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MEDIUM PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY 13/9

M. NO. 1132/91

UNDER the Land Transfer Act 1952

IN THE MATTER of Caveat C270093.1
(North Auckland Registry)

1681

BETWEEN	ENJOIN TWENTY FOUR LIMITED
	Plaintiff
A N D	J.P. VAN TILBORG
	First Defendant
A N D	JIM VAN TILBORG CONTRACTORS LIMITED
	Second Defendant
A N D	G.P. VAN TILBORG
	Third Defendant

Hearing: August 12, 1991

Counsel: Mr. Munro for Plaintiff
Mr. Hutcheson for Defendants

REASONS FOR JUDGMENT OF MASTER ANNE GAMBRILL

I have before me an application that a caveat will not lapse. The Plaintiff entered into an agreement for sale and purchase with the First Defendant on 28th February 1990 wherein the First Defendant agreed to sell a one-fifth share in Lot 4 D.P. 3981 (with building and cross-leasing occupational rights) relating to an area marked 'C' on the attached plan and subject to a lease of Flat 1 (the only

house then existing) to the area marked 'A' on the form annexed.

The agreement was typical of the complex conveyancing agreements that tend to circulate in city areas providing for "in-fill" housing on larger sections, the existing house remaining as one flat and the builder/speculator developing, building and selling the other three or four units that will fit on the site. At the time of purchase the purchaser sees the vacant lot which the developer then, by use of cross-leasing systems, is able to effect developments which, in the end result, give each owner only an undivided share as tenant in common in the land, a lease of the flat or house he or she occupies, the right to restict the other fee simple owners from the right to enter into a certain area of land surrounding his or her flat (negative restrictive covenant) and an area that the parties share the maintenance of and is for common use being the access to the property. To accommodate the needs of developers who do not have the cash to build usually more than one of these houses, a system has evolved where the interest in the fee simple of the land is often transferred for a price and the building and leases completed subsequently. One therefore has a situation where money changes hands, parties obtain an interest in the land but the definition of their responsibilities in relation to their shared ownership of the land is deferred until the erection of the relevant buildings. It is meant

to be a cheaper form of constituting land ownership than a unit title but in development it has its inherent problems and points to the understanding I have always had, that many professional advisers especially surveyors consider that one does not have the sanctity of title with this system to the extent one has in receiving a unit title with the corresponding Body Corporate obligations.

The agreements herein highlight these problems for the added reason that the caveator/Plaintiff herein has built its house and now says it has not obtained the area of land to use with the house to which it is entitled under the agreement for sale and purchase. The adjoining owner has had his house built by the Second Defendant, the garage encroaches onto the area the Plaintiff says he should have the use of and the Second Defendant has sold the house but not given title to innocent purchasers. Those purchasers are living in the house but cannot pick up their mortgage funds and settle the transaction with the Second Defendant. The Second Defendant company is already financially stretched as the evidence shows and a vicious circle exists whereby the Plaintiff wants the correct area of land or alternatively, having filed a valuation in the Court, I believe could accept compensation. The Second Defendant is financially embarrassed, the non-party occupiers of the house cannot get their title nor their lease to pick up their mortgage funds and a situation arises where there is

an impasse which, if the caveat is extended, will leave the present problems unresolved.

The First Defendant says the agreement was entered into with himself or his nominee. He says the purchase proceeded in the name of the Second Defendant which company became the registered proprietor of the land and the Second Defendant company is now the developer of the property.

