IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CIV 2009 412 000804

UNDER	Section 145A of the Land Transfer Act 1952
IN THE MATTER OF	an application that a caveat not lapse
BETWEEN	LINDSAY JOHN WILLIAMS Applicant
AND	KAREN LEE CAZEMIER AND WENDY MAY HEWITSON Respondents

Hearing: 7 December 2009

Appearances: J M Ormsby and P Maw for Applicant
C S Withnall QC and S M D Guest for Respondents

Judgment: 17 December 2009 at 1.30pm

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
As to application for order that caveat not lapse

Introduction

[1] The applicant, Lindsay Williams, seeks an order that his caveat not lapse. The pivotal question in the case is whether a contract came into existence or not. Lindsay Williams says there is a contract. The respondents say there is not. The respondents say that Lindsay Williams' contract argument fails because in their dealings the parties intended that they would not be bound until a formal written agreement was executed. Such a document was never executed. Secondly, they say that the contract would fail for lack of agreement on or certainty of essential terms.

The particular application before the Court

[2] Lindsay Williams registered a caveat against the respondents' land. He seeks an order that the caveat not lapse. This proceeding was originally commenced by Ecos Building Consulting Limited upon the basis that it had been nominated by Lindsay Williams pursuant to the contract which is said to exist. Upon the filing of the respondents' submissions, Ecos recognised that it could not succeed even were the Court to find that the contract arguably existed. Lindsay Williams then registered his own caveat against the title. The respondents consented to Lindsay Williams becoming the applicant in this proceeding and to the proceeding being treated as his application for an order that his caveat not lapse: see Minute dated 7 December 2009.

[3] The Court is therefore asked by the parties to deal with this application upon the basis that they have agreed to dispense with the formality of the notices required under s145 Land Transfer Act 1952. They ask the Court to adjudicate on the matter by determining whether Lindsay Williams is entitled to an order sustaining the caveat. Counsel agree that the Court is to apply the settled principles applicable to applications under s145 of the Act.

Application that caveat not lapse – the principles

[4] The principles which I adopt in relation to this application are these:

(a) The burden of establishing that Lindsay Williams has a reasonably arguable case for the interest claimed is upon him as caveator and applicant;

(b) The applicant must show a reasonably arguable entitlement to, or beneficial interest 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: s137 Land Transfer Act 1952;

(c) The summary procedure involved in an application of this nature is wholly unsuitable for the determination of disputed questions of fact – an order for removal of the caveat will not be made unless it is 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;

(d) When an applicant has discharged the burden upon him there remains a discretion as to whether to remove the caveat, which discretion will be exercised cautiously;

(e) The Court has jurisdiction to impose conditions when making orders.

The facts to be considered

The facts not in dispute

[5] The respondents are the registered proprietors of a property at 23 Willow Place, Queenstown.

[6] Lindsay Williams, through a company, had a shareholding in Terrace Junction Properties Limited. One of the respondents, Karen Cazemier, is with her husband (Frank Cazemier) also a shareholder in Terrace Junction.

[7] The respondents decided in 2008 that 23 Willow Place should be sold. In May 2009 Frank Cazemier and Lindsay Williams discussed the possibility of Lindsay Williams' acquiring 23 Willow Place with shares in Terrace Junction forming part of the purchase consideration. The possibility of a transfer of 23 Willow Place to Lindsay Williams was further discussed at a meeting between him and the respondents' husbands (Frank Cazemier and Clive Hewitson) at a meeting on 12 August 2009. All three who were present filed affidavit evidence. The two sides disagree on the detail of the discussion, but it is common ground that Lindsay

Williams was left to come back to the respondents (or their husbands) with any proposal.

