

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

CIV 2009-404-001971

BETWEEN MAGSONS HARDWARE LIMITED
Applicant

AND CONCEPTS 124 LIMITED
Respondent

CIV 2009-404-002097

AND BETWEEN MAGSONS HARDWARE LIMITED
Applicant

AND ROBERT JAMES CUMMINS
Respondent

CIV 2009-404-002098

AND BETWEEN MAGSONS HARDWARE LIMITED
Applicant

AND ORMISTON RESIDENTIAL LIMITED
Respondent

Hearing: 15 June 2009

Counsel: L Ponniah for applicant
G Bogiatto for respondents

Judgment: 23 June 2009 at 10:30am

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

*This judgment was delivered by me on 23 June at 10:30am,
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Solicitors:
Corban Revell, PO Box 21 180, Waitakere 0650 for applicant
George Bogiatto, PO Box 106120 Auckland 1143 for respondents

[1] In these three related applications Magsons Hardware Limited (Magsons), a building supplies company, seeks orders that caveats it has lodged against the respondents' land not lapse. Magsons has lodged the caveats against the land of the respondents Concepts 124 Limited and Ormiston Residential Limited (Ormiston) claiming a beneficial interest pursuant to a trust. The trust is said to arise out of the terms on which it supplied materials to the company that constructed buildings on this land, Flat Bush Construction Limited (FBCL). Its caveat against the land owned by the respondent Robert James Cummins claims a beneficial interest arising out of an agreement to mortgage given by Mr Cummins as security for the obligations of FBCL.

[2] The respondents say that neither the terms of supply to FBCL nor the agreement to mortgage give rise to a caveatable interest. They also say that the application should be declined as there is no economic benefit to Magsons in retaining the caveat because there is no equity in any of the properties.

Application against Concepts 124 Limited

[3] The applications have been listed for hearing together today as they arise out of the same background circumstances. At the commencement of the hearing counsel for Magsons withdrew its application against Concepts 124 Limited, advising that the caveat at issue in that application (lodged against eleven titles in a development at 46 Carlos Drive, Flat Bush) has been released following negotiations between the parties. I reserved costs (a matter I will come back to at the end of the judgment) and any orders that might be needed to effect release.

Background

[4] Magsons (trading as Mitre 10 Mega) is a supplier of building materials, both to the construction industry and as a retailer.

[5] On 11 October 2007 FBCL applied for a credit account on Magsons' standard terms and conditions of sale. The application was signed by Mr Cummins. It included a personal guarantee of the account by Mr Cummins.

[6] Magsons' standard terms and conditions included the following:

STANDARD TERMS AND CONDITIONS OF SALE

2. PAYMENT

2.1 Payment is due by the 20th of the month following the date of delivery ... unless Mitre 10 has agreed otherwise in writing.

....

4. RISK AND OWNERSHIP

....

4.2 Subject to clause 5.1 and the following provisions, ownership of the goods remains with Mitre 10 and does not pass to the Customer until the Customer:

(a) pays the Amount Owing and any other moneys owing by the Customer to Mitre 10 from time to time, whether in relation to any contract entered into on these standard terms and conditions of sale or on any other account whatever ("Customer's Indebtedness"); or

(b) resells the Goods pursuant to the authority granted by these terms.

4.3 Where the goods are processed prior to repayment of the Customer's Indebtedness, ownership of those products and/or such part or parts as are identifiable as being substantially derived from Goods supplied by Mitre 10 ("Processed Goods") shall remain with Mitre 10 until the earlier of payment of the Customer's Indebtedness or such time as such Processed Goods have been sold by the Customer pursuant to these standard terms and conditions of sale.

4.4 While ownership of the Goods or Processed Goods remains with Mitre 10:

....

(b) Mitre 10 authorises the Customer in the ordinary course of its business to use the Goods and the Processed Goods or sell them for full consideration. This authority is revoked from the time that:

(i) an Event of Default occurs

....