The original contract between the Plaintiff and Defendant dated 2nd February 1990, provided that the vendor was to provide drives, sewerage services etc., to the land and clear the area marked 'C' for building. The contract between the parties herein dated 28th February 1990 provided that in the event of Mr. Van Tilborg not settling the purchase of the four-fifth share in the land from Location Residential Limited who was the then owner of the property as per the agreement of the 2nd February 1990, the purchaser thereunder, i.e. Enjoin Twenty Four Limited, was given the right to take over the agreement. The form of the lease is annexed to the agreement together with an undertaking that the purchaser of the original house property will give a power of attorney to enable the Plaintiff's lease to be registered. Included in this complex system seem to be substantial powers of attorney to enable the developer to sign all the documents to complete the cross-leasing of the flats. The purchaser, the Plaintiff herein, in the contract covenanted to erect a

dwelling unit which was to comply with the local authority requirements, and the requirements set out in the schedule, the schedule being that the house was to be a designer kitset home as produced by Taylor & Jourdain Limited, to be either the Hazelwood or Kingston home, and a further undertaking that the purchaser would keep the area marked 'C' in a neat and tidy condition. There is further provision that the vendor will not sell without getting the necessary documentation in effect to complete the cross-lease transaction in favour of the purchaser.

The parties' agreement in effect contains 28 additional clauses to complete a cross-lease development of the property over and above the customary Auckland District Law Society agreement for sale and purchase of land. The plan of the flats and areas of use is annexed, but Mr. Van Tilborg deposes he cannot remember whether it was annexed because he had not initialled it. It shows the houses as either Hazelwood or Kingston plans, it shows an area marked 'C', it shows another house with an approximate free area to the boundary, no measurements are shown on the plan except the distances from the house to the then existing title edge boundaries and no measurements or scale appears to estimate the size of the exclusive use area which each party would retain.

The Plaintiff built the type of kitset house specified on the brochure and in the agreement. It partially settled

the purchase of the land and obtained a legal title to an undivided one-fifth share in the land, but has never had implemented the cross-leases which create the right to live in the dwellinghouse and have the exclusive use of the surrounding land.

The Plaintiff has caveated to protect the area of exclusive use that it says showed on the original plan from which it entered into the agreement to purchase the property dated 28th February 1990. The Defendant says the Plaintiff consented to the boundary alteration reducing its area of use. The Plaintiff seeks to explain the nature of the mistake it made in settling the purchase because its representative Mr. Howard, deposes he was not alerted to the discrepancy in the boundary when signing the plan to enable the flats leases to issue and says he did not distinguish the significance of the variation in the area of restricted use which is up to about 10%. The Plaintiff says that the change from the concept plan to the deposited plan was not brought to its attention nor is it possible to recognize the difference when looking at the proposed deposited plan for the flats lease. Furthermore, it gave the flats lease plan D.P. 143594 to a builder who built a fence on the purported boundary and it was only after the fence was built it realized that it no longer had the exclusive use of an area of land which it had expected originally to receive in accordance with the plan shown to it on purchase. If the original plan was to be implemented

the garage on the adjoining property would have to be demolished. The parties acted sensibly and the fence was moved to the garage edge. The Plaintiff's real complaint is that it considered it bought the best site on the subdivision as the first purchaser and now it says it has the worst.

The First Defendant says although he does not recall the original site plan, the plan was prepared by a person from whom the Second Defendant purchased the land and it was prepared in conjunction with a building company, namely Taylor & Jourdain Limited of Te Awamutu, who marketed kitset homes. The plot the "thickens" as at the time the contracts were entered into, Richard Howard the principal shareholder in the Plaintiff, was actively selling the kitset homes for Taylor & Jourdain Limited. The First Defendant said it was not possible to build the homes as shown on the plans and Mr. Howard consented to the design changes. The Defendant says Mr. Howard was aware of these changes and he signed a building agreement with the Second Defendant company which included an amended draft site plan of the Plaintiff's land for which it would have exclusive use.

A preliminary plan to obtain Council consent prior to the deposit of D.P. 143594 was signed showing Flat 3 with the curved boundary (not a straight boundary as on the original scheme) but not showing the development of the adjoining

lots was signed by the Plaintiff. It forms a step in the typical partial stage developments that are permitted under present Town Planning. This plan does not show in quantum the area of land for which a restrictive covenant will apply, but shows the length of the boundary and dimension of the site. At the same time the leases to create the flats leases for the Plaintiff's property and an adjoining property about which there is no dispute to the southern side of its property was signed by both parties.

