

IN THE HIGH COURT OF NEW ZEALAND

M. 375/84

AUCKLAND REGISTRY

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

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IN THE MATTER of Caveat No.B.267156.1
affecting all those
parcels of land
comprised and
described in
Certificates of Title
21B/882 and 21B/883

BETWEEN CAROL-ANNE DOWNER of
Auckland, Divorced
Woman

APPLICANT

A N D DENNIS IVAN TOMICH and
JENNIFER ANNE VUJNOVICH
both of Auckland, as
Trustees of the Ivan B.
Tomich Family Trust

RESPONDENTS

Judgment: 79.484
Hearing: 16 April 1984
Counsel: M.G.P. Knapp for Applicant
I.F. Williams for Respondents

JUDGMENT OF CASEY J.

On 28th February 1984 Mr Tomich and Mrs Downer signed an agreement for sale and purchase of two blocks of flats for \$525,000 from the Ivan B. Tomich Family Trust (Trustees D.I. Tomich and J.A. Vujnovich) to Mrs Downer or nominee. The sale was effected through the agency of Barfoot & Thompson Limited. The following day Mr Tomich announced that his sister would not agree as Co-Trustee, and that the deal was off. On 2nd March 1984 Mrs Downer lodged a caveat against the title and this was followed by an application to register a mortgage from the Trustees to Mr A. Vujnovich for \$50, resulting in the usual notice from the District Land

Registrar to the caveator advising that it would lapse unless an order to the contrary was made and served within 28 days. She moves accordingly.

The principles guiding the Court in an application of this nature are well known, and the caveat should be extended to give the parties an opportunity to have their rights determined in a proper hearing unless it is "patently clear" that the Applicant cannot succeed (Mall Finance and Investment Co. Ltd. v. Slater (1976) 2 NZLR 685). Mr Knapp submitted that there was enough evidence in the affidavits by the two land agents and Mr Tomich himself to give rise to an arguable question of fact as to whether or not he was acting as his Co-Trustee's agent in signing the agreement. He did not suggest that she could delegate the actual decision itself to her Co-Trustee, or that she had in any way represented to the purchaser that he had authority to act on her behalf.

Mr Gillam (one of the land agents) deposed that on 28th February, after he had put Mrs Downer's first offer to Mr Tomich, the latter phoned him and indicated he had spoken to his sister in Wellington and that they were agreeable to selling the property for between \$525,000 and \$530,000. The agent said later that afternoon, he arrived with the agreement signed by him, which was then passed on to Mrs Downer for her signature. For his part, Mr Tomich referred in his affidavit to Mr Gillman's initial approach with the offer, and said he undertook to telephone his sister and did so, "and we agreed that an appropriate sale price would be in the order of \$525,000 to \$530,000. My sister did not authorise me to sign any documents on her behalf and I mentioned that I had still to discuss this situation with my solicitor. We expressly agreed that nothing would be concluded until her return to Auckland the following Friday at which time I anticipated that I would have documents available for her to read and if in order for her signature." In her affidavit Mrs Vujnovich confirms the telephone call of 28th February 1984 from her brother advising her of Mrs Downer's offer to purchase and she says simply that she told him she would consider the agreement on her return to

Auckland on 2nd March.

Mr Tomich added that he told the agent his sister had to sign the agreement and asked that they return both copies after Mrs Downer had signed, so that he could take them to her. Mr Gillman recalled this conversation as simply an intimation that he would like her to sign the documents "as a matter of courtesy" and he would arrange for that on the following day, while another agent (Mr Timanus) said he indicated that he would like to get his sister to sign, saying "after all she is my sister" or words to that effect.

On the basis of this affidavit evidence, can it be said at this stage that it is "patently clear" the Applicant cannot establish that Mr Tomich had his Co-Trustee's authority to sign the document? Certainly the Respondents appear to have a strong prima facie case, but as in most disputed questions of fact, the final outcome will depend on cross-examination and the credibility of witnesses, especially in these circumstances where it seems the Trustees simply received a better offer. I think there is enough in Mr Gillman's affidavit to suggest that Mr Tomich was acting with his Co-Trustee's authority, and the Applicant should have her trial. Needless to say it should take place as soon as possible so that the parties will know where they stand in this substantial transaction. If the case is confined to the simple issue of agency, it should not take more than a day.

Mr Williams also referred to s.49A(1) of the Property Law Act, inserted by the 1980 amendment and originally stating that no interest in land could be created or disposed of except by writing signed by the person creating or conveying it, or by his agent "lawfully authorised in writing in that behalf." This section was further amended in 1982 by the insertion of "legal" after the introductory word "No". The interest which Mrs Downer claims in this land is one in equity as purchaser under the alleged agreement for sale and purchase. In Hatton v. Clayton & Ors (Auckland, A. 979/81; 11th April 1983) Vautier J. concluded that even before it was amended,

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this provision did not apply to the execution of a contract to sell land, and the addition of "legal" makes that intention quite plain. I therefore make the orders as moved.

W. B. Casey J.

Solicitors:

Johnston Prichard Fee & Partners, Auckland, for Applicant
Shieff Angland Dew & Co., Auckland, for Respondents