4.6 If the Customer resells or uses any Goods or Processed Goods before ownership of the Goods or the Processed Goods has passed to the Customer, the Proceeds of such sale or use shall be received and held by the Customer (in whatever form) in trust for both the Customer and Mitre 10. Mitre 10's interest as beneficiary under that trust shall be that portion of the proceeds equal to the customer's indebtedness to Mitre 10 and in the event

that the proceeds of sale are less than the debt to Mitre 10 then the entire proceeds of sale. The balance of the proceeds (if any) shall be the Customer's beneficial interest under that trust.

....

18.5 An "Event of Default" means an event where:

- (a) The Customer fails to comply with these standard terms and conditions of sale or any other contract with Mitre 10

[7] The respondent Robert James Cummins is the sole director of FBCL (he is also a director of the other two respondents). He personally guaranteed FBCL's trading account with Magsons. He agreed to provide a mortgage over any land in his own name as security for the guarantee. He also accepted liability to Magsons as a principal debtor. The relevant terms of the guarantee read:

PERSONAL GUARANTEE

3. The Guarantor to secure monies owed by the buyer of the Guarantor of the Company shall have the right and liberty to complete and have registered a MORTGAGE over any property owned by the Guarantor to secure monies owed by the buyer or the Guarantor and the Company shall also have the right to place a caveat on any such property for the purpose of this provision and the Guarantor hereby irrevocably appoints the Company as the Guarantor's attorney for the purpose of executing such mortgage.

....

5. Although as between the Buyer and Guarantor, the Guarantor may be surety only, yet as between the Guarantor and the Company the Guarantor shall be deemed to be the principal debtor and shall not be released by any matter or thing the happening of which would otherwise release one liable as a surety only.

[8] Magsons supplied building materials to FBCL pursuant to these terms of trade. FBCL used the materials in the construction of buildings on land owned by the respondents Concepts 124 Limited and Ormiston (two property development companies that are part of a group of companies controlled by Mr Cummins known as the Working Concepts Group).

[9] Magsons proceeded to supply FBCL with building materials. FBCL at that time was undertaking work for several development companies within the Working Concepts Group, primarily in or near Flat Bush, in South Auckland. Between 1 May 2008 and 31 October 2008 Magsons supplied FBCL with building materials which

FBCL used on four development sites in the Flat Bush area, including a development by Ormiston on land it owned at 63 Kestev Drive.

[10] On 27 November 2008 FBCL was put into liquidation by a shareholder's resolution. At that point it owed Magsons \$404,542.96, together with interest and recovery costs in accordance with the terms of trade.

[11] On 27 February 2009 Magsons lodged caveat 8085283.1 against land at 32 Carlos Drive, Flat Bush registered in the name of Mr Cummins. The caveat claimed an interest in the land pursuant to the agreement to mortgage given as part of Mr Cummins' personal guarantee of FBCL's credit account.

[12] On 2 March 2009 Magsons lodged caveat 8085148.1 against Ormiston's land at 63 Kestev Drive claiming that Ormiston held the land as trustee for it.

Legal principles

[13] Counsel were agreed on the legal principles that the Court applies on a caveat application, that can be found in summary in the classic statement of Sommers J in *Sims v Lowe* [1988] 1 NZLR 656, at 659-660. The following principles are of particular relevance in the present application:

- a) The caveator must justify the continued existence of the caveat by satisfying the Court that it has a reasonably arguable case for the interest it claims;
- b) An order for the removal of a caveat will not be made and a caveat will not be allowed to lapse unless it is patently clear that there was no valid ground for lodging it or that such valid ground no longer exists;
- c) The Court has a discretion to remove a caveat, if a caveatable interest exists, if on the facts of the case the caveator can have no reasonable expectation of obtaining benefit from continuance of the caveat: *Pacific Homes Limited (in receivership) v Consolidated Joineries*

Limited [1996] 2 NZLR 652, 656; *Stewart v Kaipara Consultants Limited* [2000] 3 NZLR 55.

- d) The summary nature of a caveat application makes it unsuitable for determining disputed questions of fact.

