IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2009-485-120

BETWEEN	S J THOMAS Applicant
AND	F.W.T. HOLDINGS LIMITED Respondent

Hearing: 12 August 2009

Appearances: P.S.J. Withnall - Counsel for Applicant
J.W. Tizard - Counsel for Respondent

Memoranda of Counsel: Respondent – 10 September 2009
Applicant – 14 September 2009
Applicant – 24 September 2009
Respondent – 1 October 2009

Judgment: 8 October 2009 at 3.00 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 8 October 2009 at 3.00 p.m. pursuant to r 11.5 of the High Court Rules.

Solicitors: Paul Cheng & Co, Solicitors, PO Box 10-201, Wellington
Oakley Moran, Solicitors, PO Box 241, Wellington

Introduction

[1] In a judgment ("the 9th July judgment") I gave in this proceeding on 9 July 2009 relating to an application under s. 145A Land Transfer Act 1952 that certain caveats not lapse, I made an order in favour of the applicant that these caveats 7548049.1 and 7611176.1 ("the caveats") not lapse on condition that:

> "[45] ….. the applicant is to issue proceedings by 9 August 2009 to have the substantive issues between him and the respondent determined. The applicant is to diligently pursue those proceedings.
>
> [46] If this condition is not satisfied, the way is open to the respondent to apply to this Court on notice for a discharge of this order."

[2] On 5 August 2009 the respondent filed an application in this Court to vary this 9 July 2009 order that the caveats not lapse.

[3] The specific terms of the variation order sought by the respondent are:

(a) Upon payment by the respondent into Court of the sum of $75,000 Caveat 7548049.1 registered against the land contained and described as Lot 3 Deposited Plan 353669 in Identifier 219398 (Wellington Registry) and Caveat 7611176.1 registered against the land contained and described as Units 1, 2, 3 and 4 Deposited Plan 366870 in Identifiers 271454, 271455, 271456 and 271457 respectively (all Wellington Registry) be removed.

(b) The moneys so paid in be held in interest bearing deposit pending the determination of the proceeding which the applicant was ordered to issue in the order of 9 July 2009.

(c) Alternatively, an order that the applicant execute an undertaking as to damages which the respondent may sustain as a consequence of the caveat (sic) remaining against the title (sic).

[4] The background to this matter is set out in the 9th July judgment sustaining the caveats. As I have noted, in that judgment an order was made that the caveats not lapse on condition that the applicant was to issue proceedings by 9 August 2009

to have the substantive issues between he and the respondent determined and to diligently pursue those proceedings. The applicant has filed the substantive proceedings in question. The present application therefore is not an application by the respondent to discharge the order on the basis that the conditions in the order have not been satisfied. This would not have been appropriate here.

[5] Instead, the respondent broadly contends that the circumstances upon which the 9 July 2009 judgment were based have changed and that it is appropriate for a variation order to be made.

[6] The respondent's application is opposed by the applicant.

[7] When this variation application was called on 12 August 2009 I heard argument from counsel for both parties. Then, I reserved my decision and made a specific direction that the hearing be notionally adjourned to allow for the following:

> "(a) Counsel for the parties are to liase over the next two plus weeks with a view to resolving the current pressing issue and to see if agreement can be reached, for example, by Mr Thomas as caveator consenting to registration of the National Bank of New Zealand mortgage on some basis, or by some other agreed solution between the parties;
>
> (b) Counsel are directed to file a joint memorandum (or individual memorandum if the terms of a joint memorandum cannot be agreed) by 5 pm on 28 August 2009 to advise the Court of the outcome of the negotiations noted in para 4(a) above;
>
> (c) If no resolution of matters is achieved by 28 August 2009 as confirmed in the memorandum… then I will provide my reserved decision on the FWT Holdings Ltd application thereafter."

[8] The parties have failed to resolve the issue, and have filed memoranda. As such, I now provide my decision on the respondent's present application.

Preliminary

[9] At the outset counsel for the applicant raised an objection to an exhibit ("Exhibit "E") to a 24 July 2009 affidavit of Mr. John Flynn filed by the respondent in support of the present application. This objection suggested that Exhibit "E" annexed a chain of without prejudice correspondence communications which should not be read here.

