

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV 2005-404-005883**

BETWEEN RAISER DEVELOPMENTS LIMITED  
Plaintiff  
AND TREFOIL PROPERTIES LIMITED  
First Defendant  
AND GRAFTON OAKS MOTELS (1999) LIMITED  
Second Defendant

**CIV 2005-404-005859**

UNDER Sections 145 and 145A of the Land Transfer  
Act 1952  
IN THE MATTER OF an application pursuant to sections 145 and  
145A of the said Act that a caveat not lapse  
BETWEEN RAISER DEVELOPMENTS LIMITED  
Applicant  
AND TREFOIL PROPERTIES LIMITED  
First Respondent  
AND GRAFTON OAKS MOTELS (1999) LIMITED  
Second Respondent

Hearing: 2 August 2007

Counsel: D Wood for applicant/plaintiff  
W Manning for respondents/defendants

Judgment: 2 August 2007 at 1645

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**JUDGMENT OF ASSOCIATE JUDGE FAIRE  
[on application for stay of judgment]**

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Solicitors: Bytalus Legal, PO Box 34 868, Birkenhead for applicant/plaintiff  
Stephen McDonald, PO Box 26 686, Greenlane for respondents/defendants

### **The application**

[1] The applicant applies for an order that the judgment I delivered on 11 July 2007 be stayed pending an appeal to the Court of Appeal.

[2] The application is made in reliance on r 12 of the Court of Appeal (Civil) Rules 2005. Although the application itself refers to r 710 of the High Court Rules, that, in fact, has no application because this appeal is an appeal to the Court of Appeal.

### **The judgment**

[3] My judgment ordered that Caveat 6476279.1 (North Auckland Registry) registered against that parcel of land in CT 47C/401, Lot 1, DP 82994 be removed.

### **The grounds in support**

[4] The grounds in support of the application in summary are:

- a) An appeal has been filed;
- b) If the stay is not granted the appeal will be rendered nugatory;
- c) There can be no prejudice to the respondents if a stay is granted; and
- d) That there have been significant changes since the decision was delivered.

### **The Court's approach to a stay application**

[5] The application is made in reliance on r 12 of the Court of Appeal (Civil) Rules 2005. Of particular significance are subrules 3 and 4 which provide:

- (3) Pending the determination of an application for leave to appeal or an appeal, the court appealed from or the Court may, on application,—
  - (a) order a stay of the proceeding in which the decision was given or a stay of the execution of the decision; or
  - (b) grant any interim relief.
- (4) An order or a grant under subclause (3) may—
  - (a) relate to execution of the whole or part of the decision or to a particular form of execution:
  - (b) be subject to any conditions that the court appealed from or the Court thinks fit, including conditions relating to security for costs.

[6] I am required to balance two principles. First, a successful litigant should not be deprived of the fruits of his or her litigation. Second, an appellant should not be deprived of the fruits of a successful appeal: *Duncan v Osborne Building Ltd* (1992) 6 PRNZ 85 (CA) at 87.

[7] In balancing the two principles the Courts, however, have considered a number of matters. They include:

- a) Whether, if no stay is granted, the appellant's right of appeal will be rendered nugatory;
- b) Whether the successful party will be injuriously affected by the stay;
- c) The bona fides of the applicants as to the prosecution of the appeal;
- d) The effect on third parties;
- e) The novelty and importance of questions involved;
- f) The public interest in the proceeding;
- g) The over all balance of convenience and the status quo; and

- h) Whether the appellant has demonstrated a sufficiently arguable point to be considered on appeal.

*Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd*  
13 PRNZ 48, *Videbeck v Auckland City Council* HC AKL M 1053sw02  
21 October 2002 at [7].

### **Urgent decision required**

[8] In addition to an application for stay, the applicant filed an application for an interim judgment. That application was heard by Williams J on 20 July 2007. He minuted the file:

After hearing counsel Registrar directed to retain on file all sealed copies of order that caveat with withdrawn until plaintiff's stay application was heard and determined on Wednesday 25 July 2007 (assuming appeal filed by then).

