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IN THE HIGH COURT OF NEW ZEALAND
BLENHEIM REGISTRY

M.NO.4/89

UNDER The Land Transfer Act 1952

IN THE MATTER of an application for an order that a Caveat not lapse

BETWEEN WILLIAM ROLAND EDWARDS and DIANA EDWARDS both of Blenheim, Medical Practitioners

Plaintiffs

AND WILFRED JAN HOLTROP of High Street, Renwick, Blenheim, Medical Practitioner and HERMINA HOLTROP of High Street, Renwick, Blenheim, Registered Nurse

Defendants

Hearing: 13 March, 1989

Counsel: Mr A.C. Hughes-Johnson for the Plaintiff
Mr H.W. Riddoch for the Defendant

Date of Judgment: 17.4.89

RESERVED JUDGMENT OF MASTER HANSEN

This was an application by the Plaintiffs, pursuant to Section 145 of the Land Transfer Act 1952, that Caveat No. 141899, Marlborough Land Registry, not lapse.

BACKGROUND FACTS

Both the Plaintiffs are medical practioners. Mr Holtrop is a medical practioner, and Mrs Holtrop a registered nurse.

On the 11th March, 1985, the Plaintiffs entered into an agreement with the Defendants. This was a Partnership Deed,

whereby the parties agreed to farm as orchardists in partnership with one another. The deed records the particulars of land owned by the Plaintiffs, and also of land owned by the Defendants, the subject of the caveat. The clauses of the deed relevant to this application are as follows:-

" 1. THAT W. & D. EDWARDS AND W. & H. HOLTROP will carry on the business of farming as orchardists with one another for a period of ten years from 1 July 1984 and thereafter if the partners so agree until the 30th day of June next the expiration of not less than six month's notice given by either partner to the other and the death of any partner shall not of itself terminate the partnership.

2. THAT W. & D. EDWARDS will permit the partnership to have the use of the Edwards' land less an area not exceeeding 2023.4m^2 on which W. & D. Edwards intend to build a dwelling house.

3. THAT W. & H. HOLTROP will permit the partnership to have the use of the Holtrop land less the existing house thereon and its curtilage and less also an area not exceeding 2020.4m^2 on which W. & H. Holtrop intend to build a dwellinghouse.

4. THAT W. & H. HOLTROP will permit the partnership to have the use of land known as the "Keown property" at Pauls Road of approximately 7 hectares for the term of the lease (my emphasis) and any remewal thereof held by W. & H. Holtrop in respect of that land.

5. THAT the partners agree that the value of the Edwards land to be used by the partnership is $140,000 and the value of the Holtrop land to be used by the partnership is $232,000. The partners agree that on the basis of rent being paid by the partnership at 10% of the respective values of each piece of land as aforesaid there is a rent differential of $46,000. W. & D. Edwards agree to pay to W. & H. Holtrop the sum of $46,000 not later than thirty days after the date of this agreement and such payment by W. & D. Edwards will be treated in their partnership accounts as rent paid in advance in respect of the ten year term of the partnership and treated in the partnership accounts of W. & H. Holtrop as rent received in advance and to be amortised over the ten year term of the partnership.

23 THAT.....
It is acknowledged by the partners that neither the

> Edwards land nor the Holtrop land and its improvements now on that land or to be made to the land during the term of the partnership are partnership assets. "

As well, Clause 5 provides that the partners shall be responsible for mortgage payments in relation to their respective properties.

BACKGROUND TO THIS APPLICATION

It is apparent from the correspondence exhibited to the affidavits that by early 1987 all was not well with the partnership. On the 10th April 1987 the Plaintiffs' solicitor wrote to Dr. Holtrop seeking to terminate the partnership on the 30th June, 1987. It is common ground that despite correspondence between the parties the partnership has not yet been formally dissolved. Mr Hughes-Johnson, on behalf of the Plaintiffs, accepted, for operational purposes, the partnership was at an end, but said it is clear that failing agreement between the parties as to terms of dissolution, the matter would have to be resolved by Court order. Despite the contents of a letter witten by Mrs Edwards to the Defendants, dated the 10th January, 1987, it is quite clear that the Deed of Partnership continues to subsist. I should point out that although the letter is dated 10th January, 1987, it clearly ought to be 1988, from the references to various dates in other documents, and the contents of the body of the letter. In that letter, on page 2, Mrs Edwards states the Tui Orchard Partnership ceased to exist on 30th June, 1987. It may well be that in terms of continuing to co-operate and work the business together the partnership was ended, but it is clear in the legal sense that the partnership has never been dissolved.

