

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

CIV 2009-404-000752

UNDER the Land Transfer Act 1952

IN THE MATTER OF of an application for an order that Cavaet
No. 7684956.1 not lapse

BETWEEN DEREK ANDREW REID, WILLIAM
THOMAS REID AND LINDA
MARGARET HUGHES
Applicants

AND ALAN REID, KATHERINE HELENA
REID AND HAURAKI TRUSTEE
SERVICES (2005) LIMITED
Respondents

Hearing: 30 March 2009

Appearances: C Boell for Applicants
S Tee for Respondents

Judgment: 30 March 2009

ORAL JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

Solicitors: Short & Partners, P O Box 137 241, Parnell 1151
Counsel: Morton Tee & Co, P O Box 331 133, Takapuna, North Shore City 0740

[1] The Applicants apply for an Order that their Caveat over a property at Hebron Avenue, Torbay, Auckland (the Property) not lapse.

[2] The Applicants and Alan Reid (Alan) are siblings. Alan borrowed \$51,000 from his mother's estate in excess of his entitlement from that estate. He also borrowed \$16,000 from his brother William and \$1,500 from his brother Derek.

[3] He did not repay those sums. On 20 November 2008 the Applicants obtained judgment against Alan for their debt in the sum of \$91,854.08. Before then Alan had agreed to repay the debt by monthly instalments of \$2,000. By a written Agreement he acknowledged:

If this payment is not made at any stage I accept I will arrange to have the full amount paid ... I will do this by selling the property at 52 Hebron Road, Torbay of which I have a 50% share.

[4] Even earlier, by written Agreement to Mortgage dated 16 May 2006 Alan acknowledged:

3. That I Alan Reid at any time before repayment of the principal sum or other monies for the time being owing to you Derek Andrew Reid, William Thomas Reid and Linda Margaret Hughes shall forthwith upon demand give and execute in favour of you ... a good and registerable Memorandum of Mortgage of the freehold property known as 52 Hebron Road ... to secure payment of the principal sum and other monies for the time being owing to you, the mortgage to be in such form and to contain such covenants, conditions and provisions and powers as are usually inserted in second mortgages of residential land securing funds by Auckland solicitors.
4. That I will pay the costs of and incidental to this Agreement and to said mortgage and the discharge thereof whenever the same shall be required and any caveat, withdrawal or consent thereof that you or Short & Partners may register.

[5] The Respondents' caveat was registered in January 2008. It claimed an interest in the property by virtue of the Agreement to Mortgage.

[6] The Application is opposed. The evidence provided in opposition proves that from the time of the property's purchase in 1997 it has been owned by Alan and

Katherine Reid as Trustees of the Greengauge Family Trust (the Trust). By 2004 the debt owed by the Trust to Alan and Katherine had been forgiven.

[7] The terms of the Trust show Alan is a discretionary beneficiary. Throughout the Trust has as well engaged an independent Trustee.

Applicants' Case

[8] It is that Alan, a registered proprietor has granted an interest in the property to the Applicants, even though not all of the registered proprietors did not sign the Agreement to Mortgage.

[9] The Appellants state that in the absence of full disclosure of the Trust terms and also because Alan and Katherine are separated, Alan may still retain an interest in the property and be able to deal with it.

Considerations

[10] The clear evidence is that since purchase, the Property has been owned by the Trust. Alan, personally, has never been a registered proprietor. Therefore he has no interest in it, and none which is caveatable. Also he retains no interest in the Trust which is sufficient to support a caveat. Also, and notwithstanding the representations made by Alan in the Agreement to Mortgage, and subsequently by his acknowledgement of debt, he was never in a position to provide the security promised. He never had a personal interest to commit, whether as owner, or as a discretionary beneficiary of the Trust.

[11] The Application must fail and is dismissed.

[12] I was initially disposed to order that costs lie where they fall. Alan's debt to his siblings is undisputed. The borrowing from his late mother has meant the siblings have still to receive that which was due to them. Alan has deceived the Applicants by purporting to provide them with security for their debt when clearly he had no means to provide it. By that pretence and fabrication he has delayed the

accounting that is due to them. Also, and arguably, only by their application has the measure of Alan's deceit to them been exposed.

[13] However, as early as 2005 Katherine wrote to her brother William advising that neither she, her daughters nor the Greengauge Family Trust were responsible for any of Alan's debts past or future. Then by letter dated 22 January 2008 Katherine's solicitors wrote to the Applicants' solicitors confirming ownership of the property throughout by the Trust. That letter advised that Alan had no authority to provide an Agreement to Mortgage. Also and at that time a title search of the property clearly disclosed one of the registered proprietors to be a Trustee.

[14] In those circumstances it is proper to make an award of costs and I direct these be fixed on a category 2B basis to be paid by the Applicants.

Associate Judge Christiansen