Subsequently the house now referred to as Flat 4, was erected. On the original scheme Flat 4 only had a carport. On the separate diagrams for the flat, namely Plan 145781, it is clear that Flat 4 has a garage which goes right up to the boundary of the Plaintiff's exclusive use area as shown on D.P. 143594. That plan was sealed by the Plaintiff as one of the registered proprietors but the Plaintiff then, after the City Council approval was given to the same managed to uplift the plan, which the Defendant disputes the right of the Plaintiff so to do, from the surveyors and will not release the plan and the plan cannot now deposit to enable the separate leasehold title to Flat 4 to be created.

Counsel for the Defendants says that over a period of 14 months the Plaintiff did not take steps to object or complain about any variation in area of its site and it signed a plan and it is only now when other parties are

wanting the cross-leases registered this issue has been raised.

The Defendants say the interest sought to be protected by the caveat is an alleged restrictive covenant. Counsel argues that the restrictive covenant does not relate to an interest in land which would support a caveat under s.137 under the Land Transfer Act 1952. Counsel submits that as a restrictive covenant is not capable of registration he submits that no caveatable interest exists relying on Staples & Co. Ltd. v. Corby [1900] 19 NZLR 517. He says further that the Second Defendant has sold the land and that the Plaintiff is estopped from seeking its caveat be sustained (i) by an estoppel by deed by the execution of a memorandum of lease dated 19th June 1991 which presently cannot be registered and the plan annexed thereto is D.P. 143594 which the Plaintiff executed and delineates the boundaries to which the Plaintiff is entitled and to which the Defendants and their purchasers are entitled; (ii) there is an estoppel in pais by the building agreement which allows for variations in boundary adjustments by execution of a building agreement in April 1990 showing a site and drainage plan and the boundary of the Plaintiff's property by the Plaintiff signing D.P. 145781; and (c) there is an estoppel by conduct in erecting the fence along the boundary as shown on Plan 145781 and in meeting the First Defendant and discussing the re-positioning of the boundary and assenting to the alteration of the physical

boundary in extending the exclusive use area by a very small amount to the garage wall.

Counsel for the Defendants says that the Plaintiff does have a remedy, the claim is limited to a claim for compensation and in terms of s.120A of the Property Law Act 1952 if that right exists an order would be made.

The Plaintiff says that it is entitled to lodge the caveat because (a) the neighbouring house was not of the design agreed to; (b) the neighbouring house was 6 metres closer to the Plaintiff's land than on the original sketch plan; (c) the Plaintiff lost 10% of its exclusive use area; (d) the courtyard is therefore smaller; (e) the Plaintiff has lost sunlight; and (f) the Plaintiff has not received a lease granting it exclusive use of the area marked "C" as agreed to.

There is no question about the validity of the contract and the Plaintiff says the Plaintiff must be entitled to caveat its interest pending receiving a registrable lease of its agreed exclusive use area.

The Defendants distinguish and says yes the Plaintiff is entitled to receive a lease which is a lease of the premises together with a negative covenant contained therein from which it is then entitled to exclusive use of an area. The Defendants say if the caveat was because of

the failure to grant a lease, then the caveat would be sustainable and with that view I concur. The caveat claims an interest as purchaser pursuant to the agreement for sale and purchase dated 28th February 1990.

The Plaintiff says that the purchaser cannot be forced to take a property which is substantially different from its description in the contract and relies on Flight v. Booth [1834] 1 Bing NC 370; Blanchard, A Handbook on Agreements for Sale & Purchase of Land 4th ed. pages 131 and 132.

The Plaintiff says it would have the right to cancel but it has elected not to do and because the Plaintiff is entitled to specific performance it is able to lodge a caveat to protect its position and relies on Hinde McMorland & Sim, Introduction to Land Law 2nd ed. page 151. Counsel indicated to me the balance of convenience would be a ground for sustaining the caveat but Counsel for the Defendants suggested that under a s.145 application it was not proper to give consideration to that matter and I do not feel that I should be considering it in the circumstances presently before the Court.

