

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

M No 514/90

UNDER

The Land Transfer Act
1952

BETWEEN

THE WELLINGTON CITY
COUNCIL a local
authority incorporated
under the Local
Government Act 1974

Applicant

A N D

JOHN PATRICK GALLAGHER
of 24 Waiwera Crescent,
Maupuia, Wellington,
Company Director

Respondent

Date of Hearing 13 March 1991

Counsel: Ann E A Callaghan for Applicant in support
G L Turkington for Respondent to oppose

Date of Judgment:

18 APR 1991

JUDGMENT OF MASTER J H WILLIAMS QC

The applicant, Wellington City Council, is the owner of land in the Maupuia sub-division in Wellington and in particular the owner of 9 Waiwera Crescent in that sub-division (Certificate of Title 24D/662 Wellington Registry). The respondent, Mr Gallagher, registered Caveat B113212.1 against that title on 9 October 1990 claiming to be entitled so to do "as purchaser by virtue of an accepted tender between the Caveator as purchaser and the Wellington City Council as vendor". This application is brought by the Wellington City, pursuant to the Land Transfer Act 1952 Section 143, for an order removing Mr Gallagher's caveat from the title .

Prior to 10 August 1984, the evidence suggests that the Wellington City had disposed of some of the sections in the Maupuia sub-division by ballot and that Mr Gallagher may have been an unsuccessful participant in that ballot. That is to be gleaned from the fact that on 10 August 1984 the Wellington City wrote to Mr Gallagher saying that it intended to sell seventeen further sections in the sub-division:

"... by ballot to the applicants for the original ballot at the current market value less 20% subject to:

- (1) The applicants agreeing to sign a statutory declaration that they will commence the erection of a dwelling within two years from the date of possession and for occupation by themselves and their family for at least three years.
- (2) The applicants being of the age of majority and able to enter into a legal contract.
- (3) The new "Terms and Conditions of Sale of Maupuia Sections".

Mr Gallagher applied to be included in the ballot and was notified on 30 August 1984 that the ballot would be held on 10 September. He was informed that if he were successful he would need to sign a formal application, sign the statutory declaration to which the letter of 10 August had referred and pay a deposit of at least 25% of the purchase price within seven days thereafter.

Mr Gallagher applied to be included in the ballot for four of the sections and was successful in respect of his second preference, Lot 3 on Deposited Plan 55181 which is the property at 9 Waiwera Crescent and is now Certificate of Title 24D/662. The price was \$24,000.

Mr Gallagher's offer to purchase the section was on a Wellington City form which again included the provisions in the letter of 10 August (except that the requirement for occupation "for at least 3 years" was omitted - but as to which, see below).

In the required statutory declaration Mr Gallagher declared that:

"Upon obtaining possession of a section arising from the City Council's ballot of some of its Maupuia Subdivision sections, I shall:

- (a) Commence the erection of a dwelling within two years from the date of possession of the section, and;
- (b) Occupy the dwelling together with my family (if any) for a period of three years, and;
- (c) Execute a Deed in favour of the City Council prior to the date of possession to guarantee these undertakings;"

That declaration was made on 11 September 1984 and on the same date Mr Gallagher signed a formal offer to purchase the land for \$24,000 with \$6,000 being paid in cash and the balance over three years at 13%. He agreed "to complete the purchase of the property according to the Schedule of Terms and Conditions of Sale attached hereto". Those Terms and Conditions included the following:

- "1. ...if required by the Council the Purchaser(s) shall enter into an agreement for sale and purchase the said agreement to be prepared by the City Solicitor for the Council at the cost of the Purchaser(s) and to contain such covenants conditions and agreements as may be required by the City Solicitor.
2. Upon payment of the balance of the purchase money and of all other moneys if any owing by the Purchaser(s) to the Council under these presents and provided all such payments are made on or before the date for completion (time being strictly of the essence of the contract) the Purchaser(s) shall be entitled to a transfer of the property executed by the Council after being first executed by the Purchaser(s) when the covenants herein expressed or implied necessitate execution by him such transfer to be prepared by and at the expense of the Purchaser(s) ...
3. The Purchaser(s) shall be entitled to possession of the said property as from the date of settlement.