It is apparent from the correspondence that in late 1988, the Defendants entered into a contract to sell part of their land, being Lot 2 D.P. 7027 C.T. 4B/658, to a Mr & Mrs

Douglas. In February of this year the Defendants sought to register a Memorandum of Mortgage, which led to the Assistant Land Registrar of the Marlborough District issuing a Form 32 Notice, prompting this application by the Plaintiffs.

SUBMISSIONS

The caveat lodged claims an interest in land..... "by virtue of the trust arising under a Deed of Partnership dated 11 March, 1985, under which the caveators and the registered proprietors are beneficiaries."

Mr Hughes-Johnson submitted that Section 137(a) of the Land Transfer Act 1952, is clear authority that an interest and beneficiary in a trust is a sufficient basis for lodging a caveat.

He submitted that the Plaintiffs are entitled to maintain their caveat as lessees. He said because partners are in a fiduciary relationship, where a lease of the land of one partner is granted to a partnership, the registered proprietor of the land in question must deal with the land at all times respecting this fiduciary relationship, or be in breach of trust. He said it is clear that the leasehold interest is without doubt an asset of the partnership, and cannot be dealt with other than for the benefit of the partnership.

He submitted that the partnership and a fortiori each of the partners has a leasehold interest in the land. He submitted that the Deed of Partnership makes this clear from the following terms:-

1. The finite term for carrying on of the business of ten years from the 1st July, 1984.

2. The provision in paragraph 3 permitting the partnership to use the Holtrop land.

3. Most importantly, the provisions of paragraph 6, making an adjustment on the basis of captitalized rent, which resulted in the Plaintiffs paying to the Defendants the sum of $46,000, being the differential between the capitalized rent of each property over the ten year term of the partnership. He said that this paragraph makes it perfectly clear that the right of occupation was for the whole ten year period of the partnership and that the reference to "rent" is inconsistent with a mere licence.

4. He submitted paragraph 22 "and to do all things in respect of the farming and development of the said land which the owner of the said lands could do", is a clear reference to exclusive possession. Further he submitted that possession of the land was not to be delivered up until certain payments were made by the partnership, which is, again, indicative of the right to exclusive possession.

Although paragraph 23 provided that the Defendants' land and improvements were not a partnership asset, Mr Hughes-Johnson submitted that this did not mean that the partnership could not maintain an interest in the land by virtue of a lease or agreement to lease, as he submitted the deed provided for. He said the Plaintiffs allege that the partnership, and thereby the Plaintiffs as two of the partners, have the right to exclusive possession of the land for a finite term.

In relation to the essential elements of a lease, Mr Hughes-Johnson referred to paragraph 5.004 on the standard text Hinde McMorland and Sim Introduction to Land Law. He said, clearly, in this case, the essential elements of a lease are present, i.e. the legal right of exclusive possession, a finite term, and a lease created in the appropriate form.

Therefore, he submitted the deed clearly provided for a lease and not a licence. He said the deed referred to rent and capitalized rent, and if, indeed, a licence had been intended it would have referred to capitalisation of a licence fee.

Mr Hughes-Johnson then referred to the leading authority

relating to the approach to be taken to applications under Section 145, the well known case is the Court of Appeal decision in Holt v Anchorage Management Limited [1987] 1 NZLR 108. He submitted that case is clear authority that once an arguable case has been established it is doubtful whether the discretionary power under Section 145 would be decided against the caveator on the basis of balance of convenience. He also referred to a discussion of Holt v Anchorage Management by Robert Brennan in an article Caveats Revisited in (1988) 4 BCB 265. The article concludes by the learned author recording that at present all that could be said with certainty with regard to Section 145 applications is that the caveator must at least establish an arguable case as to the existence of a caveatable interest. Mr Hughes-Johnson submitted that the judgments in Holt would dictate that once a caveator has established an arguable case, that is all that needs to be established, and the balance of convenience should not be considered. However, he went on to say that if the Court deemed it necessary to consider the balance of convenience, that also was in the Plaintiffs' favour. He said if the caveat was not sustained, then a piece of land in respect of which the caveator has an interest as lessee, will no longer be available for occupation. An essential sub stratum of the lease will have disappeared and could not be recovered. He said, further, that it was the Defendants who have chosen to attempt to alienate their interest in the land in question despite full knowledge of the terms of the Deed of Partnership, and their rights and liabilities under it.