The starting point is s.137 of Adams, Land Transfer Act paragraph 402. The argument is (a) whether the negative covenant creates an interest in land; (b) whether it is necessary to have had an interest capable of being converted to an interest in land to support a caveat; and

(c) whether the fact that the covenant is noted on land transfer titles can be treated as coming within the definition of an interest which can support a caveat. Recent decisions are Brown v. Healey, (Auckland Registry), dated 22nd July 1988, Smellie, J.; Miller v. Minister of Mines [1963] NZLR 560; and Equiticorp Finance Limited v. Smart M.2025/88 (Auckland Registry), dated 17th February 1989, Chilwell, J.

One has to consider carefully the development of and creation of cross-lease titles. At the time the original case Staples & Co. Ltd. v. Corby (supra) was decided, the parties had the right under the then extant Land Transfer Act to have an estate in fee simple, an estate in leasehold and to have registered against their title mortgages and leases. Restrictive covenants, including fencing agreements, were not registrable or noted on the register. With the development of closer inner city housing the New Zealand conveyancers developed a system of cross-leases and unit developments. It is important to look at the nature of the rights created and the legal authority for creation of the same and to consider whether by creating a restricted use area it is arguable that an interest in land is or is potentially able to be created which is sufficient to support a caveat.

The applicant's attitude to this matter is quite clear. Helpfully a Statement of Claim is filed with the

interlocutory application. The Plaintiff says the Defendants have failed to provide the Plaintiff with a lease in terms of the agreement dated 28th February 1990, i.e. with building cross-leasing and exclusive occupational rights relating to the area marked 'C' on the plan attached to the agreement.

The Defendants say that the caveator has failed to bring itself within the provisions of s.137 and the decisions re Guardian Trust & Executors Co. of New Zealand Ltd. v. Hall [1938] NZLR 1020; and In re Savage's Caveat [1956] NZLR 118. The caveat claims an interest in the Defendants' two-fifths freehold title, not an interest in the defined "area of use of land" which the Plaintiff refuses to covenant not to enter upon.

The Plaintiff says that he falls within the decisions as it is arguable as to whether there is an interest in land created by the covenant which he should obtain for the area of use. I refer to decisions relating to s.137 of the Land Transfer Act 1952. In Re an Application by Haupiri Courts Ltd. (No. 2) [1969] NZLR 353, His Honour Mr. Justice Richmond said:

> ".....whether the company, founding its right to caveat solely on its position as registered proprietor, can be said to claim an interest in land by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied, or otherwise howsoever."

He continued:

> ".....the company in the present case, although claiming as the registered proprietor to be entitled to the land, is not claiming by virtue of any registered agreement.....or trust..... The claim is otherwise howsoever.
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> .....
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> In my view, therefore, s.137(a) is concerned only with the protection of unregistered interests in land and for the good reason that such interests are particularly vulnerable in the event of some dealing by the registered proprietor. This view is consistent with the judgments of the Court of Appeal in Staples & Co. Ltd. v. Corby (supra) (which was approved by the Privy Council in Miller v. Minister of Mines [1963] NZLR 560)."

His Honour continued:

> ".....a registered proprietor cannot lodge a caveat against dealings merely because he is the registered proprietor. He must go further and establish some set of circumstances over and above his status as registered proprietor which affirmatively gives rise to a distinct interest in the land. In such circumstances it would seem that the fact that he is the registered proprietor of an estate or interest under the Act may not prevent him lodging a caveat."

I turn to the exclusive area of use to consider whether the negative covenant creates an interest in land which can give rise to a caveatable interest. The issue has also been debated and there are conflicting decisions as to whether the interest, which would support a caveat, needs to qualify for ultimate registration. In this case the interest is "noted" and difficulties arise in interpreting the status of the covenant and whether the notation, vis-a-vis registration is sufficient to create the interest in land sufficient to support a caveat. Mr. Justice Smellie followed the decision of Staples & Co. Ltd. v. Corby (supra) in Miller v. Minister of Mines (supra) and held in Brown v. Healey A.147/84 (Auckland Registry) dated 22nd July 1988, that:

> "In the interpretation of s.137 the word 'interest' in paragraph (a) means a 'legal interest'."