4. The Purchaser(s) shall commence the erection of a dwelling within two years from the date of possession and for occupation by the purchaser(s) and his or her family for at least three years.
5. The Purchaser(s) shall complete the purchase of the said property within one month from the date of acceptance of this offer by the Council. ...
8. The Purchaser(s) shall inspect the property and shall purchase the property solely in reliance upon his own judgment and not upon any representation or warranty made by the Council or any agent of the Council and to that end the Purchaser(s) at his cost shall establish the suitability of the land for himself.
9. If the Purchaser(s) shall make default for fourteen (14) days in the payment of the purchase money or any part thereof or in the observance or performance of any of the terms and conditions of these presents herein contained (time being strictly of the essence of the contract) the Council without prejudice to any other remedy it may possess and without notice to the defaulting Purchaser(s) (unless notice is required by any statutory provision for the time being in force) may forthwith or at any time thereafter at its option:
...
(b) Rescind the Agreement for Sale and Purchase and retain the deposit and the interest paid to date which shall be absolutely forfeited to the Council by the Purchaser(s) by notice in writing delivered to Purchaser(s) or posted to him in a registered envelope addressed to him at his usual or last known place of residence. ...

Payment

- 10(b) By way of Sale and Purchase Agreement with a minimum deposit of 25% on being successful in the ballot and the balance payable over a period not to exceed three years in quarterly instalments with interest on unpaid monies at the rate of 13% per annum.

That offer was accepted on behalf of the Wellington City on 12 September 1984, the deposit of \$6,000 was paid and the Wellington City sent the required notice of change of ownership to the (then) Valuation Department shortly thereafter showing the date of possession as 12 October.

On 11 September 1985 the Wellington City sent Mr Gallagher's then solicitors what it described as a "further" agreement for sale and purchase and referred to correspondence earlier that year which is not before the Court. That further agreement provided for interest on \$18,000 at 7.25% instead of 13%, for possession of the land to be given one month from the date of acceptance of the purchase offer or one month from the date of depositing of plan 55181 and included provisions concerning the erection of "one single unit private dwelling ... within two ... years from the date of possession for the personal occupation of the purchaser and the purchaser's family" which, in their detail, went somewhat beyond the provisions in that regard in the Terms and Conditions which applied to the ballot. The further agreement also provided for the purchaser of the land to enter into a Deed of Covenant with the Council "expressing the requirements of this agreement". Mr Gallagher says that he refused to sign the document because it went beyond the original term. He said, further, that he continued to make the payments due under those terms and in fact completed them by the beginning of 1988. He also says that he has paid the rates on the property ever since the date of possession. The Council does not challenge those assertions.

Mr Gallagher changed solicitors towards the end of 1985 and his new solicitors wrote to the City on 23 December saying that their perusal of the former solicitors' file showed "a prolonged dispute as to the Council's requirements as to penalty provisions in the agreement". The Council replied on 6 January requiring the amended agreement for sale and purchase to be executed. It is common ground that that never occurred.

The second anniversary of Mr Gallagher's possession of the land passed without a start being made on his house and without, apparently, any objection by the Council or any further activity by the parties. Mr Gallagher says that a number of other sections which had been sold by ballot in September 1984 had not been built on at the time.

In mid-1987 Mr Gallagher commissioned the preparation of plans for a house on 9 Waiwera Crescent. These were completed in March 1988. On a date which is variously given as 29 April or 2 May that year Mr Gallagher applied for a building permit. It was granted in June. The time within which it was required to be uplifted was extended by the Council. Ultimately the permit was cancelled on 14 June 1989. Council's witness says that was done by Mr Gallagher.

Provoked, no doubt, by Mr Gallagher's application for a building permit, Wellington City wrote to his solicitors on 2 May 1988 seeking the return of the executed agreement for sale and purchase. They followed that up on 28 October drawing Mr Gallagher's attention to the requirement to build within two years of 12 October 1984 and asking the solicitors to "advise your client's intentions in that regard".

In the meantime, either in May 1988 or May 1989 (the evidence is unclear on this point), Mr Gallagher had been made redundant from his employment. This, naturally, caused him to reconsider his building plans and he says that a series of negotiations took place about his intention to build. As a result, meetings were held and on 6 July 1989 Wellington City wrote to Mr Gallagher's solicitors saying:

"I refer to our meeting on 5 July with you and your client. Your client maintained that he had always wanted to comply with the terms of the contract, but had been prevented by circumstances beyond his control, but he still intended to build and occupy the property ...