[10] Having now had an opportunity to see this correspondence, in my view, it is difficult to see how this sequence of communications could be said to disclose without prejudice correspondence. As I see it, the email simply highlights balance sheet figures and some taxation implications for the company. In my view, this exhibit can be read here, given also that it really makes no difference to the overall outcome of the present application as will be seen later in this judgment. I rule accordingly.

Jurisdiction

[11] At the outset, counsel for the applicant suggested that the Court has no jurisdiction to make the orders sought by the respondent. He pointed out for the applicant that the original caveat proceedings were commenced by way of an Originating Application; that judgment was determined after hearing defended argument; and that the orders made in the 9 July judgment were sealed and thereby perfected on 13 July 2009. As such, the applicant submits that the rule that a judgment once sealed must stand applies: *Farquhar v Property Restoration Limited v Ors* CA186/89 27 May 1991. Counsel goes on to note that no application has been made for the recall of the 9 July judgment, and that in any event recalling the judgment would not be appropriate.

[12] In response, the respondent submits that the Court has inherent jurisdiction to make such orders as are necessary to enable it to act effectively, and may exercise this jurisdiction with respect to matters regulated by statute or rules of Court so long as it can do so without contravening any statutory provision: *Taylor v Attorney General* [1975] 2 NZLR 675. It is also well established that the Court may exercise the jurisdiction to set aside or vary procedural orders of continuing effect where the

Court has not yet made a substantive judgment finally determining the parties' rights: *Ryde Holdings Ltd v Sorenson* (1995) 8 PRNZ 339; *Stead v The Ship "Ocean Quest of Arne"* [1995] 3 NZLR 415. Authority also exists confirming that the Court may vary an order preventing the lapse of a caveat on being provided with further facts: *BP Oil New Zealand Ltd v Van Beers Motors Ltd* [1992] 1 NZLR 211.

[13] Although initiated by an originating application, an order sustaining caveats is clearly a procedural order of continuing effect, which does not involve any determination of the merits of the case. This was recognised in *BP Oil New Zealand Ltd v Van Beers Motors Ltd.* It is distinguishable from a case where orders are made as the result of the final determination of a substantive case, as was the situation in *Farquhar v Property Restoration Limited v Ors.* As such, I am satisfied that I have jurisdiction to vary or set aside the order made on 9 July 2009.

Should the Jurisdiction Be Exercised

Residual Discretion

[14] In my 9 July judgment I was satisfied that the applicant had met the initial onus of establishing that he had a reasonably arguable case as to a caveatable interest in the caveated properties. The respondent does not endeavour to suggest now that the applicant's claimed interest in the properties is not arguable. Rather, the respondent argues that in light of present circumstances it would be appropriate to exercise the residual discretion to remove the caveat. It is clear both that this discretion must be exercised cautiously and also that the onus lies in this case on the respondent. The Court of Appeal in *Pacific Homes Limited (in receivership) v Consolidated Joineries Limited* [1996] 2 NZLR 652 (CA) at p. 656 commented on the discretion in this way:

> "We are of the view that in the dictum in *Sims v Lowe* Somers and Gallen JJ were concerned with the situation which was then before the Court and were not putting their minds to a situation in which there is no practical advantage in maintaining a caveat lodged by someone who could properly claim a caveatable interest. In such circumstances the Court retains a discretion to make an order removing the caveat, though it will be exercised cautiously. An order will be made for removal only where the Court is completely satisfied that the legitimate interests of the caveator will not thereby be prejudiced. If, on the facts of a case, it can be seen that the caveator can have no reasonable expectation of obtaining benefit from continuance of the caveat in the form of the recovery of money secured over the land or specific performance of an agreement or if the caveator's interests can be reasonably accommodated in some other way, such as by substituting a fund of money under

> the control of the Court, then it may be appropriate for the caveat to be removed notwithstanding that the right to the claimed interest is undoubted."