The competing contentions and issues for determination

[14] Magsons relies on different grounds for its two caveats. It says that the agreement to mortgage in clause 3 of Mr Cummins' guarantee of the terms of trade give it a caveatable interest in respect of any land owned by Mr Cummins, which prima facie includes the property at 32 Carlos Drive. It says that Mr Cummins' contention that he holds that land as trustee has not been, and cannot be, determined on this summary application. Similarly, it says that further inquiry is needed to determine whether there is any equity available to it in the property.

[15] Magsons says it has an arguable case for a caveatable interest in respect of Ormiston's land at 63 Kestev Drive on the grounds that it retains ownership in the materials for which FBCL has not paid (pursuant to the terms of trade). There is no dispute that at least some of the materials were used in the buildings constructed on Ormiston's land. Magsons contends that this continuing ownership, and Ormiston's knowledge of it (through the common directorship of Mr Cummins), give rise to a beneficial interest in the land by way of an institutional constructive trust. It further says that the Court cannot determine, on this application whether it will receive any benefit from the caveat. It points to the fact that Ormiston has not produced any loan documentation, or provided an explanation of the loans and mortgage arrangements in respect of the mortgages registered against this land. It says that the transactions within the Concepts Group are so interwoven that it cannot be said whether or not there is any equity in the property.

[16] Mr Cummins says that Magsons cannot establish an arguable case for a caveat in respect of 32 Carlos Drive. He says that the agreement to mortgage is only in respect of land of which he is beneficial owner, and he has produced evidence that he holds the land as trustee for one of his companies, Working Concepts Limited.

He also contends that the caveat can have no benefit to Magsons as the amounts secured by two mortgages registered against the property (ahead of the caveat) greatly exceed the value of the development on completion. He says that the property is currently on the market for sale and a balancing of the competing interests favours removal of the caveat.

[17] Ormiston opposes the application on three grounds. First, it says that the caveat is deficient because the caveatable interest has been insufficiently described. Secondly, it says that the effect of clause 4 of the terms of trade is that FBCL was entitled to use and sell the materials. It says that, as it has paid for any materials used in the buildings at 63 Kestev Drive, the terms of trade provide that Magsons' only beneficial interest is in the proceeds of sale. It says that Magsons has not established any evidential basis for saying that its authority to sell the materials was revoked. Finally, Ormiston says that the caveat should be removed, in any event, because the amount secured under mortgages registered against the property far exceeds any equity in it.

[18] The essential issues arising out of these opposing contentions are:

- a) Whether Magsons has established an arguable case for a caveatable interest in respect of 32 Carlos Drive and 63 Kestev Drive; and
- b) If so, whether the Court should exercise its discretion to remove the caveats because they cannot provide any benefit to Magsons.

The caveatable interest for 32 Carlos Drive

[19] Magsons' claim to a caveatable interest in respect of 32 Carlos Drive hinges on its contention that Mr Cummins owns that property. Mr Cummins acknowledges that he is registered as the proprietor but says that he holds it as trustee for his company Working Concepts Limited. In support of this claim he has produced a declaration of trust dated 2 days prior to the registration of the transfer into his name.

[20] Counsel for Magsons submitted that the declaration of trust was not determinative of the matter and Magsons should be entitled to investigate the nature of the interest transferred to Mr Cummins, particularly as the declaration of trust refers to 42 Carlos Drive. Magsons scepticism about Mr Cummins' claim that he holds as trustee is understandable in light of the position in which Magsons now finds itself in relation one of Mr Cummins' companies (FBCL). However, it is still for Magsons to establish that it has a basis for its claim to a caveatable interest and hence for it to show that there is reason to doubt Mr Cummins' claim. Counsel for Magsons relied on two matters as giving rise to this doubt. The first was that the declaration of trust is said to be in respect of 42 Carlos Drive (not 32 Carlos Drive). The second is that documents produced to support Mr Cummins' contention that there is no equity in the property (Property Law Act notices and summaries of outstanding balance) are addressed to Mr Cummins and do not refer to any separate beneficial interest.