[8] Lindsay Williams e-mailed a proposal to Frank Cazemier on 18 August 2009. I set out material parts of the e-mail with my emphasis added:

> Hi Frank,
>
> As discussed on the phone Di and I propose to offer a mix of Terrace Junction shares and cash to a value of $1 million for 23 Willow Place. We have thought about other options along the lines that yourself, Clive and I discussed in Dunedin however they all have the potential to be complex and what we prefer is simplicity.
> **Please note that this e-mail does not constitute an offer in itself.**
>
> ...
>
> We propose an offer of 2 1/2 parcels (250 shares) which represents $650,000 plus $350,000 in cash making a total of $1 million...
>
> **Upon advice from yourself and Clive that you accept this proposal in principle we will have our solicitor prepare a standard sale and purchase agreement which will of course require some conditions which we propose as follows:**
>
> > [Lindsay Williams here detailed seven conditions including the obtaining of approval from the directors of Terrace Junction to the share transfer following the proper procedure for sale of shares of the company]
>
> ...
>
> I trust all of this makes sense and we look forward to your response in due course.
>
> Cheers
> Lindsay Williams

[9] One or two days after the e-mail, Lindsay Williams and Frank Cazemier had a telephone discussion. It was agreed that the legal costs in relation to preparing an agreement would be met equally and that Lindsay Williams was to instruct Ms S Peart of Mitchell Mackersy to prepare an agreement for sale and purchase.

[10] Lindsay Williams, at 11.25am on Friday 21 August 2009, e-mailed details to Ms Peart "for the sale and purchase agreement re: 23 Willow Place, Queenstown". He added:

> Please note that I am signing as agent for the purchaser (not sure yet which entity will own it).

[11] Ms Peart, when she received the details, planned to prepare the documentation to be available on Monday 24 August 2009. Ms Peart advised both Lindsay Williams and Frank Cazemier of that timing.

[12] Later on the Friday (21 August 2009) the respondents received from a third party an unconditional cash offer for 23 Willow Place.

[13] In the early evening Frank Cazemier telephoned Lindsay Williams. There is a dispute as to exactly what was said and I will return to that. It is common ground however that Frank Cazemier informed Lindsay Williams of the third parties' and asked for a revised offer from Lindsay Williams. It is also common ground that Frank Cazemier was to await a document from Lindsay Williams – there then remains a dispute as to whether the document was to record a proposal or a deal already reached. I will return to that.

[14] At 7.32pm that evening (21 August 2009) Lindsay Williams sent an e-mail to the Cazemiers and Hewitsons. I set out the body of the document in full:

> Hi Frank and Clive,
>
> As discussed Di and I agree to amend the proposal to purchase 23 Willow Place as outlined in my email dated 18 August as follows:
>
> Two and a half Terrace Junction share parcels at $300,000 per parcel – which represents $750,000, plus $350,000 cash, making a total purchase price of $1.1M. Agreement subject to one condition only being TJP Directors approval as to share transfer following proper procedure. Existing furniture, chattels, etc, and tenancy agreement taken over within purchase price. Sally Peart to prepare agreement this coming Monday for signing same day. Vendor and Purchaser to share Sally's total fees/costs 50/50.
>
> Please find attached my signature to this ammendment (sic).
>
> We look forward to your reply email acknowledging your agreement to the above.
>
> Regards,
> Lindsay Williams

(The attached signature referred to in the e-mail was not produced in evidence. I understand from counsel, however, that it is common ground that Lindsay Williams' signature was attached to the e-mail in a scanned form.)

[15] The first reply came from Karen Cazemier at 8.10pm. The body of the e-mail read (with my emphasis added):

> Hello Lindsay and Di, thank you for your email and agreement to the changes as discussed tonight. As one of the owners of 23 Willow Place, I agree to the amendments below, **to be prepared by Sally and signed accordingly on Monday**. Regards, Karen Cazemier.

