

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

**CIV 2008-409-002373**

IN THE MATTER OF      Section 143 of the Land Transfer Act 1952

BETWEEN                CANTERBURY BUILDING SOCIETY  
                                 Applicant

AND                        OASIS PROPERTIES LTD  
                                 First Respondent

AND                        BRIDGING FINANCE LTD  
                                 Second Respondent

Hearing:                25 March 2009

Appearances: R Dunningham for the Applicant  
                         M Martin for the First Respondent

Judgment:             25 March 2009

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**ORAL JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN**

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Solicitors:

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Wynn Williams & Co., PO Box 4341, Christchurch

[1] This matter was scheduled for a fixture before me today to consider applications for removal of the respondents' caveats.

[2] The first respondent (Oasis) has filed a notice of opposition to the applicant's (CBS) application. The second respondent has consented to the removal of its caveat.

[3] When I arranged this fixture, I directed the respondents' submissions be filed and served by 18 March 2009. No submissions were filed. Instead, by memorandum dated 19 March 2009, the respondents' solicitors advised they no longer had any instructions from Oasis to act for it in relation to the matter. In response, I advised the matter would proceed as scheduled. Mr Martin appeared on instructions from Oasis's solicitors. He advised that 20 minutes earlier Oasis' solicitors now had renewed instructions to act for Oasis. An adjournment was sought. That application was opposed by Ms Dunningham. I informed Mr Martin the application was declined. I said it came too late and urgency attached to disposal. I then informed counsel the application for caveat removal would be granted. Following are my reasons, in brief.

[4] In this case there is an onus on Oasis as caveator to establish an arguable case for its claimed caveatable interest. Even if it should do this, I should consider whether or not the caveat ought to be removed.

### **The case for Oasis**

[5] In its notice of opposition Oasis claims that before CBS entered into its loan agreement with Mr J P Leeder, the registered proprietor of unit 31, 643 Frankton Road, Alpine Village, Queenstown (unit 31), following which loan agreement CBS registered its mortgage on 21 June 2007 against the relevant certificate of title, CBS "was in all likelihood aware" of business dealings between Mr Leeder and Oasis relating to the earlier sale by Mr Leader to Oasis of unit 31 in May 2005.

[6] Oasis claims in about February 2006 it made a part-payment of \$350,000 towards purchase of unit 31. As a consequence, Mr Leeder was constructive trustee for those moneys paid to him.

[7] Oasis claims it is therefore seriously arguable that CBS dishonestly assisted Mr Leeder in breach of that trust by accepting a mortgage over the unit or by taking steps to exercise its power of sale under the mortgage.

[8] In its notice of opposition, Oasis asserted in order for it to establish these claims it would be necessary for CBS to give discovery of all documents touching on or concerning its dealings with Mr Leeder in respect of the Alpine Village, Queenstown, and in particular unit 31 there.

[9] In support of that opposition, Mr M A McGurk swore an affidavit. He is the sole director of Oasis. He recounted some history of the dealings between Oasis and Mr Leeder. He deposed Oasis entered into an agreement to purchase a number of Queenstown properties owned by Mr Leeder, including an apartment which he stated “subsequently became known as unit 31”. He says further that in March 2007, Oasis lodged a caveat on the title to Unit 32 of the Alpine Village Apartments “as this was the number then allocated for the unit which Oasis had agreed to purchase, pre-construction, in May 2005. “Unknown to Oasis, however, the numbering of the apartments had been changed and what had been unit 32 had since become unit 31. When Oasis discovered the error, a caveat was registered on the title to unit 31 on 22 June 2007”.

[10] Oasis’s caveat, therefore, was registered one day after CBS’s mortgage was registered against the title to unit 31.

[11] The essence of Mr McGurk’s evidence is provided by the following statements:

As an experienced investor in property I am very familiar with the need to provide banks and other financiers with proof of my company’s ability to service debt. I am also familiar with the usual practice of prudent lenders to make whatever inquiries they consider necessary in order to satisfy themselves as to my company’s ability to service debt. I am also familiar with the usual practice of prudent lenders to make whatever inquiries they

consider necessary in order to satisfy themselves as to my company's ability to repay a debt. So, had I been in the position of Mr Leeder, I am in no doubt that I would have alerted Canterbury Building Society to the fact that I had achieved a sale of one of my properties and that a substantial part-payment of the purchase price, amounting to \$350,000 had been received. Equally, I am sure that any of my lenders in the position of Canterbury Building Society would have found out about these matters from their own inquiries in the unlikely event that I had overlooked informing them myself. [Para 8.]

... I would be most surprised if that information had not been brought to the attention of the Canterbury Building Society long before it agreed to loan any moneys to Mr Leeder ... [Para 9.]

Accordingly I believe that it is essential in order for the Court to make a proper determination of my company's position in this matter, for the Canterbury Building Society to give discovery of all documents in its custody, power or possession relevant to its dealings with Mr Leeder in relation to the Alpine Village Apartments between May 2005 and June 2007 ... [Para 10.]

[12] In summary, it is asserted for Oasis that a prudent lender would have been aware of Mr Leeder's prior dealings with unit 31 and likely CBS's records will disclose knowledge of that prior dealing. Also, Oasis's case is premised upon its claim that its dealings with Mr Leeder concerned unit 31 against that background I have referred to.

### **The Applicant's case**

[13] In an affidavit in reply, Mr M J Egan, CBS's commercial lending manager, deposed that he was in charge of the relationship between CBS and Mr Leeder. He said on 28 May 2007, CBS entered into various loan agreements with Mr Leeder. Before then he had been in charge of CBS's lending arrangements with Mr Leeder since 2000.