[15] In *Stewart v Kaipara Consultants Ltd* [2000] 3 NZLR 55, the Court of Appeal upheld Master Kennedy-Grant's decision to make an interim order that the appellant's caveat not lapse, with a further order that if the respondent filed an undertaking to hold in its solicitors' trust account $60,000.00 from the sale of the subject properties, that the interim order should be cancelled without need for any further application. There, the Court stated:

> "[24] The properties have no value to her other than their economic value. She maintains no sentimental attachment to them as might have been the case if, for example, they had been her family home. Nor will their sale affect the value of another asset which she is retaining, as would be so, for instance, if they were adjacent to other land in her ownership for which she anticipated a common usage…
>
> [27] The grant of a specific remedy to a person claiming an interest in land lies in the discretion of the Court. It is a discretion to be exercised in accordance with settled principles. But where the particular piece of land does not have attributes giving it a personal value to the claimant, unable easily to be measured and substituted in economic terms, then the Court in balancing the interest of the defendant and other affected parties (especially those who have entered into independent commitments which will be affected by the delay in establishing the claim) will properly lean in favour of freeing the title from the claim if a fund can be created which suffices to protect the claimant's legitimate interest."
>
> (emphasis added)

The 9 July 2009 Judgment

[16] It is useful to address again some brief background to this dispute. In October 1999 the applicant entered into an arrangement with Mr. David Woodhouse, Mr. John Flynn and Mr. Brian Flynn to purchase and develop a property in Mitchell Street, Brooklyn. They were advised by an accountant that, due to tax implications, a company should be formed to acquire the property and undertake the development. That company is the respondent. Mr. John and Mr. Brian Flynn were appointed as directors and shareholders.

[17] The business partners later decided to subdivide the Mitchell Street property and amalgamate the rear section of that property with both the rear section of a neighbouring property and another section in Hoover Street, which was owned by Mr. John and Mr. Brian Flynn. Ownership of the amalgamated land was transferred to the respondent, and development began. In total the applicant contributed about

$18,000.00 to the purchase of the properties, and according to his own evidence, the applicant also contributed his time and labour to the project.

[18] The applicant later grew concerned about the development and decided not to participate in the project any longer. It was proposed that he would sell his interest to Mr. John Flynn for $100,000.00, but Mr Flynn could not raise the capital and the sum has not been paid. In the meantime, the respondent has sold two of the six units that were built on the property.

[19] The fundamental argument for the respondent is that the applicant has no direct interest in the property, which is owned by the respondent, but that he is merely an equitable shareholder in the respondent company. In response the applicant contends that he has a direct equitable interest in the property itself, which the respondent holds in part on trust for him. In the 9 July judgment, I found it to be arguable that the applicant did have an interest not only in the company, but in the land. I concluded that it was arguable that the respondent company held the property on a resulting or constructive trust for the applicant.

[20] As such, the applicant had met the initial onus for the continuation of the caveats. Nothing with regard to this aspect has changed. The respondent argues that what has changed are factors relevant to the residual discretion to lapse the caveat. At para 42 of the 9 July judgment, I refused to exercise the residual discretion to allow the caveat to lapse for the following reasons:

> "42] In considering aspects of prejudice, at this point there is no suggestion made by the respondent that the presence of the caveats is preventing any sales, pressing needs to refinance or other dealings with the properties in question in the mean time. As David Woodhouse notes in his 8 February 2008 affidavit, plans for the development of the remaining four units on the land in question are currently only just before the Council for approval. Given this, I do not see that the respondent would suffer undue prejudice if the caveats are to remain in place. If any prejudice is to be caused here, in my view it would be to the position of the applicant by ordering removal of the caveats and the present protection they provide to his claims. That said, I am not satisfied that in this case it would be appropriate to exercise the discretion to remove the caveats at this time."

New Factors

[21] Before me, counsel for the respondent acknowledged that critical material relating to the exercise by the Court of its discretion was not before me at the earlier

hearing which culminated in the 9 July judgment. On this, the respondent now says that the continued presence of the caveat is seriously affecting the development of the land and the financial viability of the respondent. The respondent further maintains that, particularly given that no viable undertaking as to damages has been provided here by the applicant, the continuation of the caveat is of greater present and potential damage to the respondent and other interested persons than any potential damage to the applicant if the variation order sought by the respondent is granted.