[16] Wendy Hewitson's e-mail response was made at 8.11pm and reads:

> Lindsey (sic)
>
> I Wendy Hewitson agree to the amended proposal as outlined in this email for the purchase of 23 Willow Place
>
> Regards Wendy Hewitson

[17] The final incident of that evening deposed to by Lindsay Williams is a second telephone call which he says he received from Frank Cazemier "during the process of amending the offer on Friday 21 August" Lindsay Williams says that Frank Cazemier told him that he (Frank Cazemier) had telephoned the real estate agent involved in the other offer and had told the real estate agent that it was rejected and that they had done a deal with another party (the Williamses). Frank Cazemier does not refer specifically to a second telephone conversation but denies a discussion of the nature alleged by Lindsay Williams. I will return to that dispute.

[18] On Monday 24 August 2009 Ms Peart produced a form of agreement for sale and purchase using the REINZ/ADLS form. Karen Cazemier and Wendy Hewitson were named as vendor; Lindsay Williams "as agent" as purchaser. The purchase price was stated to be $1,100,000.00 inclusive of GST. The printed terms as to payment of the balance of the purchase price were left blank so that the form reads:

> Balance of purchase price to be paid or satisfied as follows:
>
> (1) By payment in cleared funds on the settlement date which is
>
> OR
>
> (2) In the manner described in the Further Terms of Sale. Interest rate for late settlement: % p.a.

[19] Further terms of sale were included and read:

> 15.0 The parties have agreed that the purchase price payable for the property shall be payable in cash and shares in accordance with the following proportions:
>
> * $350,000 cash;
> * 250 shares in Terrace Junction Properties Limited at $3,000 per share:
>
> provided that the Vendor's ability to transfer the above shares is conditional upon and subject to an offer being made to existing shareholders of Terrace Junction Properties Limited in accordance with the Company's constitution. In the event that fewer than 250 shares are able to be transferred to the Purchasers or the Purchasers' agent as a result of the pre-emptive rights process, then the Vendor undertakes to pay the difference between the value of the shares transferred (based on a valuation of $3,000 per share) and the purchase price by way of cash. For the avoidance of doubt, the parties agree that the fair value of the shares is $3,000 per share and Karen Cazemier agrees to procure Frank Cazemier as a shareholder in Terrace Junction Properties Limited, to accept the offer of the shares made to him through the pre-emptive rights process and to indicate willingness to accept further unallocated shares up to a maximum of ~~125~~ 150 shares.
>
> 16.0 The Vendor and the Purchaser agree to each pay a half share of the costs of Mitchell Mackersy Lawyers in connection with this agreement and the transactions contemplated by them, including all matters necessary to achieve the transfer of the shares in accordance with the constitution of the Company.

The deletion of "125" and inclusion of "150" in the last line of special condition 15.0 is in handwriting, apparently completed by Lindsay Williams with initials placed alongside.

[20] Lindsay Williams signed a copy of the form of agreement that day (Monday, 24 August 2009), with the handwritten amendment I have noted. In the afternoon Frank and Karen Cazemier uplifted the agreement from Ms Peart. Ms Peart sent an e-mail to Lindsay Williams and to the Cazemiers and Hewitsons at 1.17pm. The e-mail is an acknowledgement of instructions, refers to the arrangements for legal costs and the engagement letters which will need to be prepared, and then deals with matters which the agreement for sale and purchase will have to cover. It appears from its contents that the e-mail was drafted before the documentation was completed by Ms Peart but there is no evidence whether it was in fact sent before or after the completion of the documentation.

[21] Under a heading "Agreement for Sale and Purchase", Ms Peart comments on a number of matters including:

(a) The agreement will be subject to and conditional upon the directors of Terrace Junction passing a resolution entering the share transfers in Terrace Junction's share register.

(b) Ms Peart will have to deal with the possibility that an existing shareholder (other than Frank Cazemier) elects to purchase shares pro rata, with problems also if there is a conditional acceptance upon determination of fair value (which is permitted by the Terrace Junction constitution).

(c) Instructions are needed from Frank Cazemier and Clive Hewitson as to how to deal with the allocation of shares in the event there is a competing offer – this needs clear agreement as to how to deal with it whatever the outcome of the offer.