Mr Hughes-Johnson further submitted that the interest relied on does not need to be capable of ultimate registration. See Superannuation Investments Limited v Camelot Licence Steakhouse (Manners Street) Limited (1988) 5 BCB 21 at 22.

However, Mr Riddoch, in his relatively brief submissions, said it is clear that the partnership was ended by the

aribitrary and unilateral acts of the Plaintiffs. There was their notice of the letter of termination, dated 10th April, 1987, and the further letter of Mr Edwards, which was cited earlier. He said it is clear that the partnership has not operated, even though it had not been formally dissolved. Therefore, he said the partnership had ceased to exist in fact. He also said the provisions of paragraph 23, where the partners acknowledge that neither the Edwards nor the Holtrop land and improvements form part of the partnership assets, makes it clear that the Plaintiffs have no interest in the land such as to justify the maintenance of the caveat.

He went on to say that if the Court held there was a caveatable interest, and an arguable case exists, the balance of convenience test then ought to be applied. He said the factual situation was that the arbitrary statements of Mrs Edwards, and what has transpired since early 1987, means the partnership ceases to exist, and there was, therefore, no claim to the lease, as the conduct of the parties had determined the partnership. However, that submission seemed to me to be directed more to the question of whether or not there is an arguable case, rather than any balance of convenience situation. He referred to the penultimate paragraph at page 124 of Holt v Anchorage Management, and said that this was as close to a pronouncement that the balance of convenience applied to Section 145 applications as was possible. He said it is clear that the Court has power to release the caveat as to part, or on terms or conditions. He said, looking at the overall circumstances of this case, and the increased valuation shown by the valuation report exhibited to the Defendants' affidavit, the Court should exercise its discretion and allow the sale.

Mr Riddoch did not address the Court on whether or not the provisions of the deed amounted to a lease or a licence, nor

did he refer to the fiduciary relationship existing between partners.

DECISION

I am quite satisfied that Mr Hughes-Johnson's submission that the partners are in fiduciary relationship, and because of that where a lease of land of one partner is granted to a partnership, the registered proprietor of the land in question can only deal with the land, respecting the fiduciary relationship or be in breach of trust, is correct. A useful commentary on the duty of good faith between partners can be found in the fifteenth edition of Lindley on Partnership at page 482. In Thompson's Trustee v Heaton [1974] 1 WLR 605, at 613, Pennycuick V-C, citing with approval from Lindley said:

" The fiduciary relationship here arises not from a trust of property, but from the duty of good faith which each partner owes to the other. It is immaterial for this purpose in which partner the legal estate and the leasehold interest concerned is vested. "

Further authority can be found in Kak Loui Chan v Zacharia (1983-84) CLR 178 where at 199 Deane J. said:

" The principle governing the liability to account for a benefit or gain as a constructive trustee is applicable to fiduciaries generally including partners and former partners in relation to their dealings with partnership property and the benefits and opportunities associated therewith or arising therefrom."

In the instant case, Mr & Mrs Holtrop have purported to sell the freehold land to Mr & Mrs Douglas, and that freehold land must be subject to the partnership's leasehold interest. Mr & Mrs Holtrop have purported to ignore the provisions of the Deed of Partnership, and in doing so must be in breach of trust, and as Mr Hughes-Johnson submitted, the allegation of breach of trust in the caveat is apposite.

I am further satisfied that the Plaintiffs have shown that there is at the very least an arguable case, showing that

the partnership and each of the partners have a leasehold interest in the land. Indeed, Mr Riddoch did not submit otherwise, but only suggested that because of the actions of the Plaintiff, the partnership had effectively ended. The provisions of paragraph 6 of the deed provide for capitalised rent,and for a differential between the value of the property of the Plaintiff and the Defendant. This was to cover the ten year term of the partnership, and that capitalised rent has, in fact, been paid and, no doubt, utilised by the Defendants. The two references in paragraph 22, mentioned by Mr Hughes-Johnson, are clearly references to exclusive possession. Mr Hughes-Johnson also referred to the well known passage of Templeman L.J. in Street v Mountford [1985] 1AC 809, at 826:-

> ". My Lords the only intention which is relative is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent. Sometimes it may be difficult to discover whether, on the true construction of an agreement, exclusive possession is conferred. Sometimes it may appear from the surrounding circumstance that there was no intention to create legal relationships. Sometimes it may appear from the surrounding circumstances that the right to exclusive possession is referrable to a legal relationship other than a tenancy. Legal relationships to which the grant of exclusive possession might be referrable and which would or might negative the grant of an estate or interest in the land including occupancy under a contract for the sale of the land, occupancy pursuant to a contract of employment or occupancy referrable to the holding of an office. Where as in the present case the only circumstances are that residential accomodation is offered and accepted with exclusive possession for a term at a rent, the result is a tenancy."

