S-T 1 Set I

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.No.292/83

IN THE MATTER of the Land Transfer Act 1952

AND

IN THE MATTER of Caveat No. B263776.1 lodged against all that parcel of land comprised and described in Certificate of Title Volume 1008 Folio 129

BETWEEN MAURICE JULIAN KENDON of Auckland, Accountant

Applicant

AND ROBERT FRANCIS HOYLE of Auckland, Airline Pilot and EDNA MARY HOYLE of Auckland, Married Woman

First Respondents

AND DUGGAN MURPHY & WILSON NOMINEES LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as a Solicitors nominee company

Second Respondent

AND CHRISTOPHER CHARLES KENNELLY of Auckland, District Land Registrar for the Land Registration District of North Auckland

Third Respondent

Hearing: 27 and 30 March, 1984.

Counsel: K.C. Manley for Applicant
H.F. Murphy for First and Second Respondents

Judgment: 30 March, 1984.

(ORAL) JUDGMENT OF VAUTIER, J.

This is a matter which I think it is necessary that the Court should dispose of at once and indeed I have, following the helpful arguments presented, been able to arrive at a clear view on what should be done. The motion before me today is a notice of motion for an order pursuant to s.148 of the Land Transfer Act 1952 permitting a second caveat to be registered against the title of land in the name of the first respondents. The history of the matter is that the applicant lodged a caveat against this title being land of which the first respondents are joint tenants on 22 February, 1984. The caveat described the interest as follows:-

> "I (the applicant) claim to be beneficially interested in the estate of ROBERT FRANCIS HOYLE of Auckland, Airline Pilot, and EDNA MARY HOYLE his wife in the land hereinafter described to the extent of one moiety thereof by virtue of an implied or resulting trust of which the said ROBERT FRANCIS HOYLE and EDNA MARY HOYLE are the trustees and I the beneficiary."

The applicant received on 1 March, 1984 a notice from the Registrar in terms of s.145 of the Act that application had been made for the registration of an instrument affecting this land. The applicant unfortunately did not succeed in making application to this Court within the 14 day period fixed by s.145. His application is dated 15 March but although it is accepted that some endeavours were made to have the papers filed in this Court on that date this did not prove possible

and the application for an order that the caveat do not lapse was not filed until the 16th March. It was then found by the applicant that the Registrar had taken the step of treating the caveat as having lapsed in terms of the section. This situation was made known to this Court when the first motion filed in these proceedings was brought on for hearing on 27 March. I heard the matter on that occasion and adjourned that motion in order that the applicant should have the opportunity of moving for an order in terms of s.148 of the Act permitting him to lodge a second caveat to protect the interest sought to be protected by the caveat which had lapsed. This further application in which leave is sought to abridge the time for giving notice of the motion has been served on the District Land Registrar but there has been no appearance on behalf of the third respondent and that, of course, is the usual situation, i.e. that he abides the decision of the Court in the matter.

Mr Murphy on behalf of the first and second respondents has consented to the abridgment of time so that the matter could be disposed of today and the Court has granted leave, as sought, for the affidavit filed in support of the first motion and the affidavit in opposition thereto to be used in relation to the motion now to be considered.

It should be mentioned that the proceedings to which the applicant refers in his affidavit as about to be commenced have indeed now been filed in this Court and I am advised duly

served on the first respondents. In these proceedings, as is agreed, the applicant seeks an order for specific performance of the agreement to which he deposes in his affidavit in support of the present application. The implied or resulting trust to which reference is made in the caveat is said by the applicant to arise in the following way. The first respondents are the parents of the applicant's wife. He and she have recently separated. Prior to their so doing the applicant says that the situation was that the respondents had been endeavouring for some time to sell two sections in Titirangi which they owned and had not succeeded in so doing. Paragraphs 9, 10, 11 and 12 of the applicant's affidavit read as follows:-