(d) The timeframe for acceptance of the (pre-emption) offer needs to be dealt with.

[22] Ms Peart concluded the e-mail by requesting the three addressees to give her a call if they wished to discuss the content of the e-mail "as the process if (sic) far from straightforward".

[23] On the night of 24 August 2009 the respondents received an increased unconditional cash offer from the third party. Frank Cazemier records in his affidavit that he contacted Ms Peart on the morning of Tuesday 25 August 2009 to advise that the respondents would not be executing the agreement. He says that he sought her advice with respect to any binding nature of the proposal. He exhibits an e-mail Ms Peart addressed to the respondent at 11.31am on 25 August 2009. Frank Cazemier says that this email "corroborated what I believed to be the position". In the e-mail Ms Peart gives advice as to whether what had passed between the parties was a contract. She concludes the e-mail by indicating that if the respondents decided to reject Lindsay Williams' offer and to accept the other cash offer, she is going to recommend that Lindsay Williams take independent advice. It is not clear, when Ms Peart and her firm had agreed to act for all parties to the transaction, why

she was offering any substantive advice to either party. In any event, in the context of this proceeding it is the correct legal position and not Ms Peart's advice which matters.

[24] Lindsay Williams deposes that he spoke to Ms Peart around lunchtime that day (Tuesday). He inquired of Ms Peart whether she had received the signed agreement from the respondents but learnt that the respondents were having second thoughts about the transaction.

[25] Lindsay Williams spoke to both Frank Cazemier and Clive Hewitson that afternoon. Lindsay Williams says that he inferred from the conversation that the respondents were having second thoughts about the deal which had been reached with Lindsay Williams and his wife and that it appeared that they were now inclined to accept a cash offer from the third party. Lindsay Williams says that he told Frank Cazemier and Clive Hewitson that the parties had a binding agreement and that they needed to take that into account. He says that Frank Cazemier told him that he was meeting his wife, Clive and Wendy Hewitson that evening to make a final decision.

[26] Mr Cazemier says that when he spoke to Lindsay Williams that day he asked Lindsay Williams several specific questions about the leasing arrangements and information relating to shareholder dividends. He says that he (and Clive Hewitson) still had reservations with respect to the shareholding which was included in the proposal of Lindsay Williams. He says he advised Lindsay Williams that he did not believe there was a binding agreement and advised him that they were minded to accept the cash offer. He accepts that he advised Lindsay Williams of the planned Hewitson/Cazemier meeting that evening for the purposes of making a final decision. He suggests that "Mr Williams appeared to be fine and accepted our approach we were taking".

[27] The next day, Wednesday 26 August 2009, Lindsay Williams says he learned from Ms Peart that the respondents had decided to abandon the deal and were instructing another lawyer.

[28] There was then a telephone discussion between Lindsay Williams and Frank Cazemier. Frank Cazemier confirmed that the respondents had accepted the cash offer. Lindsay Williams refers to Frank Cazemier as having described the cash offer "the easiest option" – Frank Cazemier says he recalls describing the cash offer as "cleaner, uncomplicated and a lot less stressful". Frank Cazemier deposes that he thought Lindsay Williams accepted the respondents' approach. For his part Lindsay Williams says that he told Frank Cazemier that he would discuss the matter with his wife and they would consider their position.

[29] On the following day, 27 August 2009, Lindsay Williams nominated Ecos Building Consulting Limited as purchaser under the contract. Ecos then caveated the title which led to the caveat lapsing procedure which in turn led to this proceeding.

[30] In the meantime, on 25 August 2009 the respondents had entered into a unconditional contract to sell 23 Willow Place to the third party for $1,120,000.00. The possession date under that unconditional contract was 11 September 2009.

Disputed facts

[31] Lindsay Williams and Frank Cazemier, as the key deponents, have taken issue with one another on a number of factual issues.

