Caveat until the conflicting claims of the different parties are determined in actions brought for that purpose."

In order to justify an extension of the Caveat the applicants must show that in their action they have an arguable case with some prospect of successfully establishing that they have an enforceable agreement to acquire the legal

ownership of the land subject to the caveat. It appears to me that this will depend in large part upon what view is taken of the letter of 30 May 1984 and in my view it is reasonably possible that the construction for which the applicants contend may be found to be the correct one. If that should turn out to be so their claim to enforce the contract may succeed. There is sufficient substance in their claim to lead me to conclude that it would be unfair to them to permit the land to be sold to another before the issues raised in their action have been determined.

There will be an order that the caveat do not lapse before the 28th day of February 1985. I limit the time of the extension in order to ensure that there is no delay in bringing the action to trial. I shall not lay down any fixed timetable for the taking of the various steps which may be involved in making the action ready for trial realising that it may not be heard in February but in the expectation that if reasonable progress has been made by then it is unlikely that there will be any difficulty in obtaining a further extension.

Costs are reserved.



Solicitors

Bannister & von Dadelszen, Box 745, Hastings for Applicants

Kelly, McNeil & Co., P.O. Box 1148, Hastings for Respondents