However, the Council is prepared to agree to his request to confirm that title will be transferred to him directly, after a building permit has been uplifted in his name and the foundations have been poured.

No doubt you will advise us when that stage is reached, and will send a transfer for execution prior to that. I draw your attention to the need for you to then put a section 230 (proviso) certificate on the reverse of the transfer prior to registration.

Please confirm that your client now will proceed on the above basis."

Mr Gallagher's solicitors replied on 10 July referring to the 6 July letter and saying that "our client intends to proceed on that basis".

No building permit had been uplifted and the foundations of Mr Gallagher's house had not been poured when his solicitors wrote to Wellington City on 4 October 1989 complaining:

"... that the City Council has permitted a sale on (sic) a neighbouring property of 11 Waiwera Crescent to a Developer who is building, we understand, four townhouses on the section. Our client is obviously concerned that the contract he entered into with the Wellington City Council required him to build a single unit dwelling for his own occupation and that that term would be comprised in all contracts in the area. Therefore our client has always contemplated building a home which would fit in with other dwellings in the area.

The representation that this position would be protected by the Wellington City Council was clearly made at the outset and it now appears that the Council has not protected our client in that regard or indeed other section owners in the area."

The developer to which that letter referred was the Housing Corporation of New Zealand and the solicitors wrote to that Corporation on 10 October making similar complaints. The Wellington City replied on 11 October commenting that Mr Gallagher's brother, Mr R G Gallagher, had been the successful ballottee for 11 Waiwera Crescent and had sold the property with no covenant on the title as to the type of building nor the duration and type of user and commenting:

"The contract the Council has with your client does not include any term whereby the Council covenants that adjoining properties will be single-unit dwellings only.

The Council denies that it made any representation in this regard and indeed the contract expressly excludes any representations or warranties.

I understand that it is the Housing Corporation which is building the multiple units and it does not obtain building permits from the Council.

Having said that your client is under an obligation to build on a single-unit dwelling, and thus title will only be transferred to him when such is underway and/or he executes a Deed of Covenant to only so build, and allow Council to caveat until it is completed."

By 1 May 1990 the Housing Corporation units on the section adjacent to Mr Gallagher's had apparently been completed and his solicitors had obtained a valuation (which they sent to the Wellington City) saying that the adjacent units had reduced the value of Mr Gallagher's property by 20% and that that affected his wish to develop his property as originally planned because such would "seriously over-capitalise the property". The letter suggested that:

"It is our view that the failure by the Wellington City Council to ensure that adjoining properties would have single unit dwellings completed on them, which we see as an implied term in our contract, has resulted in substantial loss to our client, not only in the decrease in value to his section but also in damage in his inability to pursue the building option which was originally planned.

We believe it is now incumbent on the Council to assist our client in mitigating loss. May we first suggest that title to the property be promptly transferred to our client so that he may then dispose of same, whether by the erection of a single unit dwelling and living there himself or otherwise, and thereby mitigate against the on-going damage."

No reply was received from the City until 28 August 1990 when it wrote to Mr Gallagher's solicitors saying:

"Your client has disregarded all of the building requirements set by the Council.

In view of your client's continuing failure to carry out the obligations to erect a dwelling for the personal occupation of himself and his family within two years the Council hereby rescinds the agreement and any prior offers to settle are withdrawn. The Council will be prepared to re-negotiate an increased sale price for a limited time, up to 30 days from the date hereof, but reserves the right to re-sell the site on the open market following this period, allowing your client a refund of any monies he has paid to the Council"

Mr Gallagher's solicitors rejected that claimed rescission when they next wrote, on 13 September, and saying that at the meeting, presumably that of 5 July 1989, which they had had with Council's officers:

"... it was accepted that our client would have an extended period within which to complete his building contract. No time limits were set and no subsequent time notification has been given. The purported rescission is therefore invalid in that regard."