Use of the word "deal"

[32] It is the evidence of Lindsay Williams that in his first telephone discussion with Frank Cazemier on the evening of 21 August 2009, Frank Cazemier said to him that:

> …they had a deal with us and that they wanted the Terrace Junction shares. He simply wanted to simplify the deal and he was extremely keen to make sure that our deal was binding so that he could telephone the real estate agent involved in the other offer to say that it was declined because they had agreed to another deal

[33] Frank Cazemier says that at no stage during the telephone discussion was there any suggestion by either of them that they had created a binding deal. He does not accept that he said the respondents had a deal with Lindsay Williams.

[34] In a summary context, it is not possible for the Court to determine which version is correct and in particular whether there was reference to the specific concepts of "deal" and "binding deal".

[35] Lindsay Williams deposes, in relation to what he says was the second telephone conversation that evening, that Frank Cazemier said that he had telephoned the real estate agent involved with the other offer and had told the real estate agent that the other offer was rejected and that the respondents had done a deal with Lindsay Williams. Frank Cazemier does not accept that he advised Lindsay Williams that he had rejected the cash offer on the basis that they had finalised a deal with Lindsay Williams. Again, in a summary context the Court cannot resolve the conflict between those versions of events.

Discussions as to changes in shareholding arrangements

[36] The 18 August 2009 e-mail from Lindsay Williams to Frank Cazemier had attributed a value of $2,600.00 per share to each ordinary share in Terrace Junction. The offer for 23 Willow Place was to be $1,000,000.00. The e-mail therefore proposed that the consideration would comprise 250 shares (at $650,000.00) plus $350,000.00 cash. Lindsay Williams, in relation to the first telephone conversation on the evening of 21 August 2009, says that Frank Cazemier wanted to increase the value placed on the shares as that would also assist the Cazemiers and Hewitsons in getting the Terrace Junction shares follow the pre-emptive rights period. The e-mail sent by Lindsay Williams at 7.32pm indicates a total purchase price of $1,100,000.00, comprising still $350,000.00 cash but with the 250 shares now valued at $750,000.00. Frank Cazemier denies that the suggestion to alter the share parcel value was his – he says that suggestion came from Lindsay Williams in response to Frank Cazemier's question "Is there any way you can increase the value of your proposal?". Frank Cazemier says he was simply trying to draw out from

Lindsay Williams the best possible proposal for submission to his wife and Wendy Hewitson.

[37] The impression provided by the documentary trail is that Lindsay Williams' version of this discussion is to be preferred. Frank Cazemier makes no bones about the fact that "it was simply a fishing expedition to try to get the best deal together". That was in the context of a third party who had made an unconditional cash offer. The e-mail which Lindsay Williams then sent did not offer any increase in consideration – the consideration was precisely the same, namely 250 shares and $350,000.00 cash. When the applicant referred in his email to an "amended" offer, the amendment to consideration did not give Lindsay Williams any increased position in a bidding war between two purchasers. Through Lindsay Williams's ascribing greater value to the shares, it did provide Frank Cazemier with a substantial benefit in his bargaining with the third party, namely an ability to indicate that Lindsay Williams had increased his offer to $1,100,000.00. It may be significant that the purchase price agreed to by the third party was $1,120,000.00. There is credibility in Lindsay Williams' version as to who initiated the suggestion for an increased share value but in a summary judgment context I cannot exclude the possibility that a full consideration of evidence might indicate otherwise.

[38] In the event, I do not view this particular area of dispute as critical to the outcome of the present application. The critical issue emerging from the 21 August 2009 telephone discussion is whether the parties intended to bind themselves contractually through an exchange of e-mails that evening. A determination as to who initiated the concept of changing the share value is unlikely to be of determinative value in that regard.

