11/10

NZLR(CO)

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.1057/84

1243

BETWEEN CROMWELL CORPORATION LIMITED a duly incorporated company having its registered office at Wellington Property Owner

Plaintiff

AND MALCOLM DAVID HARDIE of Auckland Registered Valuer and MERYL MARJORIE SHALDERS of Auckland, Married Woman

First Defendants

AND COLIN GRAHAM HOLDAWAY, DESMOND ARTHUR WISHART, GORDON EDWARD VIAL, MICHAEL FELIX KELLY, PETER JOHN EDWARDS, DONALD JOHN COTTON, JOHN LEONARD CLARK, CHRISTOPHER ALEXANDER DICKIE, JOHN WOOLLEY, THOMAS CHRISTOPHER HOWIE FLEMING, GEOFFREY JOHN GARLAND BAXTER and SEAN DAMIAN WILLIAMS ("McVeagh Fleming Goldwater & Partners") all of Auckland, Solicitors

Second Defendants

AND HAYES-STEWART BROKERS LIMITED A duly incorporated company having its registered office at Auckland, Property Dealer

Third Defendant

AND LESLIE BAYLEY HAYNES, WARWICK NEVILLE WHITE, DONALD FREDERICK DUGDALE, IAN LESLIE HAYNES, KEITH WILLIAM BERMAN, LOUIS PATRICK McELWEE, RAYNOR JOHN ASHER, MILES ANTHONY AGMEN-SMITH, ROBERT MANWARRING NOAKES, SIMON CHARLES BLACKWELL and NIGEL ANTHONY SEEBOLD ("Kensington Haynes & White") all of Auckland, Solicitors

Fourth Defendants

AND GERALD CHAMBERS of Te Kuiti, Farmer c/- Nicholson Gribbin & Co., Solicitors, 14th Floor, Quay Tower, Cnr Custom & Albert Streets, Auckland 1, Caveator

Fifth Defendant

JUDGMENT OF SINCLAIR, J.

Hearing: 3/4 September, 1984

Counsel: Sorrell for Plaintiff
Crew for First and Second Defendants
Asher and Mather for Third and Fourth Defendants
MacRae and Shaw for Fifth Defendant

Judgment: 17 SEP 1984

JUDGMENT OF SINCLAIR, J.

These proceedings involved a number of applications in relation to a caveat issued by the Fifth Defendant against a piece of land registered in the name of the First Defendants.

At the commencement of the hearing Mr Crew, acting for the First and Second Defendants, informed the Court that while the First Defendants were named as the registered proprietors of the land and were not on the title, they acknowledged that they had entered into an agreement with the Third Defendant to sell to it or its nominee, and on being advised that the Plaintiff had been nominated the First Defendants considered themselves bound to transfer the property in accordance with the nomination. The Second Defendants were joined as solicitors for the First Defendants as they had received the moneys paid over by the Plaintiff on settlement and because of an injunction which I had granted on the 17th August, 1984.

As there was no objection from other counsel Mr Crew was given leave to withdraw, he indicating that the clients he represented would abide by any order of the Court.

I record that in relation to this action on the 17th August, 1984 just after mid-day I made, on an application submitted to me verbally by Mr Sorrell, an interim order that

all moneys paid by or on behalf of the Plaintiff in respect of the land in question paid over on the 16th August, 1984 to the Second Defendant on behalf of the First Defendants or to the Fourth Defendants on behalf of the Third Defendant was not to be dispersed or dealt with in any way except by leave of the Court. Save for some of those moneys which found their way into the hands of the Second Defendants, the moneys paid over on behalf of the Plaintiff remain intact and I will refer to the money which was expended by the Second Defendants following settlement and from the proceeds of settlement later in this judgement.

Before the Court at this particular hearing was a notice of motion to remove the caveat lodged by the 5th Defendant, being caveat No. 5320141 and registered against all that parcel of land containing 354 square metres more or less being Lot 1 on Deposited Plan No. 60421 and being all of the land comprised and described in Certificate of Title Volume 35C Folio 616, North Auckland Registry.

This particular caveat was lodged on behalf of the Fifth Defendant on the 16th August, 1984 at a time when solicitors representing the Plaintiff were in the process of settling a purchase of the land referred to in the caveat with the Second Defendants and after the cheques due in settlement had been handed over it was ascertained that the caveat had been lodged which prevented the registration of the transfer to the Plaintiff.