The Council wrote on 17 September saying that "at all times it has been your client who has been in clear breach of his contract with the Council" and suggesting that any allegation of any responsibility on Council's behalf was unhelpful and inappropriate and that Mr Gallagher was in clear breach of his obligation to build within two years of possession. The letter concluded:

"As indicated in (Council's) letter to you of 28 August 1990, you have until the end of this month to come up with some constructive proposal on a new price. After that date the section will be put back on the market."

Mr Gallagher's solicitors said on 24 September that he was relying on the representation in the Council's letter of 6 July 1989 and asked Council to "review its current attitude" and on the same day Mr Gallagher signed the Caveat which is the subject of this proceeding. By 2 November 1990, the City had been advised of the registration of a Caveat and wrote saying:

"... You had until the end of September to come up with a constructive proposal in relation to a new price. As you have failed to do so, the Council accordingly hereby gives your client notice that as your client has failed to observe or perform Clause 1 and 4 of the Terms and Conditions of Sale, that contract is hereby cancelled."

and calling for the removal of the Caveat.

Further discussions took place between the parties. They came close to settling the matter on an agreed timetable but a concluded compromise was never achieved.

After a false start (when leave to commence this application was sought on 26 November 1990) this application for removal of Mr Gallagher's caveat was filed on 25 January 1991.

The following principles govern applications such as these:

1. As it is the Caveator who is encumbering the registered proprietor's title, the onus is on the Caveator to demonstrate that he has a reasonably arguable case that the Caveat should remain (Sims v Lowe [1988] 1 NZLR 656, 660; New Zealand Limousin Cattle Breeders' Society Inc v Robertson [1984] 1 NZLR 41, 43). This onus appears common both to applications under Section 143 and applications by Caveators for extensions of their Caveat.
2. The Section 143 procedure is unsuitable for determining disputed questions as to fact and as a result an order for removal under Section 143 will not be made unless it is 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" (Sims v Lowe (supra) at 659-660). The test is whether the Caveator has a reasonably arguable case (ibid).

In this case, the Wellington City does not and could not deny that there was an accepted tender between the parties but it says that the contract between them was validly cancelled on 28 August 1990 or on 2 November 1990 and that Mr Gallagher accordingly no longer has any caveatable interest in 9 Waiwera Crescent.

It is patently clear that, in terms of condition 9 of the Conditions of Ballot, Mr Gallagher has not observed and

performed all the terms and conditions pursuant to which he purchased 9 Waiwera Crescent. He has not entered into an agreement for sale and purchase as required by condition 1 and he has not commenced the erection of his house within two years of possession and occupied it with his family for three years. In terms of clause 9 of those conditions, therefore, the Council was entitled "without notice to ... forthwith or at any time thereafter rescind the agreement for sale and purchase".

Mr Gallagher, however, says that there are two matters which arguably disentitle the Council to rescind the agreement.

The first of those relates to the course of correspondence between the parties. Mr Gallagher says that the evidence before the Court discloses that up until 6 July 1989 neither party insisted on timeous compliance with the requirements that he sign an agreement for sale and purchase and that he commence the erection of his home within two years of possession. There is little before the Court as to any negotiations between the parties over the terms of the formal agreement for sale and purchase but certainly it may be observed that the provisions in the document before the Court appear to go significantly beyond those which applied in the ballot. As to the second of those matters, it could not be doubted that the City was, by granting Mr Gallagher a building permit in April or May 1988 and later extending it until it was cancelled on 14 June 1989, obviously evincing a preparedness to permit Mr Gallagher to commence the erection of his home at least up until that last date.

There then occurred the meeting on 5 July and the correspondence of 6 and 10 July. That has already been set out. In this Court's view, it is capable of bearing one construction only, namely that the Council had waived any failure by Mr Gallagher to commence the erection of his home up to that time and were prepared to permit him to continue with

his preparations for building. In addition, by virtue of the fact that the letter spoke of the execution of a transfer, it must be that the Council had also waived the necessity for Mr Gallagher to execute an agreement for sale and purchase. Thirdly, it is to be noted, as Mr Gallagher's solicitors later asserted, that the Council imposed no time limits on Mr Gallagher complying with the matters referred to in the letter of 6 July and in fact left compliance and the notification of such compliance up to him.