This view conflicted with a decision of Mr. Justice Gallan in Superannuation Investments Limited v. Camelot Licensed Steakhouse Manners Street Limited (1988) 5 NZBCB 21, but in neither case was the issue decisive. The Defendants herein say that the view adopted in Staples & Co. Ltd. v. Corby (supra) should be adopted.

Hinde McMorland & Sim Land Law, Vol. 1 deals with the issue at paragraph 2.151 entitled "Who may lodge a caveat against dealings". The commentary says:

> "The Courts have adopted a somewhat strict construction of this phrase. In Guardian Trust & Executors Co. of New Zealand Ltd. v. Hall [1938] NZLR 1020....The Court of Appeal pointed out that the interest conferred on the caveator by the will of his father was a right to a share in the residue and that the residue had not yet been ascertained by the realisation of the assets and the discharge of the liabilities.....It was therefore held that the caveator had no interest in the land in his father's estate sufficient to bring him within s.137.....the Court held that the guarantee did not confer upon the caveator the character of a person entitled to or beneficially interested in any of the land.....".

This case was applied in Re Savage's Caveat [1956] NZLR 118. Again, McGregor, J. held it was not an interest in land. The commentary continues:

> "It has been said that the equitable estate or interest which will support a caveat must be one capable either presently or in due course of being converted into a registrable estate or interest. If this strict view is correct it creates difficulties in regard to certain interests in land which may be noted on the register, but which cannot be actually registered."

This is clearly the situation the Court is now faced with in respect of this application. The commentary says:

> "For example a restrictive covenant may, if the appropriate conditions are fulfilled, create an equitable interest in land."

The issue therefore relates not only to the notation but to the equitable interest - will the covenant support the caveat?

The commentary also refers to the emergence of the equity arising out of acquiescence and as a possible new equitable interest in land. In Australia it has been recognized, although by assumption in the article "Caveatable Interests - Their Nature and Priority" (1970) 44 ALJ 351 at 353, that a caveat may be lodged to protect an interest which is capable of being noted (as distinct from being registered).

Under s.126 of the Property Law Act 1952 a notification of a restrictive covenant may be entered in the register but by s.126C that notification does not give the restrictive covenant any greater operation than it has under the

instrument creating it so that the restrictive covenant remains an equitable interest. I am unable to find any decisions that assist me in the matter.

It is also important to consider the evolution of s.126 which did not exist at the time of the decision in Staples & Co. Ltd. v. Corby (supra) and the introduction of s.126 in 1952 ss. A to C. In 1986 the section was replaced by s.126 A - G giving the High Court the specific jurisdiction to deal with applications relating to all restrictive covenants and right of way easements and a procedure for determining and enforcing the same.

The commentary continues:

> "In the absence of special authority, a caveat which is based on some right less than an interest in land such as the general law license cannot be supported."

It is clear that the judicial reasoning early this century and the commentators felt that a caveat could not be supported unless the caveator could claim a specific interest in land not merely an interest created by covenant. The commentators accept the possibility of the creation of the equitable interest but as said by Mr. Brookfield in his article on "Restrictive Covenants In Gross" NZLJ 17th February 1970:

> "The covenant for the benefit of other land may be entered on the Land Transfer Register, such notification giving the covenant no greater operation than it had under the instrument creating it."

There is an article in the 1975 NZLJ at 687 where the author Mr. K.R. Smith considers the effect of noting of restrictive covenants on the register. He says "interest" in Mozley & Whiteley's New Zealand Dictionary is defined as "a right or title to, or estate in, any real or personal property". "Property" is defined as "an estate being an aggregate of rights exercisable over or in respect of land". (s.2 of the Property Law Act). The Concise Oxford Dictionary also describes "interest" as "legal concern, title, right, (in property)". The learned author says:

> "Any person who is a party to a covenant restricting use of land must obviously satisfy these definitive requirements."

He continues:

> "The notice (of the restrictive covenant) to all the world is a logical and reasonable consequence of noting such a covenant on the register for subsequent purchasers of the servient tenement.
>
> .....
>
> Section 126 of the Property Law Act 1952 shows that a restriction as to user is to be noted on the folium of the land thus restricted."