The above motion for removal of the caveat was filed by or on behalf of the Plaintiff and it was conceded that that particular application could not succeed as at the time the

Plaintiff was not in a position to avail itself of the statutory right contained in the Land Transfer Act 1952 to apply for a removal of the offending caveat. However, the second Defendants on behalf of the First Defendant had also filed a similar motion and that motion, of course, could proceed and without objection from the parties Mr Sorrell appeared in support of that motion. However, at the same time, because of the presentation of the transfer from the Third Defendant to the Plaintiff for registration, notice had been given by the District Land Registrar to the Fifth Defendant pursuant to S. 145 of the Land Transfer Act 1952 advising that unless an order of this Court was made that the caveat should not lapse the caveat would, in accordance with the provisions in this statute, lapse. In consequence of that notice the Fifth Defendant had filed a motion for an order that the said caveat do not lapse and thus there were the two motions before the Court.

So far as the onus of proof in respect of motions was concerned, it seemed to me that in the circumstances of this particular matter what the Court was required to consider was whether the caveator had an arguable case. If there was no basis for the caveat at all then, of course, the caveator could not hope to succeed in retaining the benefits of it. Such a course seems to me to be in accord with the decision of the Court of Appeal in N.Z. Limousin Cattle Breeders Society Inc. v. Robertson (1984)1 N.Z.L.R. 41. At page 43 the following appears:

> "It is often said that extension of the caveat will be refused only where it is plain that the caveator has no prospect of supporting the interest claimed. We would prefer to say that the onus is on the caveator to show an arguable

> "case: cf Plimmer Bros v. St Maur, Re Caveat No 2538 (1906) 26 NZLR 294, 296 (a case under what is now s 143 of the Land Transfer Act 1952); and see Catchpole v Burke (1974)1 NZLR 620. An order that the caveat do not lapse is like an interlocutory order to preserve property - some arguable case needs to be shown to clog the title of another."

Where a caveator seeks to obtain an order that the caveat do not lapse it seems to me that the above quotation is particularly applicable to such an application. As already mentioned, the Fifth Defendant has before the Court just such an application and the above test needs to be applied in any event with regard to a consideration of that particular application.

There are other decisions of both this Court and the Court of Appeal to the same effect as the above decision just referred to and there is no necessity for me in the circumstances to refer to them. However, to consider this matter it is necessary to go into the facts, in my view, in some little depth.

From an affidavit filed on behalf of the Plaintiff and sworn by a legal executive Kenneth Slaney, it appears that his employers, Messrs Wright & Co., were instructed by a firm of Wellington solicitors to attend to the settlement of a purchase of the piece of land earlier referred to in this judgment and which is known as 71 Symonds Street, Auckland, the transaction being between the First Defendants who were then the registered proprietors of the land and the Plaintiffs.

At that particular time the First Defendants had by an agreement dated 18th July, 1984 agreed to sell the property to Hayes-Stewart Brokers Ltd and/or their nominee for the

sum of $225,000 with a settlement date on the 13th August, 1984. The sale was expressed to be a conditional one, the condition being expressed in the following terms:

> "This agreement and completion thereof is conditional upon the contemporaneous settlement of the vendor's purchase of a property situated at 6 Whittaker Place, Auckland contained in CT 72/177."

Mr Slaney's affidavit disclosed that by an un-dated nomination made between Hayes-Stewart Brokers Ltd and the Plaintiff, the Plaintiff was appointed the nominee to complete the purchase of the property in question. The nomination, while un-dated, has been stamped by the Inland Revenue Department with a notation that the transfer had been stamped with date on the 16th August 1984 and it would appear to be either that day or the day before on which the nomination was executed.

Because of the type of transaction in which he was involved, Mr Slaney was instructed to settle at the Land Transfer Office and he had to settle both with the Second Defendants and with the Fourth Defendants by paying over cheques to them on behalf of their respective clients. As earlier related, shortly after settlement had been effected it was ascertained that a caveat had been lodged by the Fifth Defendant and the interest claimed by the Fifth Defendant was described as follows:

> "As beneficiary pursuant to a constructive trust by virtue of a certain constructive trust from Hayes-Stewart Brokers Ltd at Auckland, the purchaser of the said land pursuant to a certain agreement for sale and purchase from the vendor thereunder and registered proprietors Malcolm David Hardie of Auckland, Registered Valuer, and Meryl Marjorie Shalders of Auckland, married woman."

Mr Fenwick, a partner in the firm of Messrs Wright & Co. also made an affidavit and in the course of that he related a communication he had had with the Second Defendants after the making of the injunction in which he was informed that the purchase moneys which the Second Defendants had received had been expended. It now transpires that not all the money was expended but that certain of it was used to purchase the property referred to in the above agreement for sale and purchase at 6 Whittaker Place, Auckland, that purchase having been settled at about 3 p.m. on the same day and prior, of course, to the injunction being made. The balance of the settlement moneys is still held by the Second Defendants.