[21] The declaration of trust is a short document. It reads:

THIS DEED made this 4 day of *September* 2007

BETWEEN **Working Concepts Limited** (hereinafter referred to as "the Beneficiary) of one part;

AND **Robert John Cummins** of Wellington, Businessman (hereinafter referred to as "the Trustee") of the second part.

PREAMBLE:

1. Working Concepts Limited is the beneficial owner and soon to become the registered proprietor of 42 Carlos Drive CT Identifier 238986 ("the Property").
2. The Trustee has agreed to become registered on the title of the property as Trustee for the Beneficiary.
3. This Deed records the terms upon which the Trustee to hold he Property in trust for the Beneficiary.

NOW THEREFORE THIS DEED WITNESSETH:

1. The Beneficiary and the Trustee agree with the preamble.
2. The Trustee shall at all times hold ownership of the Property in trust for the Beneficiary.
3. The Trustee shall reconvey ownership of the Property to the Beneficiary immediately upon request made in writing.

4. The Beneficiary indemnifies the Trustee in respect of all claims, liabilities, obligations, proceedings, monies incurred and expended arising from the Trustee being or becoming the registered owner of the Property.

EXECUTED by)
Working Concepts Limited) *R J Cummins*
as the Beneficiary in the present of)

George Bogiatto
Solicitor
Auckland

SIGNED by)
Robert James Cummins) *R J Cummins*
as Trustee in)
the presence of:)

George Bogiatto
Solicitor
Auckland

[22] Although Magsons is correct that the deed refers to 42 Carlos Drive, it also identifies the subject property as that in CT Identifier 238986. Counsel for Mr Cummins produced an historical search copy of that title. It shows that it was issued to Concepts 128 Limited (apparently another company, in the Working Concepts Group) on 8 August 2007, that a transfer to Working Concepts Limited was registered on 4 September 2007, and that a transfer to Mr Cummins was registered on 6 September 2007. This sequence is consistent with paragraphs 1 and 2 of the preamble to the declaration of trust.

[23] Mr Kumar accepts that CT Identifier 238986 is the title to 32 Carlos Drive. He has not suggested, let alone produced any evidence to show, that Mr Cummins is the proprietor of another property at 42 Carlos Drive (if such a property exists). Furthermore, in his affidavit in opposition Mr Cummins states that the declaration of trust applies to the property at 32 Carlos Drive. He also produces Property Law Act notices issues in respect of mortgages registered against the title to the property. Those notices refer to mortgages registered against CT Identifier 238986.

[24] On the strength of this evidence I am in no doubt that the reference in the declaration of trust to 42 Carlos Drive was an error and that the declaration of trust (as it states) is in respect of CT Identifier 238986 which is the title to 32 Carlos Drive.

[25] There is also no merit to the submission that the Property Law Act notices provide a basis for questioning Mr Cummins' evidence that he holds the property on trust. The first of the mortgages is registered immediately after the transfer to Mr Cummins. Accordingly it had to be given by Mr Cummins as the registered proprietor. The same applies to the second mortgage, given some time later. Similarly, it is appropriate for mortgagees to issue their Property Law Act notices to the registered proprietor.

[26] The timing and wording of the agreement to mortgage are also relevant. The declaration of trust and subsequent transfer to Mr Cummins were signed more than a month before Mr Cummins signed the guarantee of the terms of trade. The guarantee was prepared by Magsons (so that the contra proferentum rule applies) and was headed "personal guarantee". I accept the submission of counsel for Mr Cummins that clear and express words would be needed to extend the obligation to assets held by Mr Cummins as trustee.

[27] Counsel for Magsons also argued that the abbreviated form of the declaration of trust also allowed doubts as to whether it was genuine. He compared it to the trust deed that Mr Cummins had produced as evidence of other beneficial interests underlying ownership of FBCL. I see nothing in this point. The declaration of trust is admittedly brief, but that does not mean it is not effective. It is signed formally as a deed, and witnessed by the parties' solicitors. I have no reason to question its authenticity.