Mr. Smith argues that such restriction is an interest under s. 62 of the Land Transfer Act. Section 62 provides a registered proprietor shall hold land subject to such estates or interest as they be notified on the folio of the register. Section 126B states any notification will not give the restriction any greater operation than it has under the instrument creating it. Therefore it will give operation at least to that which is contained in the instrument.

The United Kingdom text The Law of Real Property, Megarry & Wade 5th ed., is helpful. At pagee 760 the learned authors state:

> "Even 'legal interests' can sometimes be created by what in form are mere covenants for example, by covenants creating rent changes and covenants creating easements, such as a right of way."

At page 761:

> "Although the covenant may be taken for the benefit of the whole of the covenantee's land (in this case, its lease), it can be enforced as to any part of it that the covenant touches and concerns."

The text refers to the equitable interest in land created by a negative covenant and discusses the nature of the interest and recognizes the registration of the covenant in the United Kingdom as notice to all parties.

Adams, Land Transfer Act 2nd ed. considers whether a negative restrictive covenant restricting the leases from utilization of the land gives rise to an interest which is caveatable. He says at paragraph 417:

> ".....a caveat will be ordered to be removed where delay of the caveator in completing a contract for the purchase of the land in respect of which the caveat has been lodged, has been so great that a Court of equity would not enforce specific performance of the contract against the vendor.
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> .....
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> A caveat based on a prima facie valid document will not be removed on a summary application hereunder where the facts are involved and each party has denied by affidavit the principal allegations made on affidavit by the other party: McGreery v. Murray (1912) 1 DLR 285.
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> .....where a caveatee alleges as a ground for discharging a caveat that he signed the instrument under which the caveator claims under a mistake or by way of misrepresentation, the matter should not be dealt with summarily but the Judge should direct further proceedings by action: Sawyer-Massey Co. v. Dennis I Alberta LR 125."

I turn now to the Property Law Act 1952, s.126. Paragraph 147 of Adams sets out clearly the situation with regard to restrictive covenants:

> "At common law a restrictive covenant relating to land did not constitute an estate or interest in the land.....Although the covenant was good inter partes.....Equity took a different view. An action for damages might not be considered an adequate remedy by the covenantee. Consequently equity held that a restrictive covenant would bind any holder of the land originally subject to

it, unless the holder could maintain the defence that he was a purchaser of the legal estate for value without notice. A Court of Equity enforced such a covenant by injunction, which was usually what the covanantee wanted. This equitable rule was usually known as the rule in Tulk v. Moxhay (1848) 2 Ph 774; 41 ER 1143. It is to be particularly noted the rule applies only to restrictive covenants: it does not apply to positive covenants. That appears simple, but sometimes in practice a covenant which appears at first sight to be negative is, when carefully analysed, positive in effect and thus not within the rule in Tulk v. Moxhay (supra). This must be borne in mind when construing the effect of s.126 of the Property Law Act 1952.

A valid restrictive covenant is purely an equitable estate, and being such was subject to all the precarious incidents such as an estate, until s.126 of the Property Law Act 1952 gave them much more effective protection in practice without exactly theoretically transforming them from equitable estates or interests to legal estates or interests. Restrictive covenants have often been termed equitable easements, and that is a very convenient term to use, if, however, we remember that an equitable easement over Land Transfer land may be protected only by caveat, whereas a restrictive covenant may now get the much greater protection which noting against the Land Transfer Register will achieve. In 2 White and Tudor's Leading Cases in Equity 9th ed. 169, the rule in Tulk v. Moxhay (supra) is thus formulated:

'A person who holds land with notice, actual or constructive of a valid restrictive covenant, not to use that land in a particular manner, which covenant was entered into by the late or former owner, through whom the holder derives title, will be bound by it.'

If a purchaser took only an equitable estate, he took subject to the burden of a restrictive covenant whether he had notice of it or not."