An affidavit was filed also by Mr S. C. Blackwell, a partner in the Fourth Defendants, who at the time of this transaction was acting for one Axel Henriksen. In the course of his affidavit Mr Blackwell disclosed that he had received instructions from Mr Henriksen that as between Hayes-Stewart Brokers Ltd and himself an agreement had been reached whereby Mr Henriksen was able to deal with that agreement and be entitled to such benefit as could be obtained from it. According to Mr Blackwell at that time Mr Henriksen, so far as he was aware, was neither a member nor an officer of Hayes-Stewart Brokers Ltd, but was able to conduct negotiations for the appointment of a nominee to the interests of Hayes-Stewart Brokers Ltd under the agreement.

One of the parties with whom negotiations were entered into for the purposes of taking up the nomination was the Fifth Defendant, but early in his affidavit Mr Blackwell makes it plain that from his point of view there was never a

concluded contract in favour of Mr Chambers and that that situation was brought about by there having been a failure to reach agreement as to the reward which Henriksen was to receive in return for securing the Fifth Defendant, Mr Chambers, as the nominee in relation to the contract. The affidavit records that on the 7th August, 1984 solicitors acting for Mr Chambers forwarded to his firm an application form of agreement which provided in general that Mr Henriksen would procure the nomination of Horizon Equities Ltd as nominee, that being a shelf company which later would transfer the property to a new company to be incorporated by Mr Chambers to be called Tower Projects Ltd and in which Mr Chambers would have all the shares save one and that one share would be vested in Mr Henriksen. Under that draft agreement Mr Chambers was to have the option of purchasing that one share on the development of the property for the lesser of $120,000 or 20% of the net profit that the company made onthe development. That proposal was not suitable for Henriksen.

Under cover of a letter dated 13th August, 1984 Mr Chambers' solicitors forwarded to Mr Blackwell a second set of documents; the principal change was that Mr Chambers was to buy the one share upon demand, but such demand was not to be made before the expiry of 18 months. Later in the day on the 13th August, 1984 Mr Henrikson had a number of telephone conversations with Mr Chambers, the latter being at that time in Te Kuiti. At the conclusion of Mr Henriksen's conversation Mr Blackwell deposes to the fact he spoke with Mr Chambers who confirmed that he was prepared to vary the agreement whereby Mr Henriksen was to receive $30,000 on settlement with the balance of his entitlement to be the

lesser of $120,000 or 18% of the net profit less in each case the $30,000.

In consequence of that Mr Blackwell had a number of conversations with Mr Galloway who was acting as Mr Chambers' legal adviser and some difficulty was being experienced in arriving at a formula whereby the net profit could be calculated. Mr Blackwell states that he did agree that the purchase price of $225,000 would be a deduction and later that the $30,000 to be paid on settlement to Mr Henriksen should also be a deduction and that was agreed to.

As a result of these telephone conversations Mr Blackwell amended Mr Galloway's second draft and had it signed by Mr Henriksen and sent it to Mr Galloway on the afternoon of the 14th August, 1984. Mr Blackwell contends that shortly after that occurrence he had a telephone conversation with Mr Galloway in which it was claimed that Mr Chambers was requiring a further deduction in calculating the net profit, namely that there should be taken into account interest on the above figures of $30,000 and $225,000. Mr Blackwell states that he commented that the new stipulation could very well be the last straw. According to Mr Blackwell Mr Galloway replied that he would not in any event want to use Mr Blackwell's documents, but would prepare new documents himself.

For his part Mr Blackwell says that he made it quite clear that it seemed to him that it would be unlikely that Mr Henriksen would accept the interest proposal. On the following day, the 15th August, 1984 Mr Blackwell states that Mr Henriksen confirmed that he was not prepared to further negotiate with Mr Chambers, whereupon Mr Blackwell telephoned

Mr Galloway and enquired whether the latter had found the documents forwarded by Mr Blackwell the previous day to be acceptable. According to Mr Blackwell the reply he received was that Mr Galloway wished to prepare new documents making changes in connection with the definition of the net cost of the development by providing for additional items to be deducted, one being the interest on the $30,000 and the $225,000.

Paragraph 8 of Mr Blackwell's affidavit goes on to state that Mr Galloway commented that he could not "operate by remote control with his client" and that he required to see Mr Chambers and would do so the following day. Mr Blackwell states that he then informed Mr Galloway that his client was not prepared to continue treating with Mr Chambers and that any offer that might then be on foot was withdrawn and any counter offer would be rejected. From Mr Blackwell's point of view that was the end of the dealing and the following day the settlement took place with the Plaintiff.

Mr Chambers in reply stated that he first became interested in the property after having had a discussion with Mr R. Hunter. director of Civil and Civic N.Z. Ltd on the 13th July, 1984. Mr Chambers stated that Mr Hunter had told him that Mr Henriksen claimed that he was authorised to on-sell the land in question on behalf of Hayes-Stewart Brokers Ltd. Mr Hunter was then instructed to make Mr Henriksen an offer being the lesser of $120,000 or 20% of the net profit from the development of the land in return for Mr Henriksen's agreement to nominate Mr Chambers or a company to be formed by him as purchaser of the land. According to Mr Chambers he was on the 1st August, 1984

informed by Mr Hunter that Mr Henriksen had accepted the offer in principle.

