IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-470-368

UNDER	the Land Transfer Act 1952
IN THE MATTER OF	of an application for a caveat to not lapse pursuant to section 145A of the Land Transfer Act 1952
BETWEEN	SHERYL MAREE BERRY Applicant
AND	KESTER DALLAS ATKINSON Respondent

Hearing: 12 June 2009

Appearances: Mr G C McArthur for Applicant
Mr Stemmer for Respondent

Judgment: 24 June 2009 at at 5 p.m.

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

This judgment was delivered by me on
***24.06.09 at 5 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……..…

Counsel:

Mr G C McArthur, P O Box 1011, Tauranga

Mr Stemmer, P O Box 9070, Tauranga

Background

[1] On or about 19 May 2008 the applicant lodged a caveat against the title to a property at 50 Pyes Pa Road, Tauranga. There is no dispute that the respondent is the registered proprietor of the property. The grounds upon which the applicant's caveat was based were stated as follows:

> Pursuant to a constructive trust, under which the Caveator is sole beneficiary of the trust, in respect of which Kester D Atkinson is the registered proprietor and the trust property is the above named land; the trust arising in consequence of the Caveator assisting in improving the property and by use of her monies in assisting the registered proprietor in acquiring the said property.

[2] On 18 May 2009 the applicant filed an originating application for an order that her caveat not lapse upon the following grounds:

1. The caveat protects an equitable interest the applicant has in the said land pursuant to a constructive trust.

[3] In his notice of opposition duly filed, the respondent opposed the making of the orders on the essential ground that the applicant has no equitable interest in the land.

[4] The factual background is that the applicant and the respondent commenced a relationship in 2004. They lived together from September 2006 until the relationship came to an end in November 2007. They were living at 50 Pyes Pa Road at the time when they separated.

[5] In her affidavit, the applicant said that at all material times she owned a residential property at Lincoln Terrace, Tauranga. She says that during the period that she lived with him, the respondent - whom she described as an overbearing personality - suborned her into creating a mortgage over the Lincoln Terrace property securing an amount of some $90,000. She said this money was paid into the business account of a business which the respondent formerly operated under the name of "Tackle King". I shall refer to this account in this judgment as the 'Tackle King' account.

[6] In her affidavit, the applicant made some serious allegations about the conduct of the respondent. It is not my responsibility in this judgment to come to any conclusions about what, if any, of those allegations have been substantiated.

[7] The present application involves an enquiry into the issue of the applicant's alleged contributions to the property at 50 Pyes Pa Road which the respondent acquired in or about 1 May 2007. Although the property was acquired by the respondent as registered proprietor, the applicant says that she contributed to the property from May to November 2007. She said she was the one who found the property. Once it was acquired, she says she worked from dawn to dusk on the property, her work involving her in 'cleaning up the outside of the property'. She had a medical operation in late May 2007 and soon after she was back at the property, working the same hours. She said the property had been re-designed by both of the parties using an architect. She said she worked with the respondent 'taking out walls and ceilings, putting in new walls and ceilings. We moved our living area to one end of the house while we worked on the other end and visa versa. I would hold boards etc while he nailed. I helped him put in framework, gib board etc. It was heavy work. I worked with him laying tiles and then I would do the grouting myself'.

[8] She said her contributions took the form of approximately $90,000, which was taken from her online account. This was the money raised by mortgage over Lincoln Terrace. She says that the respondent had access to the money because he had the password to her account and that he fraudulently took money from the account 'to purchase the 50 Pyes Pa Road property.

[9] She also said that she also made indirect financial contributions by travelling around New Zealand with the respondent in the course of selling karaoke machines, as part of a business that he operated.

[10] The respondent's account is quite different. He says that the property which the applicant owned at Lincoln Terrace had been abused by tenants and needed to be renovated. He offered to do the renovation on a paid basis. A large part of the money which was raised on the mortgage over Lincoln Terrace was used to fund the

renovation work done at that address. He says that the balance of the money was spent by the applicant on servicing her mortgages and meeting her personal expenses. The respondent said that while it was true that the applicant had a therapeutic massage business, she earned very little money from that source and hence the need to resort to the money raised on mortgage. He denies that the applicant did any of the work that she says she did at Pyes Pa. He described her account as

> An absolute fabrication and exaggeration. Sheryl's work comprised principally of sweeping the floors and assisting me at times when I needed another hand to lift materials. This only occurred on odd occasions. As a builder I was fairly adept at doing things myself and did not need Sheryl's assistance in the normal course of the working day.