[22] As noted above, the development involved the construction of six units. In his affidavit dated 24 July 2009, Mr. John Flynn states that all proceeds from the first two units sold were required to be paid to the mortgagee Westpac Bank, who had refused to provide further funding for the development and required the respondent to pay all outstanding loans. The respondent was unable to pay GST on the sales, and a penalty has resulted. After Westpac threatened to commence mortgagee sales of the respondent's remaining properties, Mr. Flynn deposes that he approached the National Bank. The National Bank agreed to advance $150,000.00 to enable Westpac to be repaid and to commence work on the next two units. This was not enough however to also allow the respondent to make an offer to the applicant for his interest. Mr. John Flynn states that he accepted this National Bank offer because at that stage the respondent had no realistic alternative.

[23] The National Bank later apparently agreed to provide the finance needed to enable the construction of the next two units plus a sum of up to $100,000.00 to enable Mr Flynn to pay the applicant. This finance was conditional on the withdrawal of the caveat and the registration of a mortgage over the respondent's properties, including the caveated titles. The applicant however declined an offer put to him to settle on this basis.

[24] The next two units are apparently 90 per cent completed. Mr. John Flynn states however that further work cannot be carried out because there is no money to do so, given that the National Bank cannot take security over the properties. The value of the completed project has been assessed as $1,800,000.00. The value of the development as at 18 December 2008 was assessed at $1,005.000.00. This is in addition to a $500,000.00 valuation of the Mitchell Street property. The respondent

has accounts outstanding of approximately $222,303.30. The respondent compares this to the applicant's cash contribution of $17,975.00 to the project, which amounts to 5.4 per cent of what the respondent characterises as the total "shareholder" funding. In his affidavit Mr. John Flynn calculates that reimbursement of the applicant's contribution with compound interest at 10 per cent would reach a figure of only $40,057.72.

[25] The respondent has put before the Court correspondence between solicitors for the parties following the adjournment of the respondent's application. In August 2009, the respondent presented the applicant with two possible options. The first was that the respondent accept a bank loan of $400,000.00 and pay $75,000.00 into Court as security for the applicant, and the applicant withdraw the caveat. The second involved the respondent accepting a bank loan of $300,000.00 on the basis that the applicant would consent to the registration of the mortgage and the sale or one or both partly completed units at a price of not less than $450,000.00 with the net proceeds of sale being used to complete the remaining two units, obtain title, and reduce the respondent's debts.

[26] The applicant it seems responded to this offer, asking what the loan money would be used for. The applicant's own inquiries indicated that at the most the respondent owed about $220,000.00. The respondent replied stating that the loan was also needed to enable it to meet future accounts to enable the two units to be completed. The mortgage was to take priority and secure all advances made to the respondent. The respondent then provided a break down of how the initial advance of $224,405.60 would be disbursed. It seems the applicant did not respond to this letter. On 7 September 2009 the respondent sent a further letter to the applicant's solicitor and counsel requesting a response by 5pm Wednesday, 9 September 2009, failing which the respondent confirmed it would file its memorandum with the Court. The applicant apparently again failed to provide a response. It has also not agreed to the release of the caveat from the title.

[27] In response, the applicant's broad submissions to me maintain that the respondent's view of his financial entitlement should be viewed with some suspicion. His counsel puts emphasis on the fact that the extent and nature of the

applicant's interest has not yet been determined. However, it is clear to me that at this point the applicant has not provided any substantive response to the respondent's calculations or to indicate that the earlier offer of $100,000.00 or the present offer of $75,000.00 as security would not be sufficient sums to protect his interest.

[28] The applicant also raises concerns about apparent inconsistencies in the amounts said to be owing by the respondent and the fact that some moneys owed by the respondent are to "related parties". Having looked carefully over the parties' submissions, the attached correspondence and documentation, and the affidavit evidence, I find these concerns to be of little substance. The respondent has provided the applicant with information as to its debts and discussed the applicant's concerns with the figures with the applicant. I find the submission that some of the debts are to "related parties" to be of little relevance. The debts are nonetheless debts properly incurred. And the applicant is in the same sense a "related party" to the respondent.