Contractually, the next steps in the matter are Mr Gallagher's solicitor's letter of 1 May 1990 and the Council's reply of 28 August. The terms of that correspondence have also been set out. The letter from the solicitors proposes a means of overcoming the objection concerning the nature of the buildings on other Waiwera Crescent sections. This had clearly been of concern to Mr Gallagher since October the previous year. The Council's letter in reply does not respond to the proposed means of overcoming the problem. It claims both to rescind the agreement and to affirm it, the latter by offering to negotiate an increase in the sale price. No prior indication was given of Council's intention to rescind the agreement.

In this Court's view, Council had waived compliance with the strict terms of the conditions relating to the ballot for the reasons earlier discussed and in a way which left the times and the methods of compliance with the new conditions set out in the letters of 6 and 10 July 1989 up to Mr Gallagher.

In addition, as a purchaser in possession of land, Mr Gallagher was entitled, pursuant to the Property Law Act 1952 Section 50, to the notice of breach for which Section 118 of that Act applies in respect of leases, together with reasonable time to rectify the breach.

In all those circumstances, this Court could not conclude that Council's claimed rescission on 28 August 1990 of the contract was not arguably invalid.

Similar comments apply to the claimed cancellation of 2 November 1990. It is principally based on Mr Gallagher's failure to negotiate an increased price even though it also refers to the condition relating to his failure to commence building his home within two years.

For all those reasons, this Court is of the view that Mr Gallagher has satisfied the onus on him in accordance with the authorities earlier discussed of showing that he has a reasonably arguable case in favour of the interest claimed in his caveat and the application for removal accordingly requires to be dismissed.

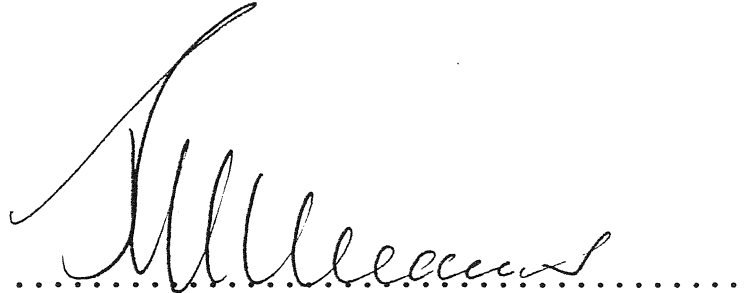
In the light of that finding, the second ground on which Mr Gallagher based his opposition to the application requires only comparatively brief discussion. That ground relates to what Mr Gallagher alleges is a failure on the part of the City Council to ensure that all the sections sold by ballot in September 1984 had only one single unit house built on them. It is clear that the titles disposed of by ballot in this way are not encumbered with any restrictive covenant as to the type of building to be erected on each but in this Court's view it is equally clear that the documents which were issued by the Wellington City in relation to the ballot were all standard forms which were doubtless made available to all those who participated in the ballot. It therefore follows that every ballottee was entitled to assume that every other ballottee was contractually bound to the Council to erect "a dwelling" on the land within two years from possession for occupation by the ballottee and his family for three years. It may be that each such ballottee was entitled to assume that all other ballottees had executed the Deed of Covenant for which the draft agreement for sale and purchase provides and that the Council would enforce both those provisions against defaulting ballottees. This argument, in this Court's view, is more difficult for Mr Gallagher because of his own plain defaults and because any expectation which he may have had in that regard may sound only in damages as between Council and any defaulting ballottees and

not directly between the Council and himself. Even then those rights of action may be doubtful if the ballottee has not agreed to execute a Deed of Covenant, particularly when the draft agreement for sale and purchase contains no obligation on a ballottee to obtain a similar Deed of Covenant from any purchaser to which the section may be sold.

However, in light of the earlier finding, those matters require to be no more than noted at this stage. They do not require determination.

For the reasons previously set out, the Court's orders are:

1. The Wellington City Council's application under the Land Transfer Act 1952 Section 143 for removal of Mr Gallagher's Caveat is dismissed.
2. It is appropriate that costs be fixed. Counsel are to submit memoranda on that topic, each within fourteen days of the date of delivery of this judgment. The file is then to be referred to the Master for determination.



.....
Master J H Williams QC

Solicitors: City Solicitor, Wellington City Council,
Wellington for Applicant.
Kevin Smith and Nigel Hughes, Wellington for
Respondent.