[11] He refers to her stated expectation in her affidavit that she would have a half share in the Pyes Pa property as not being realistic because she made no contribution to the purchase price and contributed little to the renovations of the property. He said she did not have the skills, let alone the motivation, to contribute to the Pyes Pa property.

[12] As I understand it, the respondent's evidence is that from the funds that went through his Tackle King account, $62,200 was used to pay back the Lincoln Terrace renovations and he also paid out of that account some living expenses. But some of the $90,000 remained in the applicant's accounts and she used this to pay her own mortgage and living expenses. The result was that none of the money, in his account, ended up being applied towards the renovation of the property at 50 Pyes Pa Road, Tauranga.

[13] An important affidavit was filed by Mr Logan Hunter, who is the respondent's accountant. In summary, Mr Hunter says in the affidavit that $62,200 was paid out of the applicant's account into the Tackle King account, which was the account under the control of the respondent. He says that his analysis shows that renovations to the Lincoln Terrace property cost $46,787.90. He says that the respondent paid an additional $17,651.91 plus $5,506.59 respectively toward the applicant's expenses. He said that accounts for all the money. He said that the total payments out of Tackle King came to some $69,946 all of which were applied to

paying the applicant's various liabilities. If Mr Hunter's analysis is correct, none of the money which the applicant borrowed and which was transferred into the Tackle King account was used for the work on the applicant's property at 50 Pyes Pa Road. All of it was used for her own expenses. Mr Stemmer, for the respondent, understandably placed considerable reliance on this affidavit.

[14] I have no doubt that Mr Hunter's affidavit is honestly given and is accurate as far as it goes. However in the end, it is my impression that Mr Hunter's analysis of the destination of the various payments out of the account is not a matter within his primary knowledge. That is to say, his understanding of matters must be based on information that originated directly or indirectly comes from the respondent. The information would seem to fall into two categories. In the first, the respondent has told him how an item should be treated in the accounts. In the second group, the supporting documentation in respect of the purpose for which a liability was incurred – for example, Bunnings invoices said to be for materials used for work on the applicant's property - must be based on information that the respondent gave (- in the example, information that the respondent gave to Bunnings). To that extent, many of the assertions contained in Mr Hunter's affidavit do not constitute independent verification of what the respondent says. I will discuss subsequently the net effect of all of the evidence when I give my reasons. But before I do that it is necessary to say something about the relevant principles of law.

Legal Principles

Caveats

[15] Section 137 of the Land Transfer Act 1952 provides that:

> (1) Any person may lodge with the Registrar a caveat [[in the prescribed form]] against dealings in any land or estate or interest under this Act if the person—
>
> (a) claims to be entitled to, or to be beneficially interested in, the land or estate or interest by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied, or otherwise; or

(b) is transferring the land or estate or interest to any other person to be held in trust.

[16] Section 143 of the Land Transfer Act sets out the procedure for removal of a caveat. The applicable principles to an application under s 143 are summarised by Master Faire in *Allen v Hogan Developments Limited* (2001) 4 NZ ConvC 193,420 at para [12] as follows:

> [a] Section 143 of the Land Transfer Act 1952 gives no guide as to the circumstances in which the Court may make an order that a caveat be removed. *Catchpole v Burke* [1974] 1 NZLR 620 at p 623
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> [b] If it is clear that there was no valid ground for lodging a caveat, or that the interest which in the first place justified the lodging of the caveat no longer exists, such a caveat should be removed. *Sims v Lowe* [1988] 1 NZLR 656 (CA) at p 659
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> [c] The onus under s 143 of the Land Transfer Act 1952 lies on the caveator to show that he has a reasonably arguable case for the interest he claims. *Castle Hill Run Ltd v NZI Finance Ltd* [1985] 2 NZLR 104 at pp 104-106
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> [d] The caveat, being a creature of statute, may be lodged only by a person upon whom a right to lodge it has been conferred by statute. It is not enough to show that the lodging and continued existence of the caveat would be in some way advantageous to the caveator. *Guardian Trust & Executors of New Zealand Ltd v Hall* [1938] NZLR 1020 at p 1025
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> [e] For the purpose of this application, the caveator therefore must show that it is entitled to, or to be beneficially interested in, the estate referred to in the caveat by virtue of an unregistered agreement or an instrument or transmission or of any trust expressed or implied. Section 137 , Land Transfer Act 1952
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> [f] What the caveator must establish is an arguable case for claiming an interest of the kind in s 137 of the Land Transfer Act 1952
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> [g] Even if the caveator establishes an arguable case for the interest in the land claimed, the Court retains a discretion to make an order removing the caveat although it will be exercised cautiously. *Pacific Homes Ltd (in rec) v Consolidated Joineries Ltd* (1996) 3 NZ ConvC (digest) 192,459 at p 192,461; [1996] 2 NZLR 652 at p 656;
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> …