Second telephone conversation on 21 August 2009

[39] Lindsay Williams deposes that Frank Cazemier telephoned a second time during the process of amending the offer on the evening of Friday 21 August 2009. Frank Cazemier does not respond directly to that allegation. Lindsay Williams places a statement from Frank Cazemier as to the other offer having been rejected and the respondents having done a deal with Lindsay Williams as in the course of a

second conversation. Frank Cazemier denies that there was any discussion as to rejecting the cash offer on the basis of having finalised a deal with Lindsay Williams (which appears to be a denial of the second telephone discussion which Lindsay Williams is referring to).

[40] The Court cannot in a summary context determine whether there was a second telephone conversation or what was said in it. It is also unclear on Lindsay Williams' own evidence whether the second telephone call he refers to occurred before or after the e-mail exchanges. A discussion as to a "deal" before the e-mail exchange would put a very weak (non-contractual) meaning on "deal".

Absence of a binding agreement

[41] Frank Cazemier, after denying that he had advised Lindsay Williams that he and Lindsay Williams had finalised a deal, went on to state:

> …he agreed with me on the telephone that we did not have a binding agreement at this stage. I recall exchanging jovial remarks regarding what had been exchanged by way of email was not a binding offer and wouldn't "stand up in court" for either of us.

[42] In his reply evidence, Lindsay Williams rejects this evidence. He adds that Frank Cazemier was most insistent that there be a binding agreement and that is why Frank Cazemier insisted on the exchange of e-mails that evening.

[43] The Court in a summary context cannot resolve this conflict.

Formation of a contract

[44] I now turn to consider whether a contract was formed.

[45] The Court of Appeal dealt with contract formation in *Fletcher Challenge Energy Limited v Electricity Corporation of New Zealand Limited* [2002] 2 NZLR 433. The prerequisites for formation of a contract were identified by Blanchard J (for the majority) at [53]:

[53] The prerequisites to formation of a contract are therefore**:**

(a) An intention to be immediately bound (at the point when the bargain is said to have been agreed); and

(b) An agreement, express or found by implication, or the means of achieving an agreement (eg an arbitration clause), on every term which:

(i) was legally essential to the formation of such a bargain; or
(ii) was regarded by the parties themselves as essential to their particular bargain.

…

How to determine whether the parties have entered a binding contract

[46] I adopt the following passage from Burrows, Finn & Todd *Law of Contract in New Zealand* (3rd ed., 2007) at 8.22(a):

> In determining whether the parties have entered a binding contract the Courts must first look to see whether there is an appearance of consensus on sufficiently certain terms, and then determine whether the parties intended whether the agreement was intended to be legally binding at that point, or whether the parties had expressly or impliedly intended to postpone undertaking contractual liability until the execution of a formal contractual document. [13]

The reference at footnote 13 is to *Verissimo v Walker* [2006] 1 NZLR 760 (CA) at 768 – 770.

Certainty as to essential terms

[47] I adopt as an accurate summary of the law the following summary in *Law of Contract in New Zealand* at 3.7.6:

> …the Courts will, if possible, uphold a common contractual intention embodied in an agreement despite the absence of provision as to some matters, or of ambiguous or uncertain wording if the nature of the obligations intended to be assumed can be established and given effect. As indicated in *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand,* the question is whether the essential terms are clear or can be ascertained.

[48] The requirement of certainty was revisited by the Court of Appeal in *Wellington City Council v Body Corporate 51702 (Wellington)* [2002] 3 NZLR 486. Tipping J, for the Court, said at [30]:

> *Is the process contract enforceable?*
>
> [30] The position can be summed up in the following way. The essence of the common law theory of contract is consensus. It follows that for there to be an enforceable contract, the parties must have reached consensus on all essential terms; or at least upon objective means of sufficient certainty by which those terms may be determined. Those objective means may be expressly agreed or they may be implicit in what has been expressly agreed. Taking price as an example, for a contract to be enforceable the parties must have agreed upon the price, or at least they must have agreed upon objective means of sufficient certainty whereby the price can be determined by someone else, or by the Court. If the price is left for later subjective agreement between the parties, the contract is not enforceable.