[9] On 25 July 2007 Randerson J, again after hearing counsel, minuted the file:

1. adjourned to 2 August at 10am before Judge Faire to hear application for stay of judgment.
2. Interim order made by Williams J on 20 July is extended until 2 August 2007.

[10] I have approached this case on the basis that a decision on the stay application must be given today so that the holding provision provided by the interim injunction is not frustrated.

### **Background**

[11] The plaintiff filed proceedings out of this Court under Civ 2005-404-005883. The plaintiff seeks an order for specific performance of a property agreement and a business agreement allegedly entered into between the applicant/plaintiff and the respondents/defendants on or about 11 May 2005 in respect of a property at 117 Grafton Road, Auckland and the business conducted in it. In a judgment which I delivered on 16 November 2006, I ordered that the caveat which had been lodged

by the applicant plaintiff pursuant to the claim made under the sale and purchase contract that I have referred to not lapse until further order of the Court. That judgment reserved to the parties on fourteen day's notice leave to have the application for an order that the caveat not lapse listed for further consideration if, as a result of a change of circumstances, further orders should be made. In addition, orders were made directing a trial of the substantive proceeding in August 2007. Those directions made provision for the service of briefs of evidence and the other matters that are prescribed in rr 441B to 441I and 441M to 441Q of the High Court Rules. Provision was also made for the filing and service of an amended statement of defence and counterclaim and a supplementary affidavit of documents. Provision was also made for the disposal of any application for security for costs that might be filed.

[12] Paragraph 35 of the judgment recorded as follows:

[35] The second major point advanced in opposition to the extension of the caveat is the balance of convenience. The defendants, understandably, are aggrieved that there have been two opportunities for the plaintiff to tender settlement in the conveyancing sense which could have led to the transfer of the business and the land to it. There is no precise evidence that the plaintiff has sufficient funds to complete the settlement. Mr Wood drew attention to the fact that a deposit of \$400,000 has been paid in respect of the original transaction. Mr Manning is concerned that the caveat, if sustained and is found to be in respect of an interest which no longer exists, exposes the defendants to a position where they cannot recover any loss that they might suffer as a result of the restriction which currently appears on their title. He acknowledged that the problem only arises if there is a fall in value of the assets covered by the agreement and the loss of an opportunity to sell. On the other hand, there is an existing proceeding and it is possible, having regard to the interlocutory orders and trial orders that I discussed with counsel in the course of this hearing, to minimise that risk. I am told that there will be an application for security for costs in respect of the substantive proceeding. That will create an opportunity to review the position at that stage. In the event that an order is made and not complied with, and the proceeding is stayed, the caveat might then be discharged. It is for that reason that I intend to tag the order made on this application to allow the defendants to have the application to sustain a caveat re-listed should a new development occur.

[13] An order for security for costs was made and there was non-compliance. That led to a request for the originating application to be listed again before me. It

was as a result of that further request that my judgment of 11 July 2007 was delivered.

[14] The judgment records a number of defaults in compliance with Court orders by the applicant/plaintiff and [12] lists the specific reasons for the conclusion which I came to and which led to the order removing the caveat.

[15] A number of developments have occurred since my judgment was issued:

- a) The plaintiff has paid the security for costs ordered; payment having been made to the Registrar of the Court on 31 July 2007;
- b) Counsel for the applicant plaintiff has confirmed to me that Mr Clode the director and sole shareholder of the applicant plaintiff agrees to extend the personal undertaking which he himself gave in respect of damages and in respect of the injunction proceeding to apply to any damages which the continued existence of the caveat may cause through the stay period and until disposal of the appeal;
- c) Mr Clode, the applicant plaintiff's director has confirmed on oath that the briefs of evidence for the trial of the substantive proceeding which is due to start on 20 August 2007 are currently being finalised and will be available for the defendants by either Friday, 3 August 2007 or no later than Monday, 6 August 2007;
- d) The setting down fee in respect of the trial has been paid to the Registrar of the Court;
- e) The plaintiff company has filed and served a statement of defence to the defendants' counterclaim; and
- f) Further particulars have been supplied in accordance with the defendants' request relating to the plaintiff's amended statement of claim.