[28] Having regard to all of the above matters, I find that Magsons does not have an arguable case for a caveatable interest in respect of 32 Carlos Drive. I do not have to consider whether there is any benefit to Magsons in retaining the caveat in light of this finding.

The caveatable interest for 63 Kestev Drive

[29] The first ground for opposition to Magsons' application in respect of the caveat over 63 Kestev Drive is that it should be allowed to lapse because it insufficiently identifies the caveatable interest. The interest claimed is:

... a beneficial interest in the land ... as cestui que trust of which the registered proprietor, Ormiston Residential Limited, is trustee.

A caveatable interest in this form was accepted in *Zhong v Wang* (2006) 5 NZ ConvC 194,308 (also a commercial case).

[30] The description of the interest could easily have included the nature of the trust. Nevertheless, I consider that it was stated with sufficient certainty in the circumstances of the case to meet the requirements of s 137(3) and (4) of the Land Transfer Act 1952. Ormiston can be taken to have knowledge of the retention of ownership clause in the terms of trade by reason of the common directorship of Mr Cummins. With that knowledge it should have been clear that Magsons was claiming a constructive trust even if the nature of that constructive trust was not clear (counsel for Magsons limited its claim to an institutional constructive trust whereas counsel for Ormiston anticipated an argument for a remedial constructive trust). The caveat procedure is designed to provide simple and speedy protection. Requiring too much precision would be contrary to this philosophy: *Buddle v Russell* [1984] 1 NZLR 537; *Zhong v Wang*. It will still be necessary to decide whether there is sufficient certainty in the circumstances of the particular case, but the critical element (that the registered proprietor stands in the position of trustee for Magsons) is present in the present case.

[31] This leads me to the point on which the caveatable interest in respect of 63 Kestev Drive depends, namely whether Magsons has retained ownership of the material supplied to FBCL and used in the buildings on this land.

[32] Magsons' contention that FBCL held the materials on trust pending payment or on-sale in accordance with the terms of trade was not challenged by Ormiston. Nor did I understand Ormiston to be challenging the proposition that an institutional constructive trust will arise by operation of principles of equity if a party receives trust property with notice both of the trust and that the transfer to the third party was in breach of that trust: *Commonwealth Reserves I v Chodar* [2001] 2 NZLR 374,384 citing *Westpac Banking Corporate v Savin* [1985] 2 NZLR 41, 52.

[33] If Magsons retains ownership so that FBCL held the materials subject to a trust in favour of Magsons, it is at least arguable that Ormiston had notice of that trust and of breach by reason of FBCL using or selling the materials after it failed to pay when due. This knowledge is held through the common directorship of Mr Cummins. The critical question for the present application is whether there is an arguable case for Magsons' continuing ownership after the materials were used in Ormiston's development. This depends in turn on whether FBCL sold the materials to Ormiston as permitted by the terms of trade.

[34] The relevant terms of trade can be summarised:

- a) Ownership of goods remains with Magsons until FBCL either pays the amount owing in respect of them and any other monies owing from time to time (clause 4.2(a)), or resells the goods "pursuant to the authority granted by these terms" (clause 4.2(b));
- b) Payment for goods supplied is due by the 20th of the month following delivery unless otherwise agreed in writing (clause 2.1);
- c) FBCL is authorised to use or sell the goods (whether in their original form or as processed) in the ordinary course of its business, provided any sale is for full consideration. This authority is revoked from the time that FBCL fails to comply with the standard terms of sale (defined as an event in default) (clause 4.4(b)(i));
- d) If FBCL resells or uses the goods before ownership passes to it, FBCL holds the proceeds of sale or use in trust for Magsons to the extent of FBCL's indebtedness to it (clause 4.6).

[35] There can be no doubt that FBCL's use of the materials in the construction of buildings for Ormiston was in the ordinary course of its business. There is no dispute that materials to the value of \$118,306.78 were incorporated into FBCL's work for Ormiston. Mr Cummins filed an affidavit in relation to Concept 124 Limited in which he produced a spreadsheet prepared by Magsons' accountant that

gives a breakdown of the outstanding charges and shows this amount as due in respect of materials supplied for 63 Kestev Drive.