[29] The applicant also raises concerns about the absence of a "priority amount" under the proposed National Bank mortgage. He claims that he must retain some say over amounts advanced under the mortgage to ensure that his "interest" in the properties is not unduly diluted. The applicant suggests that the respondent's failure to provide the priority amount is what prevented the applicant from consenting to registration of the mortgage. However, as the respondent explained to the applicant, the bank documents do not state a priority amount, as at this point there are no other charges over the properties. The applicant's claim does not relate to a competing charge, but to an alleged property right. As the respondent explained, the bank is entitled to recover all amounts properly advanced to the respondent, unpaid interest, and any costs incurred in remedying breaches or realising its security.

[30] Finally, the applicant argued that the correspondence between the parties indicated that one reason why the respondent sought the extinguishing or variation of the orders is that it seeks the "unfettered freedom in the future to deal with the land as it sees fit", and in particular to sell the land and dispose of the proceeds as it chooses. This refers to the respondent's suggestion that the applicant consent to sale of one or both of the near completed units, to pay debts and finance the development of the final two units, a suggestion which the applicant's solicitors indicated they

were prepared to entertain. I say nothing further on this aspect other than to comment that it seems to reflect what is an ongoing and unfortunate failure on the part of these parties to reach a sensible commercial agreement on any issues arising between them.

Conclusion

[31] Nevertheless, I conclude here that the applicant has not raised anything to suggest that its legitimate interests in the properties would not be reasonably accommodated by substituting the caveats for a fund of money (figures of $75,000.00 and the previous settlement offer of $100,000.00 have been mentioned) paid into Court and held in an interest bearing deposit. I am also satisfied that the applicant would not be prejudiced by such a substitution: *Pacific Homes Limited (in receivership) v Consolidated Joineries Limited.*

[32] So long as the caveats remain on the titles and the parties continue to dispute any further mortgage advances which are required to settle creditors and complete the development, in my view, problems between the parties will continue to abound and development of the properties will effectively be frozen through lack of financing. Further, I accept that the respondent has debts and accounts outstanding which need to be paid. In these circumstances it is surely in the interests of all parties involved including the applicant that the development be completed so that everyone can be promptly paid.

[33] There is no suggestion on the part of the applicant that his interest in the properties is anything other than economic. Taking this into account, as well as his financial contribution to the properties in comparison with the contributions of his former business partners and noting the current debts outstanding to third parties including taxation debt, a balancing of interests at this point in my view clearly favours freeing the titles: *Stewart v Kaipara Consultants Ltd.*

[34] In this case, freeing the titles from the caveats and replacing them with a fund paid into the Court I am quite satisfied would reasonably accommodate and not prejudice the applicant's interests, while also providing a fairer balance as against

the interests of the respondent and those third parties to whom outstanding amounts are owed by the respondent in respect of the development. That fund would protect the applicant's interests in pursuing his ancillary claim against the respondent. The fund to be paid into Court is to be $100,000.00, a figure at which the applicant was earlier prepared to sell his interest in the properties to Mr. John Flynn. And, as I understand the position, that figure of $100,000.00 can be accommodated in the approved National Bank funding arranged by the respondent.

Result

[35] For the reasons outlined above, the respondent's present application is successful. As such, I now make the following orders:

(a) The orders made by me in this proceeding on 9 July 2009 are varied by the addition of the following further orders outlined in paras. [33] (b) and (c) below.

(b) Upon confirmation of payment by the respondent into Court of the sum of $100,000.00 Caveat 7548049.1 registered against the land contained and described as Lot 3 Deposited Plan 353669 in Identifier 219398 (Wellington Registry) and Caveat 7611176.1 registered against the land contained and described as Units 1, 2, 3 and 4 Deposited Plan 366870 in Identifiers 271454, 271455, 271456 and 271457 respectively (all Wellington Registry) are to be removed.

(c) The $100,000.00 so paid into Court is to be held on interest bearing deposit pending determination of the proceeding which the applicant was ordered to issue in the order of 9 July 2009.

(d) Costs are reserved. If counsel are unable to agree and costs are sought by any party they may be the subject of memoranda to the Court filed sequentially.

'Associate Judge D.I. Gendall'