Mr Hughes-Johnson has pointed to strong evidence to show that here there is a legal right of exclusive possession; there is a finite term; and that the lease is created in an appropriate form. Again, at its very lowest, I am satisfied that Mr Hughes-Johnson has demonstrated that the Plaintiffs have an arguable case that the partnership, and thereby the partners, have a leasehold interest in the land.

Mr Riddoch submitted that for all intents and purposes the

partnership is dead, although he did concede in submissions that the partnership was not dissolved, it had only ceased to exist in fact. Whilst the business of the partnership is no longer being conducted, it is quite clear that the partnership has not yet been dissolved. Despite Mrs Edward's references in letters to the partnership being terminated on the 30th June,1987, it is quite obvious from other correspondence that no final agreement has been reached as to the terms of dissolution of the partnership. There can be, accordingly, no formal dissolution of the partnership. The Partnership Deed is still in existence as are the rights and the obligations of the parties under that agreement. I cannot accept Mr Riddoch's submission that because the partnership is finished in practical terms, the rights and obligations under the deed no longer exist.

It is quite clear from the decisions in Holt that on an application under Section 145 for an order that a caveat not lapse, the caveator must show that there is an arguable case, or a serious question to be tried, as to the validity of the claim to have a caveatable interest under Section 137. It will be apparent from the foregoing that I am satisfied that the Plaintiff has established that it has an arguable case to claim a caveatable interest. However, Mr Riddoch urged the Court that even if that had been established by the Plaintiff, the Court is bound to consider the balance of convenience. In doing so, he referred to the penultimate paragraph of the decision of Casey J. in Holt at page 124; the decision of Mr Justice Tipping in Skyline Finance Limited v Capital Corporation (an unreported decision, delivered in Christchurch on the 1st February, 1988); and my own decision in Wigram Holdings Limited v O'Neill Motors Limited (1989) 4BCB 42. In the Wigram Holdings case, I can say that I considered the balance of the convenience out of an abundance of caution, because of some doubts expressed, especially by academic writers, as to whether or not it is a proper consideration in exercising

the discretion. In Holt, Somers J. at page 120 said:

" It is not easy to imagine circumstances in which it will be convenient to allow an arguable but undecided claim to be left in a state in which it may be defeated.....The protection of equitable interest by the lodging of a caveat is an integral part of the Land Transfer Act, and an arguable claim to such an interest ought generally to be resolved under the protection afforded by the statute."

At page 123 Casey J. said:

" Accepting that the decision under Section 145 is discretionary once an arguable case for a caveat is shown (and here I point to the different language in Section 143) I doubt whether the simple American Cyanamid approach of looking merely at the balance of convenience between the caveator and the caveatee is adequate. Having regard to the wide scope of the protection intended by these provisions, there must be taken into account potential loss from the action of third parties through e.g. lien claims, notices under the Matrimonial Property Act 1978 undisclosed agreements to mortgate etc., as well as from foreseeable activities of the registered proprietor. The difficulties inherent in this exercise may render the ordinary concept of the balance of the balance of convenience of little help in reaching a decision, and suggests that the approach taken by the Court in Catchpole v Burke is a more practical solution."

In Catchpole v Burke [1974] 1 NZLR 620, as Mr Hughes-Johnson submitted, it was held that the proper course was to extend the operation of a caveat until the rights of the parties were determined and other proceedings where there were doubts surrounding the rights of the caveator.

Furthermore, in the headnote to Holt v Anchorage Management at 2, it states once an arguable case has been established, it is doubtful whether a discretionary decision under Section 145 would be decided against the caveator on the balance of convenience. A caveator is entitled to maintain his caveat against challengers if he can show that he has the kind of interest which Section 137 entitles him to protect; and a caveat should be extended until existing claims by the different parties are determined in actions brought for that purpose.