[36] Ormiston answers this by saying that it has paid in full for all work undertaken by FBCL on this property. In an affidavit filed in opposition Mr Cummins states:

11. I confirm that some of the building materials (“goods”) supplied by the Applicant to FBCL were incorporated into the building of the caveated properties, and hence were “processed”, as suggested in paragraph 19 of Mr Kumar’s affidavit.
12. However none of the FBCL Debt is attributable to the Respondent. I confirm that the Respondent is in fact a creditor of FBCL having paid in full for all work done by FBCL on the Property. The respondent has in fact made further unsecured advances to FBCL in addition to payment in full for all certified work.

[37] Magsons contends that this evidence does not establish the preconditions for transfer of ownership, namely that the materials have been sold to and paid for by Ormiston at a time when the authority to sell was still in force. Counsel for Magsons pointed to the fact that Mr Cummins had not said expressly that FBCL had sold the materials to Ormiston or that Ormiston had paid for them, and had not produced any documents evidencing the sale or use of the materials or the payment for them. He submitted that Magsons should be entitled to maintain its caveat until the true position could be established in a substantive proceeding.

[38] I accept the submission of counsel for Ormiston that once FBCL uses or sells the materials as permitted by the terms of trade, Magsons’ ownership interest converts to a beneficial interest in the money received by FBCL for that use or sale. Indeed I did not understand counsel for Magsons to challenge that. The question that I must decide, however, is whether Magsons has an arguable case that the goods were not used or sold in accordance with the terms of trade.

[39] The terms of trade are clear that Magsons does not lose ownership of the goods until they are sold in accordance with the authority given in clause 4.4(b). FBCL was authorised to sell them prior to paying Magsons for them (and before ownership transfers to it) but only for full consideration. Magsons contends that

there is no evidence that FBCL did in fact receive full consideration. It has no access to the contract between FBCL and Ormiston or the documents relating to performance of that contract, particularly in relation to payment for the materials that Magsons had supplied. Given that FBCL and Ormiston are associated parties, and evidence that there are interlocking financial arrangements within the group of companies, Magsons has a concern that the relationship between FBCL and Ormiston may not be arms length and full consideration may not have been given for the materials. Whilst Magsons' concerns are based on conjecture rather than evidence, that is unsurprising as the evidence all lies in Ormiston's hands. Given the amount outstanding and the relationship between FBCL and Ormiston, it is surprising that Ormiston has not produced any documentation even to support its claim that all certified work has been paid for. The evidence given by Mr Cummins in that respect is sparse in the extreme.

[40] The second matter relied on by Magsons is that FBCL's authority to on-sell was revoked as soon as FBCL failed to comply with any of the standard terms, which obviously included the obligation to pay by the 20th of the month following delivery. It is apparent from the schedule of outstanding charges (produced by Mr Cummins in his affidavit in the Concepts 124 Limited application) that FBCL failed to pay for materials delivered in June 2008 for use in 63 Kestev Drive when payment was due on 20 July 2008. It seems at least arguable that FBCL's authority to use or sell the materials was revoked from that date by reason of clause 4.4(b)(i) of the standard terms. Counsel for Ormiston argued that Magsons had produced no evidence to show the authority was in fact revoked. Whilst it is true that there is no express revocation, clause 4.4(b)(i) states that FBCL's authority "is revoked" as distinct from "may be revoked" from that time. This suggest revocation occurs automatically, without need for notice. It is arguable, therefore, that FBCL did not have authority to use or sell materials delivered after 20 July 2008. It is also a reasonable inference that materials delivered shortly before 20 July 2008 would not have been used in construction prior to the revocation of authority. Without intending to predetermine the matter, it appears that there is reason to question FBCL's authority to use or sell materials to a value in excess of \$40,000. The point cannot be determined in this summary application.

[41] Although the points raised by Magsons could not be said to be compelling, I find that there is sufficient in them to provide an arguable case for a caveatable interest in respect of 63 Kestev Drive.