Mr Chambers deposes to the fact that after discussion with Mr Galloway and one of Mr Galloway's partners, Mr Gunson who specialises in taxation law, a draft agreement was produced on 9th August, 1984. Mr Chambers acknowledged that the form of the agreement was somewhat involved and he related that the initial nomination would be taken in the name of Horizon Equities Ltd which would later transfer the property to a new company, Tower Projects Ltd, and that Mr Henriksen would have a single share in the latter company.

As a result of a communication from Mr Hunter which indicated that Mr Henriksen may have been going to deal with another party, Mr Chambers states that he rang Mr Henriksen and that the matter was sorted out between them, particularly in relation to the fact that there had been no time limit fixed within which the property was to be sold or developed. Mr Chambers says that he made certain alterations to the agreement, handing those to Mr Hunter on the 11th August, 1984 when he called at Mr Chambers' property at Te Kuiti and that the documents were then to be delivered to Mr Galloway on the Monday morning.

On the 13th August, 1984 Mr Chambers states that Mr Henriksen rang and asked for an immediate payment of $30,000 in addition to what had already been agreed. He states that he refused, but later spoke to Mr Henriksen and suggested a counter offer of an immediate payment of $30,000 but reducing the later payment for his share in Tower Projects Ltd to the lesser of $90,000 or 15% of net profit on the development.

Later that afternoon Mr Chambers states that Mr Henriksen rang again stating that he was calling from his solicitors office and asking for a modification which would result in the payment of $30,000 immediately and the lesser of $90,000 or 20% of net profit on development. After some negotiations it was stated that a percentage figure of 18% in respect of the 20% was agreed to and that Mr Henriksen agreed to accept the $30,000 in 30 days time. According to Mr Chambers, to ensure that matters were properly recorded he repeated the agreement which had been reached with Mr Henriksen. His affidavit in paragraph 9 reads as follows:

> "I then repeated the agreement we had reached to Henriksen as follows:-
>
> "Henriksen would receive $30,000 cash within one month and the lesser of $90,000 or 18% of the nett profit on development calculated in accordance with the formula stipulated in the draft agreement. Henriksen confirmed that this was the agreement and that we had a deal. I was insistent about establishing the exact terms of the agreement and that it was binding on both of us due to Henriksen's increasing demands and to its on-again, off-again history over the past few days. He then asked me if I would like to speak to his solicitor. I understood by this that Henriksen wanted to make sure that the deal was binding on both of us and I readily agreed to speak to his solicitor. The solicitor took the phone and I introduced myself. The solicitor said that 'as I understand it the Agreement is that Axel Henriksen will receive $30,000 cash within one month of settlement of the purchase and he will receive the lesser of $90,000 or 18% of the nett profit on development calculated in accordance with the draft Agreement.' We agreed that otherwise the terms of the agreement were to be as in the draft Agreement. I confirmed that this was the agreement and asked if we had a definite deal. The solicitor confirmed that 'we have a deal' whereupon I asked to whom I was speaking. He said 'my name is Blackwell.'"

It is to be noted that in that purported agreement there was a reference to the net profit being calculated in accordance with the formula stipulated in the draft agreement. That

conversation was on the afternoon of the 13th August, 1984 at a time when the second draft agreement had been forwarded by Mr Galloway to Mr Blackwell and it is not clear from what Mr Chambers says as to whether the reference to the draft agreement was the first one which he had seen or the second one prepared by Mr Galloway which I infer from all the evidence he had not, at that time, seen as he had been in Te Kuiti all the time. However, so far as Mr Henriksen was concerned I think it reasonable to infer that he was directing his mind to the second draft agreement.

Mr Chambers stated that having had the above telephone conversation he spoke to Mr Galloway telling him he had reached agreement with Mr Henriksen and that the $30,000 was to be included as part of the cost of the project before any net profit was calculated. Mr Chambers stated that he thought that Mr Henriksen understood that, but suggested that Mr Galloway ring to confirm that that was Mr Henriksen's understanding. The following day on the 14th August, 1984 Mr Chambers stated that he again spoke to Mr Henriksen by telephone and wanted to be sure that the $30,000 to be paid to Mr Henriksen and interest thereon would be treated as a cost against the development because, if not, then Mr Henriksen would in effect get 18% of the $30,000. It is to be noted that interest on the $30,000 was raised for the first occasion. According to Mr Chambers Mr Henriksen stated that although he had not thought the matter out, he agreed that the correct way of dealing with the $30,000 was to treat it as a development cost.