> "In December 1982 the First Respondent, Robert Francis Hoyle, and I discussed the difficulties that the Hoyles were having in selling the sections and we agreed on a basis on which I would try and obtain a sale on their behalf. It was agreed that I should try and sell the sections; Mr Hoyle stated the price that he wanted $22000.00 for the land comprising the sections and anything I sold for above that was mine and my wife's.
>
> In April 1983 I negotiated a sale of the section adjoining that subject of the present application to one Barry Spencer and his wife Margaret. The sale price was $25500.00. The sale was settled in May 1983 and I received from the First Respondents $3500.00 being the difference between the sale price and the figure of $22000.00 which they were wanting from the sale.
>
> Around the time of Mr and Mrs Spencer showing interest in the section sold to them Mr Hoyle and I had further discussions over the section subject of this application and it was agreed between us that rather than sell that section to a third party and I and my wife receive the proceeds of sale that it would be transferred to my wife and myself jointly.
>
> I also, and with the knowledge of the Hoyles, and their encouragement and agreement, commissioned engineers reports on the section

> for the purposes of finding out what would be necessary by way of special works to enable a dwelling to be built on it with a view to obtaining a building permit in due course to build. In addition, and with a view to not only making the section more attractive but also with a view to making the section eventually sold to Mr and Mrs Spencer more attractive I undertook the clearing of weeds and trees and general tidying up of both sites."

The matters therein referred to are amplified in subsequent paragraphs of the affidavit and the steps that the applicant has taken in an endeavour to bring matters to a finality are referred to but the essential situation is indicated by the paragraphs to which I have referred.

The first-named of the first respondents in the only affidavit filed in opposition to the present application, sets forth only one paragraph in which the facts of the matter are commented upon and this paragraph reads as follows:

> "I say that at all times material to the applicant's claim to the said land the relationship between my wife and myself on the one hand and the Applicant and my daughter, his wife, on the other was that of parent and child and that any dealings between my wife and myself on the one hand and the applicant and my daughter on the other in relation to the said land were solely in the nature of donors and donees. With the breakup of the Applicant's marriage to my daughter no question of completing a gift to the applicant will be contemplated by my wife and myself."

The question for the Court is whether or not in this situation an order should be made under s.148 permitting the Registrar to accept a second caveat for registration.

Mr Manly on behalf of the applicant submits that the first matter for consideration is whether or not the caveat as

registered discloses a caveatable interest. He submits it does by referring to an implied or resulting trust as described therein and he further submits that so far as the question of whether or not the applicant does in fact have an interest in this land which is capable of sustaining a caveat the Court should accept the matters to which he deposes notwithstanding the denial that may be read out of the statements that are made by the first-named of the first respondents in his affidavit because all that the applicant is required to do is to show that he has an arguable case and the Court is not required to determine the substance of the dispute between the parties. That situation, of course, is clearly accepted in the various authorities reported as being the proper approach. One need only refer in this regard to the decision of the late Chief Justice in Catchpole v. Burke [1974] 1 NZLR 620. There, of course, it was an extension of caveat that was being dealt with but I do not think that any distinction can be drawn as regards the application under s.148 insofar as this particular aspect is concerned.

Mr Manly further points out that the fact that there is no agreement in writing as to the alleged undertaking to transfer the land to him and consequently no fulfilment of the condition in that regard required by the Contracts Enforcements Act is not vital as regards an application for specific performance and, further, he points out that the adequacy or inadequacy of the consideration may not be a relevant consideration for the Court when the matter comes to be determined.

The matter, he submits, should be approached on the same basis as that which would be adopted in relation to an application for an interim injunction made in the course of proceedings in this Court seeking an order for specific performance. Applying those standards he submits that the affidavit of the applicant clearly discloses an arguable case and the balance of convenience must be said to be in favour of the applicant because his right to specific performance if he is able to establish it could be lost if he is unable to protect the interest claimed by means of a caveat.

Mr Murphy on behalf of the first and second respondents opposes the making of the order on three broad grounds. First, he submits that the description in the caveat itself is insufficient and does not meet the requirements of s.138 as to the contents of the document. The trust interest referred to, he says, is not sufficiently clearly designated. It could be referable to such an interest as an easement or a profit a prendre. Secondly, he points out that the affidavit of the applicant does not disclose any caveatable interest at all in respect of the interest which the second of the first-named respondents, Mrs Hoyle, has in the land in question. Thirdly, he points out that exceptional circumstances are required to justify the making of an order in terms of s.138 and he adverts to the fact that an earlier decision of my own, Metcalfe & Ors. v. Skyline Holdings Limited (unreported) M.372/81, Hamilton Registry, judgment 22 April, 1982 shows there has been no reported case which counsel were able to find in this country where the lodging of a second caveat had been permitted.

