IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2008-485-2604

BETWEEN	ANDREW VICTOR SHELLEY Applicant
AND	ANGELENE STEPHENS Respondent

Hearing: 13 March 2009

Appearances: J. Dean and D. Calder - Counsel for Applicant
F. Gush - Counsel for Respondent

Judgment: 18 March 2009 at 4.00 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 18 March 2009 at 4.00 p.m. pursuant to r 11.5 of the High Court Rules.

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Introduction

[1] This is an application for an order that Caveat 7934514.1 registered against a one-half share interest in the title to a residential property at 1 Bailey Grove, Upper Hutt being certificate of title WNF4/1006 (Wellington Land Registry) ("the property") not lapse.

[2] The registered proprietor of the one-half share interest in the property, the respondent opposes the application.

Background Facts

[3] The applicant and the respondent were married on 19 January 1991 and separated on 23 May 2003. Their marriage has been dissolved. They are the parents of two children. Since separation, the respondent has had day-to-day care of the children and the applicant has had regular contact.

[4] On 21 January 2005 the parties signed an Agreement regarding separation, spousal maintenance, child support and the division of relationship property ("the relationship property agreement"). That relationship property agreement provided broadly:

(a) The parties settled the division of their relationship property on the basis that the respondent would retain the property as her separate property.

(b) The applicant agreed to pay a lump sum for spousal maintenance of $26,000.00.

(c) At settlement of the division of all the parties' relationship property, the respondent was to pay to the applicant the sum of $45,519.58 ("the net settlement figure") as a net settlement amount.

(d) The relationship property agreement provided that at that time the property was valued at $252,000.00 and after deduction of mortgages had a net total equity of $114,911.09. It went on to say that the respondent owed the applicant one-half being the gross sum of $57,455.55 for his share of the equity in the property.

(e) Notwithstanding this acknowledgement, the relationship property agreement then went on to note that the respondent owed the applicant some $301.23 representing half the difference in certain adjusted insurance payments amounts and $524.00 for chattels, but the applicant owed the respondent $4,193.75 representing half of a bonus he earned and received over a 6 month period to the end of May 2003.

(f) When these amounts are netted off from the applicant's acknowledged one-half share in the equity of the property at $57,455.55 this left a balance due from the respondent to the applicant of $54,087.03.

(g) While it is not completely clear from the relationship property agreement, the parties appeared to intend that the $26,000.00 spousal maintenance payment owing from the applicant to the respondent was accounted for in assessing the net settlement figure being the final amount due to the applicant. Before me, Ms. Gush for the respondent conceded that this was the position. Deducting this $26,000.00 from the $54,087.03 noted above, thus left a balance of $28,087.03.

(h) Notwithstanding this, the relationship property agreement at para. 3.31 stated:

> *"3.31 In full and final settlement of the abovementioned claims Angelene (the respondent) shall pay Andrew (the applicant) the net settlement amount of $45,519.58. ……"*

(i) The relationship property agreement then went on to provide that contemporaneously, the parties would enter into a separate Loan Agreement ("the Loan Agreement") whereby the applicant would provide finance to the respondent for the net settlement figure and the respondent would make fortnightly loan repayments with interest to the applicant. The relationship property agreement provided that credited from these fortnightly loan repayments would be the amount required by way of fortnightly child support payments due from the applicant to the respondent. These were to be credited from the net settlement figure being the $45,519.58 owing under the Loan Agreement.

[5] Before me, it became clear that the applicant explains this net settlement figure of $45,519.58 by adding to the debt figure of $28,087.03 (calculated at paragraph [4](g) above as one-half of the property equity of $54,087.03 less the $26,000.00 spousal maintenance payment) due from the respondent, an amount of $17,432.55 owing to the applicant for post-separation contributions to the parties' joint revolving National Bank credit account.

[6] On this, para. 3.10 of the relationship property agreement stated:

> *"3.10 The Property has a mortgage registered against it to the National Bank of New Zealand Limited. Andrew has made payments of $40,547.68 and Angelene has made payments of $5,682.58 to the Joint Flexible Revolving Credit Account (National Bank of New Zealand 06-0583-0341826-00) since the parties' separation on 23 May 2003."*

One-half of the $34,865.10 difference between these payments amounts is $17,432.55.

[7] On 21 January 2005 the parties also entered into the Loan Agreement. It referred to the net settlement figure and principal sum of $45,519.58.

[8] This document was signed by the parties after being independently advised by their respective solicitors. The Loan Agreement provided that the applicant would register a security interest against the property during the term of the loan with that security interest removed "*within 5 working days of Angelene (the respondent) repaying the full outstanding balance*". The "*outstanding balance*" was defined as the principal sum plus any interest charged less any repayments made by the respondent.

[9] So far as repayments under the Loan Agreement are concerned, the parties accept that around 21 January 2005 the respondent paid to the applicant $20,000.00. This left a balance loan of $25,519.58 from which the respondent has since been credited with regular net amounts of offset child support payments totalling about $8,100.00.