[16] I record those changes of circumstance because they are matters which the Court of Appeal may well allow to be considered by that Court when it determines the appeal because of their significance in relation to the overall position of the plaintiff and defendants in this litigation. The caveat was, of course, allowed to remain on the title so that the substantive issue as to whether or not a decree of specific performance in respect of the relevant sale and purchase agreement could be determined by the Court. The order removing the caveat was made out of a concern which the Court had as to whether that proceeding would, in fact, be prosecuted expeditiously, if at all, and, further, that in the event that it was not the defendants were likely to sustain potential losses which were unlikely to be able to be recovered from the plaintiff because of what was known of the plaintiff's financial position. In short, my judgment of 11 July 2007 resulted in an assessment of the balance of convenience. The defendants are concerned that their ability to sell the property to another potential buyer is significantly compromised by the continued existence of the caveat on the title. The risk of damage caused by that position, in my view, can be reduced if:

- a) The trial of the substantive proceeding proceeds on 20 August 2007 and leads to a conclusion of this dispute; and
- b) That additional security is available by way of an undertaking as to damages in the event that the plaintiff fails and the defendants suffer loss as a result of the existence of the caveat.

[17] The matters recorded in the previous paragraph have to be judged against the consequence of refusing to grant a short stay in this case. To do so, having regard to the evidence placed before me, indicates that there is a strong possibility of a transfer from the defendant property owning company to another party which would defeat the plaintiff's claim for specific performance. The immediate effect would be to render the appeal itself nugatory because the plaintiff/applicant would not be able to reodge a caveat claiming an interest from the then registered proprietor of the subject title.

[18] I do not over look the fact that the consequence referred to in the previous paragraph does not mean that the plaintiff is left without any relief from the defendants in respect of the substantive proceeding because there is always the possibility of pursuing a claim for damages.

[19] I conclude that a stay is justified at least for a limited period at this time. That period is up to the conclusion by judgment of the trial due to start on 20 August 2007. If, however, that trial date has to be abandoned then the position of any extension of the stay would need to be reconsidered.

[20] I record that since hearing counsel Mr Wood has arranged for Mr Clode the director of the applicant/plaintiff to file a further personal undertaking in the terms that I have earlier recorded in this judgment.

### **Orders**

[21] I order:

- a) The judgment of 11 July 2007 is stayed pending further order of this Court but subject to the following conditions:
  - i) A personal undertaking as to damages arising in respect of the registration of the caveat shall be provided by the applicant/plaintiff's director, Mr Clode;
  - ii) That the trial of the substantive proceeding in fact proceed on 20 August 2007; and
  - iii) That in the event that the trial does not proceed on 20 August 2007, the applicant/plaintiff prosecute the appeal with diligence;
- b) A conference with the trial Judge in respect of the substantive proceeding in Civ 2005-404-5883 is fixed for 9am on 6 August 2007



for the purpose of finalising matters pertaining to the trial. As a guide for counsel only, there is attached to this judgment an agenda for such conference;

- c) In the event that the trial does not proceed on 20 August 2007, the application for stay is to be allocated an urgent fixture to determine whether the stay should continue;
- d) Costs in respect of this application are reserved. In the event that counsel cannot agree, memoranda shall be filed in support, opposition and reply at seven-day intervals.

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JA Faire  
Associate Judge

### **Pre-Trial conference Agenda**

- a. Review of timetable compliance.
- b. Review of time required for hearing.
- c. Agreement on relevant facts not in dispute.
- d. Identification of the issues still arguable and for resolution at trial.
- e. Openings to include:
  - Summary of plaintiff's/defendant's claim;
  - Chronology;
  - Issues statement;
  - Summary of legal principles with reference to directly relevant authorities;
- f. Bundle of documents – to include only those documents to be referred to by witnesses or counsel in submission.
- g. Other issues.

Counsel shall file and serve two working days before the conference a memorandum which addresses each of the items mentioned above, or, alternatively, a joint memorandum.