The following day Mr Chambers states that he came to Auckland and saw Mr Galloway in the afternoon and was informed

that Mr Henriksen's solicitors had purported to withdraw from the agreement at about 11.45 a.m. on that day. Mr Chambers states that he was furious, stating that Mr Henriksen could not withdraw as the final agreement had been reached on the evening of Monday, the 13th August 1984. He states that he then signed the amended agreement which Mr Galloway had prepared to reflect the arrangements which had been reached and delivered it to Mr Henriksen's solicitor himself. Mr Chambers' affidavit concludes relating a conversation he had with Mr Blackwell at the time, but that conversation has no bearing on the issues which are involved in this matter.

Mr Galloway also made an affidavit on behalf of the Fifth Defendant and he came into the matter quite early on behalf of Mr Chambers. One of his first actions was to have a search made of Hayes-Stewart Brokers Ltd. That search disclosed that Mr Henriksen was not a shareholder or director and he states that in consequence he spoke to Mr Haynes, one of the Second Defendants, and he disclosed to Mr Haynes the result of the search and Mr Haynes replied to the effect that Mr Henriksen had "control". Rather strangely this apparently was not pursued by Mr Galloway any further and I comment that throughout all the documents nowhere can I ascertain precisely what Mr Henriksen's relationship with Haynes-Stewart Brokers Ltd was and quite remarkably there is no evidence of anybody having made any attempts to discover precisely what his relationship with the company was.

Mr Galloway deposes to the preparation of the first drafts and to his subsequently receiving from Mr Chambers,

as deposed by Mr Chambers, that draft duly amended which was in consequence of the discussion which Mr Chambers had with Mr Henriksen. He further deposes to preparing a second draft and a photocopy of that draft as annexed to his agreement and marked Exhibit F.

As originally drafted Clause 6 has five sub-paragraphs in which definitions are given to various phrases used in the draft agreement and which relate in the main to the manner in which the net profit was eventually to be calculated.

On the 13th August, 1984 according to Mr Galloway he received a telephone call from Mr Blackwell stating that as a third party, presumably the present Plaintiff was negotiating on more favourable terms and the document Exhibit 'F' which had earlier that day been delivered to the Second Defendants as Mr Henriksen's solicitor would not be signed. That fact was communicated to Mr Chambers and Mr Galloway states that on the 13th August, 1984 he had a further telephone call from his client stating that agreement had been reached for the basis of the purchase of Mr Henriksen's share in the company to be affirmed and, as Mr Galloway sets it out, settlement was a payment of a sum of $30,000 and the lesser of $90,000 or 18% of the amount calculated as the market value of the land and any building thereon at the time of the purchase of the share, less all costs incurred by Tower in purchasing and/or developing the property. He further states that on the same day he had had some telephone discussions with Mr Blackwell in an attempt to resolve any differences which

existed and states that it appeared that they had been able to reach agreement and that Mr Blackwell would amend the second draft to reflect the new arrangements.

What is significant is that Mr Galloway acknowledges in paragraph 14 that he did inform Mr Blackwell that as Mr Chambers resided in Te Kuiti it was difficult to deal with the matter by remote control and that Mr Chambers would need to see the document in its final form to ensure that it accurately reflected the agreement reached with Mr Henriksen. He stated that he further indicated that he could not bind Mr Chambers to any amendments or wording until Mr Chambers had approved them.

On the 14th August, 1984 Mr Galloway acknowledges that he received from Mr Blackwell the second draft amended and actually signed by Mr Henriksen, but Mr Galloway states that on reading the documents he realised that the agreement as drafted by Mr Blackwell did not reflect his understanding of what had been agreed to. Accordingly he rang Mr Blackwell and stated that the consideration for the nomination was as recorded in paragraph 13 of his affidavit and which I have just referred to in this judgment, and that the phrase "all costs incurred in the purchase of the land" was to include the purchase price for the property, namely the sum of $225,000, and the initial payment of $30,000 and interest thereon as detailed in the final agreement.

He went on to depose that he informed Mr Blackwell that incidental changes would be required in the definitions of the final agreement as a consequence of these "points". He further deposed that he stated he was drafting a final agreement which would deal with the points just referred to

and which would reflect full details of the consideration to be provided by Mr Chambers to Mr Henriksen for the nomination and as understood by both Mr Blackwell and Mr Galloway.

On the 14th August, 1984 Mr Galloway states that he received a call from Mr Varney who is employed by the Second Defendants, seeking confirmation that the purchase of the property by Mr Chambers was to proceed. Mr Galloway says he gave that confirmation, stating that Mr Chambers would have to come to Auckland and sign them and that he had made an appointment to see him at 9 a.m. onthe 16th August, 1984 for that very purpose.