He refers to the statement in Adams on the Land Transfer Act 2nd Ed. p.355, para.419, where it is said that "except in very exceptional circumstances no such order would be made: a caveator who allows his caveat to lapse must be deemed for most practical purposes to have abandoned his claim". Reference is there made to the decision in Howell v. The Union Bank of Australia (Limited) [1888] 6 NZLR 567.

Mr Murphy also referred to a decision of the Supreme Court in South Australia, Deanshaw v. Marshall [1978] 20 SASR 146 and the passage in the judgment of Mrs Justice Mitchell at p.155, line 9.

I turn to consider these various arguments raised. As regards the sufficiency of the document itself it has to be noted that s.138 requires that the caveator shall state with sufficient certainty the nature of the estate or interest claimed by him. I had occasion to consider this aspect in the judgment to which Mr Murphy has also referred, New Zealand Mortgage Guarantee Co. Ltd. v. Pye [1979] 2 NZLR 188. In that case I held that the draftsman of the caveat had not complied with the requirements of the section. It is to be noted, as I mentioned in the course of the argument, that Casey, J. in a decision, Buddle v. Russell (unreported) M.391/83 Auckland Registry, judgment 24 August, 1983 held that the requirements of the section were met in a case in which the estate or interest sought to be protected was simply described as "by virtue of a constructive trust between (the respondent) and myself". As to those words he said on p.3 of the judgment:

> "Here the words used describe a situation which is quite clear to anybody reading the document; Mr Buddle wants to protect whatever interest he may have in the land as beneficiary under the constructive trust alleged. It is of the same character as that upheld in Peycher's case, where the husband claimed simply 'as cestui que trust of which my wife ... is trustee'."

The Judge in that case clearly considered that it was of some significance that the matter was one which arose between parties in a close relationship and no doubt, therefore, where neither would be under any misapprehensions as to the nature of the claim that was being put forward.

It is, I agree, clearly of importance that the nature of the interest claimed should be clearly specified in the caveat. This is a step which can be taken only on the authority of the statutory provision and of course it enables the caveator to prevent another person dealing in the ordinary way with his property.

I conclude in this case, however, that the requirements of s.138 are in all the circumstances sufficiently fulfilled. The point that Mr Murphy makes as to the quantum of the interest claimed is, I think, not really sustainable. The fact that the caveat refers to a moiety claimed against each of the first respondents makes it clear that the trust is alleged as against the property as a whole, i.e. the fee simple. There is here clearly no doubt in the mind of the first-named of the first respondents as to the nature of the claim put forward. That, I think, is evidenced by the fact, as mentioned by Mr Manly, that he does not in his affidavit in opposition seek to traverse

individually any of the allegations that are put forward as regards the various matters which were agreed between the parties or done in the course of the dealings between them with regard to this land.

As regards the question of whether or not an arguable case is made out, Mr Murphy did not seek to contend that no arguable case was shown on the affidavit of the applicant. As his contention was limited to the point I have already referred to as to there being no arguable case shown for any sustainable interest in the share of the land of Mrs Hoyle which, he pointed out, she could deal with as a registered proprietor quite separately from her husband. Upon consideration, however, I conclude that that really becomes just another one of the matters which are in dispute between the parties and would call for determination in the proceedings which have been commenced. As Mr Manly has submitted there are averments in the applicant's affidavit which would support an argument that both the first respondents were in agreement as to the creation of the trust or the undertaking to transfer the land to the applicant in the manner which he alleges. He referred in this regard to the statement in paragraph 9 of the affidavit where reference is made to both the first respondents and likewise in paragraph 12 of the affidavit in question. There could, of course, in any event, be argument as to whether or not Mr Hoyle in whatever he did was acting as an agent for Mrs Hoyle. Those matters, however, are clearly in my view simply a part of the contest which has to be resolved as regards questions of fact in issue and those matters clearly I am not called upon to determine today.