Is there any benefit to Magsons from the caveat over 63 Kestev Drive?

[42] Counsel for Ormiston submitted that the caveat over 63 Kestev Drive should not be sustained in any event because there was no equity in the property. He relied on the following evidence of Mr Cummins:

5. The title searches of the Property exhibited by Mr Kumar show that the title is mortgage to Equitable Property Holdings Ltd (“Equitable”) and Sage Securities Ltd (“Sage”) and Marac Finance Ltd (“Marac”). The debt to Equitable is now circa \$18,000,000, the debt to Sage is circa \$3,000,000 and the debt to Marac is circa \$12,000,000.
6. The proximate value of the Property is \$8,300,000 (GST inclusive) on completion. There is, therefore, no equity available for the Applicant, or the Respondent, in the Property.

[43] Counsel for Magsons submitted that the Court should not attempt to determine this issue on the limited evidence before the Court. He submitted that the finances of the companies within the Working Concepts Group were clearly interwoven, and it was not possible on the limited information provided by Ormiston to determine what secured debt applied solely to this property, or what other properties might also be available to meet the debt secured against 63 Kestev Drive.

[44] I consider that this is one of the rare cases where the Court should exercise its discretion against the caveator, notwithstanding an arguable caveatable interest. I come to that view having regard to the following matters:

- a) Mr Cummins has given evidence that the mortgages secured against 63 Kestev Drive secure a total sum in the order of \$33 million. He says that the approximate value of the property on completion is in the order of \$8.3 million. Even if there are other properties subject to some or all of this debt their combined value would need to exceed

\$25 million before it could safely be said that there was potential equity available in 63 Kestev Drive. That is a substantial sum.

- b) The evidence given on the application in respect of Concepts 124 Limited is that the debt to Marac Finance is also secured over a 22 townhouse development at 46 Carlos Drive, but in addition to the Marac mortgage there is also a mortgage over that property to North South Finance Limited of about \$3 million as of mid April 2009. Mr Cummins says that the approximate value of each of those units is about \$420,000. Even if all of them were still unsold (and there is evidence that a number have been sold) the realisable value would only be in the order of \$9.2 million. Mr Cummins has said that there is no equity in that development.
- c) The evidence in respect of 32 Carlos Drive is that there are two mortgages secured against that property securing debt of just over \$3.6 million. As against that Mr Cummins says the approximate value of the property is \$2.1 million. Again he says there is no equity in that property. These are different mortgages from those secured against 63 Kestev Drive and 32 Carlos Drive.

[45] Magsons did not challenge the evidence given by Mr Cummins, even to give a basis for the submissions by counsel for Magsons. Counsel for Magsons informed me that it did not do so (and indeed did not even present written submissions in advance) because it believed that it would be able to settle the matter. Whilst I can understand that, counsel did not seek an adjournment to raise any of these matters. In the circumstances I accept that the evidence put forward by Mr Cummins is unchallenged.

[46] I accept that it is not possible to determine the overall equity position conclusively on the evidence before the Court. Nevertheless, it is unchallengeable that there is substantial debt secured against 63 Kestev Drive that will have to be cleared in one form or another before the caveat can have any benefit for Magsons. In light of the overall indebtedness that I have outlined above, it seems unlikely that

these secured creditors would be willing to give Magsons a priority in repayment even for the comparatively small amount of the debt (in the order of \$40,000) for which there appears to be a caveatable interest. Leaving the caveat in place will inevitably lead to further legal costs, and potentially add to the interest burden payable on the secured debt. If there had been a stronger case for a caveatable interest the prejudice to Ormiston and potentially to secured borrowers might have been justified. In the circumstances of this case I do not consider that there is sufficient reason to believe that Magsons will be benefited by leaving the caveat in place.

Costs on application against Concepts 124 Limited

[47] As mentioned at the commencement of this judgment, Magsons withdrew its application to sustain its caveat against land owned by Concepts 124 Limited at the commencement of the hearing. Counsel advised that the caveats had also been withdrawn that morning. That has since been confirmed.