The following day, the 15th August, 1984 Mr Galloway acknowledges that he received a telephone call from Mr Blackwell enquiring whether the terms of the agreement which Mr Blackwell had sent theprevious day had been agreed to. Mr Galloway states that he then advised that they did not reflect his understanding of the agreement as conveyed to him by Mr Chambers, whereupon Mr Blackwell informed him that Mr Henriksen had received another offer for the nomination and that the signed offer made to Mr Chambers the previous day was withdrawn.

Mr Galloway further stated that he enquired whether the problem was the interest as an expense, whereupon he received the reply that Mr Henriksen regarded Mr Chambers' expenses in calculating the net profit as being too great. According to Mr Galloway, he having no authority from Mr Chambers to vary the oral agreement, the conversation ended at that point. That turn of events was notified to Mr Chambers by Mr Galloway with the result that Mr Chambers came to Auckland and,

according to Mr Galloway, confirmed the final agreement had accurately reflected the terms of the agreement reached with Mr Henriksen on the 13th August, ,1984 and that that final agreement was subsequently delivered by Mr Chambers to Mr Blackwell.

A subsequent affidavit from Mr Slaney, sworn on the 22nd August 1984, disclosed that a further caveat was lodged on behalf of the Fifth Defendant in which the interest claimed was as purchaser"by virtue of a certain agreement for sale and purchase from the vendor thereunder and registered proprietors Malcolm David Hardie of Auckland, Registered Value and Meryl Marjorie Shalders of Auckland, Married Woman."

Somewhat later an affidavit was sworn by Mr Hunter which refers to some of the meetings which have earlier been referred to and he refers to a conversation which he had with Mr Henriksen in relation to the property in question. According to Mr Hunter he had been informed by Mr Henriksen that he, Henriksen, had purchased the property with three partners, all of whom had by then renegged and that Mr Henriksen was facing settlement on the 13th August, 1984. Mr Hunter says that Mr Henriksen explained that the property had been purchased inthe name of the Third Defendant or nominee and that he had authority to nominate a purchaser on the company's behalf. Mr Henriksen, according to Mr Hunter, had both a liquidity problem and a tax problem and would be prepared to nominate Mr Chambers as purchaser in return for an arrangement by which Mr Henriksen would receive a payment in the region of $120,000 tax free.

Mr Henriksen himself also swore a third affidavit on the 31st August, 1984 wherein he describes himself as an insurance broker and in which he claims that he made it clear to Mr Chambers that any arrangements which were made were subject to a contract being drawn up and approved by their respective solicitors and signed by them both. As to his withdrawal from negotiations, he states that after having made some concessions he was then asked to have further items deducted to arrive at a net profit and that he was asked in addition to deduct interest at commercial rates on certain items before the net profit was ascertained. As such a concession could reduce his potential return by some thousands of dollars he instructed his solicitors to cease negotiating with Mr Chambers.

The only other affidavit which contains anything of significance is one from Mr Varney who is employed by the Second Defendants and in which he states that after settlement had taken place in respect of the sale to the Plaintiff he carried out a settlement in respect of the purchase by the First Defendants of the property at 6 Whittaker Place, Auckland, which agreement also contained a condition similar to that contained in the agreement for sale between the First Defendants and the Third Defendant. The agreement the First Defendants had in respect of 6 Whittaker Place, Auckland was with Upland Holdings Limited and paragraph 12 of that agreement provides as follows:

"This agreement and completion hereof is conditional upon the contemporaneous settlement of the purchasers' sale of their property at 71 Symonds Street, Auckland." Mr Varney states that the First Defendants placed the utmost importance

on the inter-dependence of the two agreements for sale and purchase and in consequence of that he settled the purchase of the Whittaker Place property on the 16th August, 1984 at about 3 p.m. The balance over and above the amount re-required for the purchase, he deposes, is now retained in his employer's trust account.

The present position is that while the Plaintiff has paid over the settlement moneys in respect of the Symonds Street property, it cannot get its transfer registered, nor can it deal with the property in any way because of the presence of the caveat. The first matter, therefore, is to determine whether there was any concluded contract as between the Fifth Defendant, Mr Chambers, and Mr Henriksen. As I have already pointed out, just precisely what Mr Henriksen's position in relation to the Third Defendant was has not been disclosed. It is unsafe to speculate. He may have been an agent of some description; he may have been acting under a power of attorney, he may have even been a creditor of the Third Defendant. Suffice it to say that having regard to the subsequent nomination by Mr Henriksen of the Plaintiff company, there is sufficient for me to assume that he had the necessary authority to deal with Mr Chambers on behalf of the Third Defendant and in relation to the nomination. The principal question is whether there was a concluded agreement between those two persons.

I have been at pains to set out in some detail the contents of the affidavits which have been filed on both sides for two reasons: firstly it was a contention of the Fifth Defendant that there had been an oral contract arrived at as a result of the telephone conversation between Mr

Henriksen and Mr Chambers on that day and secondly to highlight the course of conduct which had been followed by Mr Henriksen and Mr Chambers and their respective legal advisers during the course of the negotiations.