[14] He said neither he nor CBS had any knowledge of Mr Leeder's dealings with Oasis at that time and if it had it would not have agreed to the lending or would have required different loan covenants to protect its interest. There was no knowledge of Oasis's claim until after its caveat was lodged against Unit 31.

[15] Concerning Oasis's claim in Unit 31, Mr Egan notes that numerous documents supplied with Mr McGurk's affidavit refer to unit 32 and not unit 31.

Only after CBS's mortgage was registered did Oasis's solicitors raise for the first time its explanation of a claimed change in the numbering of the units. Mr Egan states:

[CBS] had no dealings with [Mr Leeder] in relation to unit 32 and did not know of any misunderstanding over the identities of the respective units until around July 2008.

It was at that time in July 2008 Oasis's solicitors contacted CBS regarding their intention to proceed with a mortgagee sale of unit 31. Also, and until that time Oasis had not made any claims concerning its previous dealings with Mr Leeder and the reported payment of \$350,000 to him.

[16] Responding to Oasis's request for discovery, Mr Egan attaches to his affidavit copies of what he says are all relevant documents in CBS's custody, power or possession pre-dating its loan advance to Mr Leeder. His affidavit is concluded by this statement:

However, the remainder of the file is available for inspection by [Oasis] at the offices of [CBS's] solicitors during normal business hours.

[17] Since this application was filed, two significant events have occurred:

- a) On 9 February 2009, Mr Leeder was adjudicated bankrupt on the petition of ASL Mortgages Limited; and
- b) On 12 February 2009, CBS accepted a tender for unit 31 and entered into an agreement for sale and purchase, with a settlement date of 26 February 2009.

### **Considerations**

[18] Generally, caveats will not be removed unless it is quite clear the caveat cannot be maintained.

[19] Even when a caveator makes out an arguable case for a caveatable interest, the Court has a residual discretion to order the removal of the caveat. Such

discretion will only be exercised if the Court is satisfied that the caveat's legitimate interests will not thereby be prejudiced. The onus of proving that the caveat should be removed ultimately lies with the party challenging the caveat.

[20] CBS has a registered first mortgage over unit 31. A mortgagee's accrued power of sale under a mortgage is indefeasible (*Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance Ltd* [1984] 2 NZLR 704).

[21] In the absence of fraud, a mortgagee's rights cannot be displaced. A mortgagee's indefeasible rights are superior to any interest in a property claimed by a caveator.

### **Does Oasis have a caveatable interest in unit 31?**

[22] The evidence discloses that Oasis agreed to purchase unit 32 in 2005. In February 2006, Oasis paid \$350,000 towards the purchase of unit 32. Oasis lodged a caveat against the title of unit 32. It was registered on 2 April 2007. On 22 June 2007, Oasis removed its caveat from the title of unit 32 and registered a near identically worded caveat against the title to unit 31. It is asserted the change was made following advice from Mr Leeder's solicitors that the numbering of the units had changed and that Mr Leeder would allow the first respondent to transfer its caveat to the title of unit 31.

[23] In my view, these facts offered in support of Oasis's claim do not provide proof to a sufficient standard of Oasis's claim of a caveatable interest in unit 31. The agreement between Oasis and Mr Leeder was to purchase unit 32. None of the clear evidence discloses otherwise.

[24] Oasis's opposition asserts Mr Leeder held the sum of \$350,000 as constructive trustee for it. This suggests Oasis's remedy would appear to be for the payment of money with a caveat (over unit 32) providing security for that debt, rather than as a means or protecting an equitable interest in the land. In those circumstances, it is arguable there is insufficient interest to sustain a caveat over the land.

[25] In its original caveat (over unit 32) Oasis claimed:

An estate as beneficiary under a constructable resulting trust arising out of a course of conduct in terms of which ... John Peter Leeder now holds the estate in trust for the caveator.

[26] Arguably, in that description of things, there is not sufficient information to define the interest that Oasis seeks to protect.

[27] In the mix of all of those factors, I accept the submission that it is questionable whether the circumstances surrounding Oasis's agreement to purchase unit 32, qualified by the switch to a caveat against unit 31, amounts to a caveatable interest in unit 31.

[28] Even if the Court should find Oasis did have an arguable case for a caveatable interest in unit 31, I consider this is a proper case for the Court to use its discretion to remove it.

[29] CBS is the first registered mortgagee exercising its indefeasible power to sell unit 31. It has not consented to Oasis's claimed interest in the property and nor has CBS surrendered its priority.

[30] The crux of Oasis's case is that CBS has dishonestly assisted Mr Leeder in a breach of trust by accepting a mortgage over unit 31. I am satisfied that there is no substance to those claims at all. I accept the submission that those claims are matters of suspicion and perception. They are not backed up by any evidence. CBS has agreed to provide full disclosure. Significant disclosure was made through Mr Egan's affidavit. CBS has offered its records for inspection but that opportunity has not been taken up.

[31] I also accept the submission that Oasis's legitimate interest will not be prejudiced by the removal of the caveat because there is no practical advantage to sustaining the caveat. The evidence clearly shows there is insufficient equity in unit 31 to satisfy Oasis's claim against it because the proceeds of sale will be insufficient to satisfy the debt to CBS.

[32] Another difficulty facing Oasis is the fact of Mr Leeder's bankruptcy. This will cause difficulties if the first respondent is intent on issuing proceedings against Mr Leeder to resolve the claimed interest.

[33] CBS has entered into an agreement to sell unit 31. It is overdue for settlement. This fact causes complications, and likely costs for CBS.

[34] I am satisfied this is a proper case for the granting of an application for removal of Oasis's caveat.

### **Judgment**

[35] The application is granted.

[36] At the request of counsel, I am adjourning the matter of costs to be dealt with by memoranda to be filed within two weeks of this date.

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Associate Judge Christiansen