[48] Counsel for Concepts 124 Limited sought costs. Counsel for Magsons opposed the order, and submitted that costs should lie where they fall. Counsel addressed me on this at the end of the hearing, but as there was insufficient time to address the point fully I directed filing of memoranda.

[49] Magsons filed this application on 6 April 2009. Similarly to application in respect of the caveat over Ormiston's land, it claimed a beneficial interest arising under a constructive trust as a consequence of its materials being incorporated into the buildings on the caveated land.

[50] The caveat was lodged against 11 units in a development at 46 Carlos Drive, some of which had been sold and settlement was pending. The parties met two days after the application was filed. There is a difference of view as to the outcome of that meeting, which was the subject of ongoing correspondence between respective solicitors. By 20 May 2009 there was at least an interim agreement allowing caveats to be lifted on payment of \$5,000 for each sale transaction. Concepts 124 Limited contended that this was only to last until resolution of the caveat proceeding, and was

without prejudice to the parties' respective positions on that proceeding. Magsons appears to have believed that it was in respect of all of the affected titles and was to be the subject of a formal consent order. Under this arrangements four transactions were settled, with Concepts 124 Limited paying a total of \$20,000 to Magsons under the arrangement.

[51] By the time of the hearing it appears to have become common ground that on Magsons own analysis (the schedule compiled by Magsons' accountant, produced by Mr Cummins) that only \$2,290 worth of materials were used on the 46 Carlos Drive development. It is unclear when the first payment under the interim arrangement was made, but at that point there was no longer a basis for a beneficial interest arising out of ownership in those materials. I note that Concepts 124 Limited also opposed the application on the grounds that there was no equity in these properties, and that there was a refinancing arrangement in place which was being prejudiced by the continuing caveat.

[52] I consider that costs on this application should be considered at the same time as the costs on the other two applications, and particularly the application in respect of the caveat over Ormiston's land. In my view the solicitor for Concepts 124 Limited made it clear in his letter of 20 May 2009 to Magsons' solicitors that the arrangement was an interim one only and would not affect the parties' legal positions in respect of the application before the Court. It is similarly clear from a letter from Magsons' solicitors to the solicitor for Concepts 124 Limited of 8 June 2009 that Magsons accepted the possibility that there was no binding agreement going beyond the Court hearing (they referred to what could follow if Concepts 124 Limited did not agree to formal consent orders). In those circumstances Concepts 124 Limited could not take it for granted that the application would not proceed and that the caveats would be withdrawn.

Decision

[53] The applications by Magsons to sustain caveat 8085283.1 (in respect of land at 32 Carlos Drive) and caveat 8085148.1 (in respect of land at 63 Kestev Drive) are dismissed. The interim orders made on 22 April 2009 are discharged.

[54] Caveat 8086119.1 (lodged over titles at 46 Carlos Drive) having been withdrawn, the interim order made in CIV 2009-404-001971 on 22 April 2009 is discharged.

Costs

[55] Although there are three separate applications before the Court, there is a considerable of over-lap of facts and legal issues. Nevertheless each application had to be considered and addressed separately. I also note that the basis of the caveat lodged in respect of 32 Carlos Drive differed from that for the caveats lodged in respect of 63 Kestev Drive and 46 Carlos Drive. I consider that it is reasonable to make allowance for these matters in the costs to which I consider the respondents are otherwise entitled. I make the following orders as to costs:

- a) In respect of all three applications Magsons is to pay each of the respondents costs for steps up to preparation for hearing on a 2A basis;
- b) In respect of CIV 2009-404-002097 Magsons is to pay the respondent R J Cummins costs of preparation for hearing on a 2A basis;
- c) In respect of CIV 2009-404-001971 and 002098 Magsons is to pay the respondents jointly costs of preparation for hearing on a 2A basis;
- d) In respect of all three proceedings, Magsons are to pay the respondents jointly costs of hearing on a 2B basis;
- e) There is no order as to the additional memoranda submitted in respect of costs on CIV 2009-404-001971.

Associate Judge Abbott