When one has regard to all of the evidence, remembering that in this context the onus of showing that a concluded contract to nominate the Fifth Defendant as the purchaser rested on him, then I have no hesitation in saying that the Fifth Defendant has failed to show that any concluded contrac had ever been arrived at.

During all of the negotiations which went on there were from time to time agreements on various heads arrived at. But at no stage was there, in my view, a total agreement on all terms. If there had been a total agreement on all terms one asks why there was the necessity for any further negotiations after that date and why was there any necessity for the preparation of the final agreement by Mr Galloway and which was taken by Mr Chambers to Mr Blackwell after there had been a cancellationof all negotiations by Mr Blackwell on the 15th August, 1984.

I refer once again to that which Mr Chambers set forth in his affidavit and in relation to the telephone conversatio which took place on the 13th August, 1984 and which is set ou in full in the earlier part of this judgment. Nowhere in that conversation, or the record of it as deposed to by Mr Chambers, is there any reference to interest on the $30,000 being claimed as a cost as against the net profit and certainly nowhere in there is there any reference to interest on the $225,000 being treated as an item which should be

taken into account in assessing that net profit. The first time that interest on the $30,000 was raised was on the 14th August, 1984 when Mr Chambers rang Mr Henriksen. Even at that time there was no reference to interest on the $225,000. When one compares the final draft agreement as prepared by Mr Galloway with that tendered by Mr Blackwell there are significant differences. In Mr Blackwell's final draft as signed by Mr Henriksen the purchase price of the share to be vested in Mr Henriksen was stated to be the lesser of $120,000 or 18% of the amount which was calculated by a formula set out by Mr Blackwell in the agreement. That method of purchasing the share was very different from that which was set out in paragraph 3(b) of Mr Galloway's final agreement which provided for a payment of $30,000 in respect of that share and the lesser of $90,000 or 18% of the amount calculated as the sale price of the land and any building thereon less all costs incurred in a manner which was set forth in the agreement.

In Clause (8) of Mr Blackwell's final draft the various deductions which were to be made in arriving at the net profit were set forth, while in Mr Galloway's final draft these were contained in clause (6) and there are very significant differences between the two. I do not intend to refer to all the differences, but they can be easily ascertained on an examination of the two draft agreements. Of great significance is the fact that in Mr Galloway's agreement the cost price of the land and the $30,000 to be paid to Mr Henriksen were to be taken into account before net profit was arrived at. In Mr Blackwell's draft the cost of

the purchase of the land was to be a deduction, but at that stage not necessarily the $30,000 to be paid to Mr Henriksen. But of major significance was the introduction at that time into Mr Galloway's draft of a deduction for interest at commercial rates, inter alia, on the amounts of $225,000 and $30,000 just referred to. Nowhere before did that provision ever appear. There had been some suggestion by Mr Chambers to Mr Henriksen according to Mr Chambers' affidavit, that interest was to be a factor so far as the $30,000 was concerned, but never was there suggested a rate at which that interest should be levied. Certainly there was no mention of interest at commercial rates and of course to allow that as a charge could alter the amount which would eventually be payable to Mr Henriksen by a very considerable sum.

Despite all the submissions which were made to me by Mr McCrae, I am of the certain view that no concluded agreement was ever arrived at between Mr Chambers and Mr Henriksen and that at the time when Mr Blackwell purported to sever negotiations the parties were still endeavouring to reach an agreement but no concluded contract had ever been arrived at. If a concluded contract had been arrived at I cannot comprehend the necessity for Mr Galloway's final agreement introducing new terms which had never been alluded to before and which had never been discussed. The whole situation is much more consonant with the attitude adopted by Mr Blackwell and Mr Henriksen that Mr Chambers' requirements as to the deductions which were to be made before the net profit was arrived at were being varied from time to time to a point where it was no longer desirable to continue negotiations with Mr Chambers.

I appreciate that this is but an interlocutory application, but Mr Chambers must at least show that prima facie a contract had been arrived at. On all of the evidence it is just impossible to come to that conclusion and to define the terms of the contract at all. That is sufficient in my view to dispose of the matters in issue in these proceedings, but if more is required it is quite obvious that both the Fifth Defendant and Mr Henriksen required whatever was to be their final contract to be recorded in writing and that it was not to become binding upon them until that occurred.