The text thereafter refers to Wellington & Manawatu Railway Co. Ltd. v. Registrar General of Land [1899] 18 NZLR 250, where Edwards, J. said:

> "There is nowhere in any statute any provision authorising the registration of any instrument creating an equitable interest - even of such an instrument as an agreement for sale, there is nothing in the Act which even remotely suggests that a covenant in a transfer hampering the use of land, or precluding the registered owner of a freehold interest in land from setting up any right incident to his ownership, could be registered."

But following various litigation over fencing the Land Transfer Act was amended and provision was made for the registration of fencing covenants.

The principle of law applicable to Staples & Co. Ltd. v. Corby (supra) remained in effect until the operation of the Property Law Act 1952. Adams says:

> "It may be stated here in passing that there has never been any objection to the inclusion in memoranda of leases of land under the Land Transfer Act, of covenants hampering the use of the land. In fact in that Act itself there will be found forms of restrictive covenants for use in leases.....".

Herdman, J. said that following the right to note fencing covenants:

> ".....one of the important consequences of this statutory provision is that the covenant runs with the land. It creates an interest in land within the meaning of the Land Transfer Act and it is registrable....." (under the specific provisions of the Fencing Act).

Referring to restrictive covenants the learned author said there must be a dominant and a servient tenement being under the provisions of the Land Transfer Act 1952, but noted that restrictive covenants in gross will still not be noted against the Land Transfer Register, nor will positive covenants be noted.

Adams outlines the type of restrictive covenants extant (a) where the covenant is simply for the vendor's own benefit; (b) where the covenant is for the benefit of the vendor in his capacity as owner of a particular property; (c) where the covenant is for the benefit of the vendor, in so far as he reserves unsold property, and also for the benefit of other purchasers, as part of what is called a building scheme. Adams suggests it is inconceivable that the Registrar will decline to note a restrictive covenant which has been validly created. Finally, it should be pointed out that the restriction notified on the appropriate folio would be an interest within the meaning of s.62 of the Land Transfer Act. However, Adams says:

> "This section does not make a restrictive covenant a registered interest in the sense that, say a memorandum of lease or of mortgage is registered. Even though noted on the register book, a restrictive covenant continues to be an equitable interest with 'no greater operation than it has under the instrument creating it'."

It is noted further that:

> "It is a matter of construing the covenant according to common sense in the light of current usage and custom."

Garrow's Law of Real Property says at page 288:

> "But it is conceived, as restrictive covenants can now be noted against land subject to the Land Transfer Act, that a restrictive covenant, the benefit of which is annexed to land, would now support a caveat."

In the more recent decision, namely Holt v. Anchorage Management Limited [1987] 1 NZLR 108, Somers, J. said at page 120:

> "Where.....(the caveat) is in issue the claim made must be shown to be arguable. It is a claim to land or estate or interest under the Land Transfer Act. 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 interests by the lodging of a caveat is an integral part of the Land Transfer Act.....".

The Court of Appeal have stressed that as there is no half-way house under a s.145 application, our Courts should let the caveat remain if there is an arguable case. Balance of convenience considerations do not appear to apply to a s.145 application.

I have seen brief reference to various caveat decisions. I refer to Motor Holdings (Air Services) Ltd. v. Bryers

M.633/85 (Auckland Registry) dated 20th June 1985 where Barker, J. was faced with a claim by a caveator who had entered into a licence to use land. It was agreed this licence could support a caveat. The Court held it was doubtful whether there was a lease but the agreement amounted to an equitable easement and could support a caveat which would justify the recognition of an arguable case.

In Spackman Holdings Ltd. v. Exim Associates Ltd. CP.562/87 (Wellington Registry) dated 21st December 1987, Heron, J. recognized that a claim by a lessee that the lessors covenant in the lease, that consent would not be unreasonably withheld would give support to a caveat. The Courts in Auckland in a decision by Wylie, J. Haylock & Ors. v. Neil & Anor A.677/85 (Auckland Registry) dated 13th July 1987, the Court recognized that an applicant had a caveatable interest in the owner's land to protect an oral agreement to grant a right of way.