It is indeed clear that the view has been taken that an order under s.148 of the Act should only be made in exceptional circumstances. It is to be noted that there is a recent instance, although unreported, of a case where an order under this section has been made. In the decision to which I have earlier referred, Metcalfe & Ors. v. Skyline Holdings Ltd. (supra) I adverted on p.22 to a matter of Wigglesworth v. Mitri and Porter (unreported) M.1287/79 Auckland Registry, judgment 12 October, 1979 where Chilwell, J. made an order under this section in the particular circumstances which arose in that case, these being that the applicant did not succeed in obtaining a fixture for the hearing of his application within the second period referred to in s.145. This was, depending on the view taken of the matter, largely his own fault or the fault of his solicitor but the case was nevertheless treated as one where special circumstances existed.

Notwithstanding the fact that orders under this section have been, it is true, seldom it seems made, the fact remains that the section is in the statute and the Court must exercise the discretion thereby conferred upon it if it considers that circumstances exist which warrant that course. Certainly, in the present case it is not, I think appropriate to refer to the matter as one in which it could be said that the caveator must be deemed by reason of the caveat being allowed to lapse, to have abandoned his caveat. Clearly there was no intention whatever to abandon the caveat and it was only through the last minute failure to secure the filing of the papers in

time that the lapse arose. In all the circumstances I think that it is proper to regard this as a case where there are very special circumstances justifying an order permitting a second caveat to be registered. I think, however, that the order should certainly be made on terms, as Mr Murphy has submitted.

The view that applications of this nature should be regarded in the same kind of light as applications for interim injunctions has been adopted on a number of occasions recently. In Recent Law [1984] Part 1, page 34 there is a reference to an unreported decision of Savage, J. Leather v. Church of the Nazarene M.857/83, Auckland Registry, judgment 12 August, 1983 where, according to the report, His Honour stated the principle in this way in relation to an application under s.145:

> "In my view, on the authorities, where the caveator shows he has an arguable case or, to put it another way, there is a serious issue to be tried, the Court should ordinarily extend the caveat until the conflicting claims are determined in an action brought for that purpose; but, further, in the light of Eng Mee Yong v. Letchumanan [1980] AC 331, the Court may in appropriate cases require the caveator to give an undertaking as to damages as a condition of the extension."

The applicant in this case, by taking the step of seeking to prevent the first respondents dealing with the land in any way until his claim is disposed of, should in my view take the risk of that being shown to have caused the first respondents' loss if he should fail in his action. As Mr Murphy points out, there is of course the express power conferred by s.146 enabling the Court to award compensation where a caveat is shown to have been lodged without reasonable cause. It was suggested that

if a second caveat is authorised by the Court security should be provided for as a condition. I think, however, that the situation is probably met by requiring from the applicant the same form of undertaking as that which is given in relation to applications for interim injunction.

The other conditions to which Mr Murphy referred as appropriate if the Court should grant the leave sought, I think, are certainly appropriate and should be imposed. There will accordingly be an order in terms of s.148 requiring the District Land Registrar to receive a second caveat affecting the same estate and interest as that which was affected by the caveat dated 21 February, 1984 registered against the land of the first respondents but this order is made upon the following conditions:

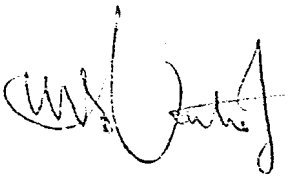
1) That the action commenced by the applicant in the Auckland Registry of this Court under A.No.232/84 be prosecuted with all due diligence.

2) That opportunity is reserved to either party to apply further in the present proceedings.

3. That the applicant is required to execute an undertaking to abide by the decision of this Court as to any damages which the first respondents' may show they have sustained by reason of the second caveat being registered against their title which they should not have been compelled to sustain.

In addition, it is indeed, I think, appropriate that the costs of these proceedings should be borne by the applicant who is clearly seeking an indulgence in respect of this second

application which should not have been necessary had he proceeded with proper diligence to make the necessary application in time. I fix the costs payable by the applicant to the first respondents in the sum of $250, plus proper disbursements.



SOLICITORS:

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