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NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

28/1

M. NO. 1926/93

2489

IN THE MATTER of the Land Transfer Act 1942

A N D

IN THE MATTER of an Application pursuant to Section 143 for Removal of Caveat

BETWEEN EQUUS TUDOR PARK HOLDINGS LIMITED

Plaintiff

A N D SALLY ANN NEUBERGER

Defendant

Hearing: 20 December 1993

Counsel: K A Muir for the Plaintiff
D J Clark for the Defendant

Judgment: 20 December 1993

(ORAL) JUDGMENT OF MASTER KENNEDY-GRANT

This is an application by the plaintiff for an order removing a caveat placed over property registered in the name of the plaintiff by the defendant. The caveat alleges an interest in the land *"as beneficiary by virtue of an implied trust entered into on the 7th day of December 1989 between [the defendant] and [the plaintiff] which is the trustee."*

I do not consider that it is open to me to accept argument based on any ground other than that of implied trust (accepting that on the authority shortly to be referred to that includes a resulting trust). It was an implied trust which was alleged in the caveat. It was an implied trust of which notice had been given to the world and no other.

Mr Clark relies, for a definition of the circumstances in which an implied trust arises, on the following passage from ***Garrow & Kelly's Law of Trusts and Trustees*** (5th ed) page 13:

> *"... the intention of the transferor of the property has not been expressed in any way from the language he has used in transferring the property to the trustee, but from the circumstances of the case law presumes that a trust was intended, notwithstanding that absence of language expressive of such an intention ... under this heading are classified cases of what are called resulting trusts ..."*

He relies also on the following passage from the judgment of Fisher J in ***Cossey v Bach*** [1992] 3 NZLR 612 at 630/17-39:

> *"Resulting trusts are based upon the rebuttable presumption that without more, a settlor must have intended to retain the beneficial interest in such of his own property as he has not effectively disposed of to another. The presumption is that a person providing or contributing to the purchase price of real or personal property in respect of which a sole or joint interest is conveyed into the name of another retains an equitable interest in the property conveyed to the extent of his contribution if there is nothing to indicate that he intended to confer the beneficial interest upon the legal transferee. The presumption may be strengthened if the inference is that the initial disposition had been made to further a joint venture which has since failed:* ***Baumgartner v Baumgartner*** *(1987) 164 CLR 137,149 cited in* ***Gillies*** *at p342. A contribution to the purchase price qualifies for this purpose only if it had value in money or money's worth, was made upon or before the acquisition of the property, and formed part of, or was directly or indirectly traceable to, its purchase price (see further the authorities collected in* ***Fisher on Matrimonial Property*** *at paras 4.12 and 4.13). The presumption does not apply if there is evidence of a contrary intention. As suggested earlier, settlement in joint names might well evidence just such a contrary*

> *intention. But assuming that the settlor has survived that obstacle by showing that there was no intention applicable to the current circumstances, the presumption can be invoked. For this purpose it will be necessary to ascertain who provided the purchase price of the property in question and, if more than one contributed, in what proportions. The result will represent the provisional beneficial ownership of the property but will then be subject to the test for reasonable expectations.*

I consider that the situation with which I am concerned in this case is distinguishable from the situation which existed in ***Cossey v Bach*** and other similar cases. What I have here is a transfer by the parties to the marriage to a company of property in which they have had a beneficial interest prior to the transfer. In ***Cossey v Bach,*** ubi supra, it was the transfer of property to the other party to a marriage which was in issue. Because the transfer in this case was to a company, which is a separate legal creature from the defendant and her husband, I do not consider that it is arguable that there was an implied trust, whether a resulting trust or otherwise. A company is a separate entity. Shareholders benefit from it being a separate entity. It appears as a separate entity on the land register. To admit the argument now put forward would be to undermine both company law and the law relating to the registration of title of land. I do not consider that the defendant has a caveatable interest in respect of this property.

I therefore make the order sought.

I fix the costs of the application at $500 plus disbursements and order them to be paid by the defendant to the plaintiff. The payment is not to be sought nor made until such time as the matrimonial disputes between the defendant and Dr Neuberger have been resolved.

MASTER T KE

Solicitors

Wilson Wright & Co, Auckland, for the Defendant
Morgan-Coakle Ryan & Bierre, Auckland, for Plaintif

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