Despite some reservations expressed by academic writers, I am satisfied that all an applicant needs to establish is that he has an arguable case, or a serious question to be tried, as to the validity of his claim to have a caveatable interest to be entitled to the protection of a caveat. I do not read the penultimate paragraph of Casey J's. decision, at page 124 of Holt, to mean that the balance of convenience still applies. I take it to outline circumstances and situations where the Court may refuse to exercise its discretion in favour of the applicant.

In Sims v Low [1988] 1 NZLR 656, at 659, Somers J. stated:

> " It is clear that this summary procedure for the removal of a caveat against dealings is wholly unsuitable for the determination of disputed questions of fact. From this it follows, and has been consistently held, that an order for the removal of such a caveat will not be made under Section 143 unless it is patently clear that the caveat cannot be maintained, either because there was no valid ground for lodging it, or that such valid ground as then existed no longer does so. See e.g. Plimmer Brothers v Saint Maur, re Caveat no.2538, (1906) 26 NZLR 294,296; Catchpole v Burke [1974] 1 NZLR 620, 623/624,625, (a case under Section 145); Moore Finance & Investment Company Limited v Slater [1976] 2 NZLR 685,686,688. The patent clarity referred to will not exist where the caveator has a reasonably arguable case in support of the interest claimed. Catchpole v Burke, New Zealand Limousin Cattle Breeders Society Incorporated v Robertson [1984] 1 NZLR 41,43, and Holt v Anchorage Management Limited [1987] 1 NZLR 108, show that the same test applies to both Section 143 and 145."

I take from that passage that it is now clear that once a reasonably arguable case for sustaining the caveat is made out under either a Section 143 or 145 application, balance of convenience is no longer a relevant consideration.

However, if I am wrong in my interpretation of the above cited passage, and balance of convenience is still a consideration for the Court to take into account under a Section 145 application, I am satisfied that such balance is in favour of the Plaintiff. Whilst it is true that the

partnership no longer operates as a day to day business, the rights of the parties to the Deed of Partnership are contained in that document. It would be quite wrong of the Court to prejudge the terms that the parties may come to in agreeing to ultimately dissolve the partnership. It would be even more wrong to presume (if the matter is litigated) what decision a Court would reach if an order was made dissolving the partnership. An order removing the caveat at this stage in relation to the land to be sold, would fetter the right of the Judge hearing any application for the dissolution of partnership. Those questions of balance of convenience are on the Plaintiffs' side, and far outweigh the situation faced by the Defendants. As Mr Hughes-Johnson submitted, they have determined to enter into an agreement to sell part of the land, thereby ignoring the provisions of the Deed of Partnership to the detriment of the Plaintiffs.

Accordingly, if, indeed, balance of convenience is still a relevant consideration, I am satisfied the balance is in favour of the Plaintiffs.

There is one further matter to consider, and that is whether or not the interest needs to be capable of ultimate registration. In Superannuation Investments Limited v Camelot Licenced Steakhouse (Manners Street) Limited [1988] 5BCB 21, Gallen J. reached the view that it did not. However, In Brown v Healy [1989] 5 BCB 42, Smellie J. obiter dicta reached a contrary view.

Mr Hughes-Johnson submitted that the better view is that propounded in Superannuation Investments Limited. He further submitted that even if the Court held that the interest needs to be capable of registration, it is the interest itself that must be capable of registration, and not necessarily the document which is available at that time. He said if that were not the case, the interest

arising by virtue of agreements for sale and purchase, as an example, would not be capable of sustaining a caveat.

I adopt the conclusions reached by Gallen J. in Superannuation Investments Limited. Further, it seems to me clear that it is the interest that must be capable of ultimate registration and not the document itself. Clearly, the leasehold interest, or at least the arguable leasehold interest, under the Deed of Partnership is ultimately capable of registration.

For the foregoing reasons, there will an order that the caveat do not lapse pending further order of the Court.

I am satisfied, however, that the dispute between the parties relating to the partnership should be resolved as quickly as possible. Accordingly, I am prepared to see counsel at short notice either in Christchurch or on my next visit to Blenheim to lay down a suitable and appropriate timetable order.

I was not addressed on the question of costs, and counsel are invited to file a memorandum as to costs within 14 days of the handing down of this decision.

MASTER HANSEN

Solicitors for the Plaintiffs: P.R.R. Mulligan, by his Agent, Lundon Radich Dew, Blenheim.
Solicitors for the Defendants: Wain & Naysmith, Blenheim.

Reserved decision of Master Hansen delivered this 17th day of April 1985

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