[10] Before me, however, it became clear that the respondent disputed first, the net settlement figure of $45,519.58 recorded in the agreements, and secondly, the respondent's liability for the remaining sum of $17,432.55 under the Loan Agreement.

[11] Notwithstanding this, the real issue here is whether the $45,519.58 acknowledged debt in the Loan Agreement, which is the subject of the caveatable interest claimed, has been paid or satisfied by the respondent.

Counsel's Arguments and My Decision

[12] The present application for an order that the caveat not lapse is brought in reliance on s. 145A *Land Transfer Act 1952*. The applicable principles for applications to preserve caveats under s. 145A are clearly established. They include the following:

> "*(a) The plaintiffs must establish an arguable case for claiming a caveatable interest in the property in terms of s. 137 Land Transfer Act 1952 – Manson Developments Limited v Airport Trustees Limited, High Court, Auckland, Associate Judge Faire, CIV 2008-404-325, 19*

June 2008. The onus lies on the plaintiffs as caveators to show that they have this reasonably arguable case for the interest claimed – Sims v Lowe [1988] 1 NZLR 656 (CA) and Castlehill Run Limited v NZI Finance Limited [1985] 2 NZLR 104.

(b) *In terms of s. 137 Land Transfer Act 1952 the caveators must show that they are entitled to or beneficially interested in the estate or interest in the land referred to in the caveat by virtue of an unregistered agreement, instrument or document.*

(c) *Even if the caveators establish an arguable case for the interest claimed, the Court retains a discretion to make an order removing the caveat in certain circumstances, although this discretion is to be exercised cautiously Pacific Homes Limited (in receivership) v Consolidated Joineries Ltd [1996] 2 NZLR 652."*

[13] In the present case the caveatable interest claimed by the applicant is said to be :

"Pursuant to an unregistered mortgage loan dated 21 January 2005 …".

[14] A preliminary issue arose regarding "without prejudice" correspondence. This was with respect to exhibits "H" and "I" in an affidavit of the applicant. These are a "without prejudice save as to costs" letter from the solicitors for the respondent to the solicitors for the applicant dated 11 June 2004 and a draft "Heads of Agreement" dated 10 January 2005 which is unsigned.

[15] Counsel for the respondent contends that these communications are privileged and cannot be put into evidence here.

[16] With respect, I disagree on this aspect. An exception to the rule that without prejudice correspondence cannot be used in subsequent litigation provides for its admission into evidence if a Court might otherwise be misled or deceived: *Cedenco*

Foods Ltd v State Insurance Ltd (1996) 10 PRNZ 142 (CA) and *McFadden v Snow* (1951) 69 WN (NSW) 8, 9 Kinsella J.

[17] In my view that is a situation which might arise here. It is important too that the Court has all proper and available material before it to enable a full consideration of the present application. And, on balance, I cannot see how the material in question disadvantages either party here in any major way.

[18] That said, I rule that exhibits "H" and "I", although part of without prejudice except as to costs correspondence, can be admitted and read here.

[19] I turn now to consider the substantive issues before me. Addressing first the Loan Agreement, it referred to a principal sum loan or "net settlement amount" of $45,519.58. This was the net settlement figure referred to at paragraph 3.31 of the relationship property agreement. As I have noted above, it was stated that this *"net settlement amount of $45,519.58"* was to be paid *"in full and final settlement of the abovementioned claims"* between the applicant and the respondent.

[20] The expression "*abovementioned claims*" referred to in the relationship property agreement, in my view clearly must be read to include the parties' interest in the property, with adjustments for chattels, insurance, and the bonus payment referred to at para [4] above, less the gross sum spousal maintenance payment of $26,000.00. Para 3.13 of the relationship property agreement also provided specifically for the waiver of:

> *"… Any other claim that they (the parties) may have for recovery of expenditure incurred against the joint revolving credit account or the joint credit account (now closed)."*

[21] Regarding the joint revolving credit account held with the National Bank of New Zealand, as I have noted above, para 3.10 of the relationship property agreement recorded that the applicant had made payments of $40,547.68 and the respondent payments of $5,682.52 since their separation on 23 May 2003.

[22] It is the contention of the applicant that the respondent owed him $17,432.55 representing one half of the difference between these post-separation payments to the revolving credit facility account. Adding this $17,432.55 to the respondent's debt noted at paragraph [4](g) above at $28,087.03 reaches the net settlement figure of $45,519.58, which is referred to in both the relationship property agreement and the Loan Agreement. When reimbursement to the applicant of this $17,432.55 is taken into account, it is difficult to ignore the conclusion that the figures add up perfectly.