[17] It is also recognised that the summary procedure for removal of a caveat against dealing is wholly unsuitable for the determination of disputed questions of fact. Accordingly it has been said:

> ... that an order for the removal of such a caveat will not be made under s 143 unless it is patently clear that the caveat cannot be maintained either because there was no valid ground for lodging it or that such valid ground as then existed no longer does so. *Sims v Lowe* [1988] 1 NZLR 656 at pp 659-660..." (See also *Glanville v Medial Holdings Ltd*, HC AK, M 46-IM03, 25 February 2003, Heath J; and *Pratt v Hodge*, HC HAM, M 216/02, 20 May 2003, Master Faire; and Hinde McMorland & Sim "Land Law in New Zealand" 10.020.)

Constructive trusts

[18] I do not understand that there is any significant difference in the positions taken by Mr McArthur, on the one hand, and Mr Stemming on the other about the principles relating to constructive trusts.

[19] The leading case on the subject of constructive trusts in the setting of de facto relationships is *Lankow v Rose* [1995] 1 NZLR 277, a judgment of the Court of Appeal. I propose to refer only to the judgments that Hardie Boys and Tipping JJ delivered in that decision. Such citation will sufficiently set out the principles and the way in which they are to be applied.

[20] In his judgment, Hardie-Boys J said, at p 282:

> The essential requirements I see to be twofold: that the plaintiff contributed in more than a minor way to the acquisition, preservation or enhancement of the defendant's assets, whether directly or indirectly; and that in all the circumstances the parties must be taken reasonably to have expected that the plaintiff would share in them as a result. Both statements need some amplification. In the first place, by contributions to assets one is not referring to those contributions to a common household that are adequately compensated by the benefits the relationship itself confers. The contribution must manifestly exceed the benefits. Putting it in conventional estoppel terms, the plaintiff's contributions must have been to his or her detriment; or in Canadian terms they must have resulted by the end of the relationship in the enrichment of one to the juristically unjustified deprivation of the other. Further, the contributions need not be in money; they may be in services or in any other respect. But there must be a causal relationship between the contributions and the acquisition, preservation or enhancement of the defendant's assets for, as a claim to a constructive trust is a proprietary claim,

a claim to an interest in property, the contributions must have been made to assets; not necessarily to particular assets, but certainly to the defendant's assets in general. The contributions may then be recognised by the imposition of a trust over a particular asset or particular assets, which may in turn be quantified or satisfied by a monetary award.

[21] Further, at p 282 he said:

It is also to be remembered that it is of the nature of intimate human relationships that the parties will give little if any conscious thought to financial outcomes should the relationship fail; and of course while it lasts they are usually of no concern and minimal relevance. Thus I respectfully agree with the observation of Richardson J in *Gillies v Keogh*, quoted above, that from the ordinary circumstances of a shared life the requisite expectation properly can, and will, be inferred. To displace the inference, some particular feature must be demonstrated, as it was in *Gillies v Keogh*, where one party made it clear to the other at all times that she was asserting the property was hers and hers alone: see p 340.

[22] He continued at p 286:

Further, and with respect to Ellis J, I am unhappy with any analogy with the Matrimonial Property Act. One danger of the analogy is that the Court will tend to look to contributions to the relationship in the way that under the Act it must look to contributions to the marriage partnership; whereas for a constructive trust the Court must look to contributions to assets. Furthermore, the constructive trust remedy must reflect relative contributions, so that there is no room for the kind of presumption of equality that the Act provides. And finally, I would not regard it as a reasonable expectation that de facto couples should share in assets in the same way that married couples do. If the distinction between the two categories is to become one of form only, that is a revolutionary step which in my view only Parliament can take.