Counsel for the Defendants urges that the Plaintiff has been guilty of delay which the Defendants are now prejudiced by. There are innocent purchasers who cannot complete. The caveat was lodged at the time the Plaintiff was called upon to sign the Land Transfer plan to enable the purchase by the purchaser of Flat 4 to complete. Whilst it is clear there has been some delay the Plaintiff explains the delay by the fact that he was unaware of the

movement of the boundaries and the reduction of area. This is a matter of evidence that is difficult for this Court to assess. Furthermore, it is clear that the whole concept of the staged development, the concept of delay and execution of the documents of title, the benefit of the registered proprietor, in this case the Defendants, receiving payment for land and transferring an undivided one-fifth share thereof to enable building to commence and the delays thereafter whilst the building commenced and then only at that point the lease with the proposed negative restrictive covenants in being executed, is a totally different type of conveyancing transaction from that which gave rise to the decision in Staples & Co. Ltd. v. Corby (supra). At the time of that decision no covenant or restriction of any type was noted against the register and the parties had to rely on any equitable arrangements and contracts they could make.

Since the commentaries were written the law applicable has expanded. The District Land Registrar and the local authorities have recognized a system of conveyancing which requires these flats developments to proceed on the basis of the powers and rights protected by various covenants, e.g. the defined areas of common use, the defined areas of restricted use. Since 1986 the Courts under s.126F have been given extensive jurisdiction under s.126F(a) to determine whether any positive or restrictive covenant does nor does not relate to or beneficially effect any land, is

or is not enforceable whether under this Act or otherwise by or against any person. If the Courts have this specific jurisdiction under the Property Law Act 1952, and the Courts have recognized that easements of right of way, even if equitable, will support a caveat, I believe in the present instance it must be recognized that it is arguable (a) whether the restrictive covenant can by its notation create any interest in the land particularly in view of the dictionary definition of an 'interest' in land; and (b) whether the Plaintiff is entitled to specific performance of the agreement as originally entered into and its right to that restrictive covenant is enforceable. The texts all written prior to the 1986 amendments to s.126 recognize that it is at least arguable whether the notation of the equitable interest is sufficient to support a caveat. In the United Kingdom under similar provisions, the clauses have treated the registration/notation on the title as sufficient to create notice of the interst which is enforceabale pursuant to legislation. I believe a similar situation now applies in New Zealand following the amendments to s.126. For these reasons I would not allow the caveat to lapse.

However, I am concerned about the delay and the effect on the other parties herein. The Defendants are in a difficult financial position. I am not aware of the Plaintiff's financial position but I am aware that the company is holding the property that it wishes to sell to

enable a profit to be made on the development of its site. In reality it is two developers each looking for profit out of the development of land and the building of a unit. Although the Plaintiff says he was not aware of the change to the area to which the company was entitled, then the Defendants should have alerted Mr. Howard to the change. The Defendants say the Plaintiff could have known and recognized this change when the company affixed its seal to the survey plan. This is all speculative.

I am not in a position to decide this matter. What I do know is that the Defendants' position is prejudiced by the caveat. The prospective purchaser's position is prejudiced. Because of the parties' various financial inter-relationships and their present situations, I have already said I would be prepared to extend the caveat. However, I have required that the Plaintiff company and the Plaintiff and its Director Mr. Howard, file undertakings as to damages in this Court by both parties in the form normally required in injunction proceedings. I also require the Statement of Defence to the Statement of Claim to be filed within 14 working days from 19th August 1991. Leave is reserved to seek further orders to bring the matter to trial as expeditiously as possible to determine whether the Plaintiff (a) is entitled to a restrictive covenant area of use over a further area of ground; and (b) if specific performance cannot be granted, whether the Plaintiff is entitled to damages. As the Plaintiff has

succeeded on this application, there will be costs to the Plaintiff of $1000 plus disbursements as fixed by the Registrar.

MASTER ANNE GAMBRILL

Solicitors:

Cairns Slane, Auckland, for Plaintiff
Turner Hopkins, Auckland, for Defendants