[23] In response, the respondent's argument is that the net settlement figure of $45,519.58 in the agreements is incorrect. Counsel for the respondent noted that if this is the final figure, the amount the respondent is required to pay the applicant before taking account of her spousal maintenance payment would be $71,519.58, which is over half the value of the relationship property. But that of course ignores the acknowledged fact that post-separation the applicant paid $17,432.55 more than the respondent off the revolving credit account. The respondent however goes on to contend that the correct starting point is half the relationship property - $54,087.03. After deduction of $26,000.00 for spousal maintenance owing to the respondent, this leaves $28,087.03. If this figure is adopted, then according to the respondent, the loan has been fully repaid by the respondent, by the lump sum payment of $20,000.00 and $8,087.03 set off against child support owed by the applicant.

[24] In turn, under the applicant's calculations, from a starting point of $45,519.58, which has already taken into account the spousal maintenance sum, and from which a lump sum payment of $20,000.00 and a further amount set off against child support owed is deducted, the respondent still owes the applicant $23,458.00. The effective difference between the parties' calculations is that the respondent denies liability for this additional figure of $17,432.55.

[25] Counsel for the respondent endeavoured to argue that the respondent's interpretation of the loan should be favoured, as it relies on an equal division of relationship property. Counsel submitted further that the sum of $17,432.55 was not explicitly stated in the relationship property agreement, and could not be implied. It is argued that the respondent was not aware that she would be made to pay an additional $17,432.55, that she did not receive legal advice with regard to this sum,

and that if she had known she would liable she would not have given up her earlier pursued claim for an economic disparity payment. Counsel also attempted to buttress this argument by reference to the scheme and provisions of the *Property (Relationships) Act 1976*.

[26] In response, counsel for the applicant argued that the respondent was legally advised throughout and aware of the liability for the $17,432.55. Counsel pointed to the without prejudice correspondence noted above. In my opinion, this correspondence does little to assist. The without prejudice letter between solicitors refers to liability for this payment, but it also refers to the respondent's claim for economic disparity, which it appears she may have subsequently given up. The unsigned Heads of Agreement prepared by the applicant then, it might be thought somewhat mysteriously, sums up the settlement including the payment to the applicant for contributions to the joint revolving credit account, but it is silent as to the respondent's claim for economic disparity.

[27] Whether or not the respondent was aware of and legally advised as to her liability for the $17,432.55, it is difficult to escape the conclusion that it forms part of the moneys taken into account to reach the net settlement figure of $45,519.98 in the agreements. Although the sum of $17,432.55 is not mentioned explicitly, paragraph 3.10 of the relationship property agreement does refer to post-separation contributions to the joint revolving credit account.

[28] Counsel for the respondent attempted to rely on paragraph 3.13 of the relationship property agreement, which provides that the parties agree to waive any *other* claim for recovery of expenditure incurred against the account. However, in my view it is reasonably arguable here that the word "other" means other than the expenditure referred to at paragraph 3.10.

[29] Paragraph 3.31 of the relationship property agreement states:

> *"In full and final settlement of the above mentioned claims Angelene shall pay Andrew the Net Settlement Amount of $45,519.58. The property listed in Schedule "A" is Angelene's separate property and the property listed in Schedule "B" is Andrew's separate property."*

There is a reasonable argument in my view that the expression "above mentioned claims" must include paragraph 3.10.

[30] Furthermore, the final settlement amount of $45,519.58 is explicit in the relationship property agreement and repeated in the Loan Agreement, both agreements being signed after the applicant and the respondent had received legal advice.

[31] If the respondent believes she should not be liable for the $17,432.55, or that this amount was unfairly or unscrupulously included in the relationship property and Loan Agreements, or that she was in some way "duped" into dropping her economic disparity claim, her recourse may well be elsewhere, including a possible challenge to the agreements in the Family Court. As the agreements currently stand, however, the respondent acknowledged she owed the applicant $45,519.58, and the applicant has done enough here to establish an arguable case that a significant amount remains owing under the Loan Agreement. The applicant has clearly shown he has a continuing claim to the caveatable interest in the property concerned by virtue of the Loan Agreement, and I am satisfied this is not an appropriate case to exercise the Court's residual discretion to remove the caveat. A cautious approach here is needed, given especially the relationship of the parties. And, the Court's residual discretion to remove the caveat should be exercised only if the Court is "completely satisfied" that the caveator's legitimate interests will not be prejudiced – *Pacific Homes Ltd (In Rec) v Consolidated Joinery* [1996] 2 NZLR 652. That is not the case here.

Result

[32] The application to sustain the caveat succeeds.

[33] An order is now made that caveat 7934514.1 registered against the one-half share interest of the respondent in Certificate of Title WNF4/1006 (Wellington Land Registry) shall not lapse.

[34] As to costs, the applicant has been successful in this application and is entitled to an order for costs in the normal way. Costs on this application are

awarded to the applicant against the respondent calculated on a Category 2B basis together with disbursements as fixed by the Registrar.

‘Associate Judge D.I. Gendall’