The ultimate question in this case is whether a half-interest in the home and chattels represents a just and proper assessment of Ms Rose's contributions to Mr Lankow's assets, bearing in mind the money he provided for her motorcars.

[23] In his judgment, Tipping J said, at pp 293-294:

In the usual case in this field the legal title belongs to one only of the former de facto partners. That partner, the defendant, seeks to retain not only the legal title but the whole beneficial interest. The other partner, the claimant, seeks a beneficial interest in the property in recognition of what she has done during the relationship. Putting it another way, the claimant seeks a beneficial interest in return for her contributions in and to the former relationship.

However, in my judgment it is not enough for the claimant to show a contribution to the relationship. In order to be awarded a beneficial interest in property owned in law by the defendant, the claimant must first show

some contribution, direct or indirect, to the property at issue. A contribution to the relationship will not qualify unless it is also, as will often be the case, a contribution to that property. This is not as restrictive an approach as it may appear. I will return to the ambit of qualifying contributions a little later.

The second thing the claimant must establish is that she expected an interest in the property. If, for any reason, she had no such expectation, a constructive trust cannot be imposed in her favour. Thirdly the claimant must show that her expectation of an interest was reasonable in the circumstances. The fourth step is for the claimant to show that the defendant should reasonably expect to yield her an interest. The fact that the defendant is not willing to yield an interest or did not expect to have to do so is no bar to her claim if he should reasonably expect to do so. In that respect the Court stands as his conscience.

The imposition of a constructive trust in such circumstances can be seen as a development of the concepts of resulting trust and proprietary estoppel. A resulting trust arises when property is owned at law by one person and another person has provided all or some of the consideration for its acquisition. Traditionally a resulting trust did not arise when one person improved the property of another: see the speech of Lord Reid in *Pettitt v Pettitt* [1970] AC 777 at p 794B. The reason why the person with the legal title is required to yield a beneficial interest to the claimant is that equity will not allow the owner of the legal estate to deny the claimant a beneficial interest. In equity the conscience of the legal owner is required to acknowledge the other party's beneficial interest in the property. A refusal to do so is regarded as unconscionable conduct on the part of the legal owner justifying the intervention of equity.

This, in my judgment, is the most convincing rationale for the intervention of equity in this field. Equity cannot alter or interfere with the defendant's legal estate. However, on the premise that the defendant is acting unconscionably by denying the claimant a beneficial interest, equity treats the defendant as a constructive trustee of the legal estate to the extent of the claimant's assessed interest. By this means equity requires the defendant to account to the claimant for her interest.

….

[24] He then summarised what the claimant must show in the following terms (p294):

Before discussing further the question of contributions, I summarise what the de facto claimant must show:

1. Contributions, direct or indirect, to the property in question.

2. The expectation of an interest therein.

3. That such expectation is a reasonable one.

4. That the defendant should reasonably expect to yield the claimant an interest.

If the claimant can demonstrate each of these four points equity will regard as unconscionable the defendant's denial of the claimant's interest and will impose a constructive trust accordingly.

[25] In determining this application I intend to be guided by the above statements of principle.

Reasons for judgment

[26] The applicant claims that she had a reasonable expectation that she would receive in interest in the property. She claims that she made contributions by helping to renovate the home – working long hours to do so. She also claims that her money that was derived from a mortgage over the Lincoln Terrace property was used in the purchase of the Pyes Pa Road, property.

[27] She has not pointed to any specific evidence tracing money from the proceeds of granting the mortgage through to the acquisition of 50 Pyes Pa Road. Rather, she appears to depend upon an inference that some of the money went into the respondent's bank account and was under his control there; and that because he did not use the money in furtherance of her interests, the Court may conclude that he used it for his own purposes, namely, to purchase the property at Pyes Pa.

[28] The claim based upon services in the form of assisting with renovations has lead to a direct opposition of affidavit evidence that cannot be resolved in a hearing like this. The financial issue cannot be resolved either, notwithstanding Mr Hunter's helpful affidavit. That is for the reason that the conclusions which Mr Hunter reaches involve assumptions that cannot be independently proved. For all of these reasons, in my view, the position has not been reached where it can be said that it is 'patently clear' that the caveat cannot be maintained (see paragraph [17]above).

Orders

[29] The application is granted. I would expect the parties to resolve the question of costs between themselves and if they cannot, I will allocate time before Court at the 9 a.m. on a suitable date to hear oral argument.

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J.P. Doogue
Associate Judge