As was acknowledged by Mr Chambers, the contract between the two of them was complex and was not one which could be left to rely for its efficacy upon word of mouth. It is obvious from the negotiations which went on that both parties regarded a written contract as an essential element of their negotiations. Indeed, Mr Henriksen goes so far as to state that as a fact in his affidavit and I am inclined to accept that as being definitive of the relationship between the parties. I remind myself of the quotation which was adopted by the Court in Carruthers v. Whittaker & Anor (1975)2 N.Z.L.R. 667 when the Court of Appeal in New Zealand referred with approval to a statement of Lord Greene, M.R. in Eccles v. Bryant (1948) Ch. 93 at page 99 when the following was said:

> "When parties are proposing to enter into a contract, the manner in which the contract is to be created so as to bind them must be gathered from the intentions of the parties express or implied. In such a contract as this, there is a well-known, common and customary method of dealing; namely, by exchange, and anyone who contemplates that method of dealing cannot contemplate the coming into existence of a binding contract before the exchange takes place. ..... When you are dealing with contracts for the sale of

> "land it is of the greatest importance to the vendor that he should have a document signed by the purchaser, and to the purchaser that he should have a document signed by the vendor. It is of the greatest importance that there should be no dispute whether a contract had or had not been made and that there should be no dispute as to the terms of it."

In my view it is patently obvious from the negotiations which went on in this matter that the parties did not intend themselves to be bound until such time as all the terms of the contract had been agreed to, had been reduced to writing and had been signed by both of them. That never occurred and in my view that supports the view that I have already arrived at that there was no concluded contract ever entered into between the parties. Even if there had been, the contract which would have resulted would have simply been an agreement to nominate Mr Chambers as the nominee of the Third Defendant. That would not have given Mr Chambers any interest in the land at all. It merely gave him a right to be nominated as the purchaser and to have the eventual transfer of the land made to him or at his direction. As was observed by Somers, J. in Hurrell v. Townsend (1982)1 N.Z.L.R. 537, it is trite law that a vendor of land cannot object to convey title to a person nominated by the purchaser provided the nominee is not a person under a disability, but as a nominee the nominated person does not become a party to the contract unless specific steps are taken to substitute the nominated person as the purchaser. This can be done in a number of ways as was set forth by Cooke, J. in Lambly v. Silk Pemberton Ltd,(1976) 2 N.Z.L.R. 427. The learned Judge in that case noted that for that to occur compelling language would be necessary. That was the test which was adopted by Somers, J. in Hurrell's case supra. Nothing of

that sort has occurred in the instant case. If Mr Chambers had become the nominee any attempt to defeat his rights could have been enforced by him pursuant to the provisions of s.5 of the Contract (Privity) Act 1982, but the provisions of that section certainly would not make Mr Chambers a party to the contract, but would merely give him a statutory right to enforce his entitlement.

In addition to the matters I have set out above, there are other considerations which could be brought into play to possibly defeat any rights which Mr Chambers feels he may have acquired. For instance, the wording of the caveat leaves a lot to be desired in my view. No date is set forth in relation to the date of the creation of the constructive trust, nor is the manner in which the constructive trust is said to have arisen set forth. If, indeed, Mr Chambers had stated that such a trust arose as a result of his being a nominee of the Third Defendant, that, as Mr McCrae conceded, would probably have been sufficient to invalidate the caveat in that it did not establish the requisite qualification for lodging a caveat, namely, an interest in the land in question.

There is the further point that the agreement for sale and purchase with the Third Defendant is conditional upon the completion of the Whittaker Place property. That condition was imposed for the benefit of the Vendor and was not, on the evidence, fulfilled or waived until at or about the time of settlement with the Plaintiff. Thus until the contract became unconditional, there was no equitable interest vested in the purchaser, let alone its nominee, capable of supporting an action for specific performance and therefore a caveat.

There is no necessity for me now to consider the implications of the decision in Eng Me Yong v. Letchumanan (1980) A.C.331 insofar as it relates to the approach of the Court when considering an application that a caveat should not lapse. The above decision of the Privy Council which related to a caveat under the Malaysian Torrens System suggests that the approach ought to be similar to that which is adopted in relation to interlocutory injuctions. There has been no definitive statement in this country on such an approach although Savage, J. was inclined to adopt it in Leather v. The Church of the Nazarene, M.857/83, Auckland Registry, judgment 12th August 1983. For my part I simply observe that from a practical point of view it may not prove too difficult to follow the views of the Privy Council.

Accordingly in respect of the applications at present before me I hold that the motion for an order for the removal of the caveat must succeed and that the Fifth Defendant's application that the caveat do not lapse must fail.

I am not in a position to deal with the second caveat lodged by the Fifth Defendant, but in view of the findings of fact which I have come to he may now find himself in difficulties in trying to sustain that caveat.

I have not dealt with the terms of the interim injunction earlier made by me, but no doubt the First Defendant, Third Defendant and their respective legal advisers can deal with this matter by consent. However, if they are in any difficulties they can make the necessary approach at any time.

The Fifth Defendant must meet the costs of the other

parties. In the meantime the question of those costs are reserved and if the parties cannot settle them then that aspect of the matter can be referred back to me.

P. D. Ellis J.

Solicitors:

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