

M.47/86

**NOT
RECOMMENDED**

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

BETWEEN JOHN QUENTIN EDE of
Balclutha, Farmer

Plaintiff

A N D NZI FINANCE LIMITED a
duly incorporated
company having its
registered office at
Auckland and carrying
on business as a
Financier

First Defendant

A N D KEITH LEONARD STIRLING
of Clydevale, Farmer

Second defendant

Hearing: 25 February 1986

Oral Judgment: 25 February 1986

Counsel: D J Jenkin for plaintiff
C A Johnston for first defendant

[ORAL] JUDGMENT OF HENRY J.

This is an application for an order pursuant to s.145 of the Land Transfer Act 1952 that a caveat lodged by plaintiff do not lapse.

The evidence discloses that plaintiff has commenced an action for specific performance, that action now being in the Auckland Registry of this Court with no fixture has yet being allocated.

At the hearing of this application there was no appearance on behalf of the Second Defendant, who is the registered proprietor of the land in question. There is presently before the Court no proof of service of these proceedings on the Second Defendant, although Mr Jenkin on behalf of the Plaintiff has indicated that he understood Mr Bogiatto of Grove Darlow & Co. was expected to appear. The application is opposed by Mr Johnston on behalf of the First Defendant, which is the holder of a mortgage over the property which it has now presented for registration, that dealing having given rise to the need for the present proceedings. The First Defendant has itself lodged a caveat to protect its interests under that mortgage.

The only evidence in support of the application is from a legal secretary, Christine Joy Nightingale, to whose affidavit is exhibited a copy of the Statement of Claim in the substantive proceedings earlier referred to, included in which is a copy of a certain deed bearing date 19 November 1982 which forms the basis of Plaintiff's claim to an entitlement to an interest in the property. There is no affidavit from the Plaintiff detailing evidence of matters to support his claim and giving reasons why it would be unjust for the caveat not to be extended. I think Mr Johnston is on strong ground in criticising the lack of basic evidence upon which the Court should base its judgment in an application of this nature. However, there is evidence before the Court

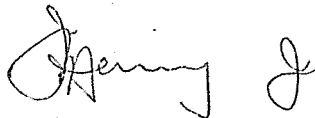
which discloses that the Plaintiff is a party to a deed which on its face gives him an interest in at least portion of the property in question and which also establishes that he has taken appropriate steps to enforce his rights through the Court. I am concerned that if I were to adopt Mr Johnson's basic submission, namely, to dismiss the application, that there is a possibility an injustice would result because the Plaintiff's right to purchase could be extinguished.

What I propose doing is to adjourn this application for a short period to enable the Plaintiff to establish by satisfactory evidence if he can the matters which would justify the order which he now seeks. That evidence will need to cover all relevant factual matters and in particular those pleaded in the Statement of Claim which would establish at least on an arguable basis, his entitlement to an order for specific performance of the deed of November 1982. I draw particular attention to his claim to be entitled to the whole of the property. Prima facie as matters now stand it would seem that his maximum entitlement, pursuant to the terms of the deed, would be a 57/100th share of the land. The balance, which is claimed is available pursuant to an option referred to in the deed, would seem to be dubiously based because according to the terms of that deed it may well be that the option expired on 3 June 1983 without having been exercised.

I have reached the view that it would be unjust to dismiss the application at this juncture. I have given some consideration to the possibility of making an order in respect only of a 67/100th share of the property, but on balance I am of the view that the whole matter should remain for final determination when and if adequate evidence is before the Court.

For those reasons the application will be adjourned to 18 March 1986 and as an interim measure I will make an order that the caveat in question do not lapse until 25 March 1986 or the further order of the Court.

Leave will be reserved to all parties to apply. Costs will be reserved.



Solicitors:

Cairns Slane Fitzgerald & Phillips, AUCKLAND, for plaintiff
Bell Gully Buddle Weir, AUCKLAND, for first defendant