Discussion

Consensus on sufficiently certain terms?

[49] Lindsay Williams' case involves the proposition that there came into existence on the evening of Friday 21 August 2008, through the exchange of the e-mails of Lindsay Williams and the Cazemiers and Hewitsons, a contract containing the following terms:

(a) Lindsay Williams agrees to purchase and the respondents agree to sell 23 Willow Place.

(b) The purchase price is $1,100,000.00 to be satisfied by 250 Terrace Junction shares, attributed a value of $750,000.00, together with cash of $350,000.00.

(c) The "existing furniture, chattels etc" are included.

(d) The existing tenancy agreement is taken over.

(e) The agreement has one condition only, namely that it is conditional upon the approval of the Terrace Junction directors as to the share transfer following the proper (pre-emption) procedure.

(f) Ms Peart is to prepare an instrument (incorporating these agreements) on 24 August 2009 to be signed the same day.

(g) The vendor and the purchaser are to meet Ms Peart's fees and costs on a 50/50 basis.

[50] Mr Ormsby, for Lindsay Williams, submitted that the points of Lindsay Williams' proposal contained in the 7.32pm e-mail, as agreed to by Karen Cazemier and Wendy Hewitson by their e-mails at 8.10 and 8.11pm expressly cover the essential terms, with one exception.

[51] Mr Ormsby submitted that essential terms covered were:

(a) The parties to the contract (Lindsay Williams, Karen Cazemier, and Wendy Hewitson).

(b) The subject matter of the contract, 23 Willow Place and 250 Terrace Junction shares.

(c) The consideration for it (a swap, with a cash equalisation payment of $350,000.00).

(d) The conduct amounting to performance which is required by the party (the obtaining of the approval of the Terrace Junction directors following proper procedure).

[52] In Mr Ormsby's submission the single essential term not expressed in the email exchange was the time within which performance was to occur. He submitted that in a situation where all other essential terms are agreed the Court will find an implied term that settlement will take place within a reasonable period (in this case

after the completion of the pre-emption process). Mr Withnall did not submit otherwise.

[53] I consider that the e-mail exchange through both its express terms and an implied term as to completion within a reasonable period dealt with all terms essential to the formation of a contract of the nature contended for in this case. Having regard to the expression of most of the terms, I need comment on only three in particular:

- Mr Ormsby correctly noted that the e-mail exchange on 21 August 2009 identified the one essential condition as the obtaining of the "Terrace Junction directors approval as to share transfer following proper procedure". In his submission that the parties did not intend to be bound until a formal contract was executed, Mr Withnall noted the significant differences between the condition identified in the e-mail exchange and the much more comprehensive provisions drafted by Ms Peart into the form of agreement for sale and purchase the following Monday. Mr Withnall presented that submission in the context of his broader submissions as to the intention of the parties. He did not suggest that the significantly amplified detail of the form of agreement for sale and purchase cut across the certainty of the condition referred to in the e-mail exchange itself. In my judgment it does not. The meaning of the condition in the e-mail exchange is plain – the agreement the parties are entering into is conditional upon Lyndsay Williams' ability to transfer ownership of the shares following the pre-emption process.

- In making submissions as to the parties' intention (or otherwise) to be bound, Mr Withnall made submissions as to the absence of detail in the standard provision on the form of agreement for sale and purchase drafted by Ms Peart as to how the balance of the purchase price was to be paid or satisfied. The way in which that provision was left blank is set out at [18] above. Mr Withnall's submissions were to the effect that the fact that the alternatives on the form had been left blank

indicates that there was being presented an option between settling and cash or settling in accordance with a share transfer under cl 15. He suggested in relation to his "intention" argument that this indicated a new offer. Reading the document as a whole, it cannot be reasonably read to be containing an option as submitted by Mr Withnall. The overwhelming implication is that option (1) has been left in by error. It is a frequent experience of the courts that those using the standard forms of agreement overlook, when completing the specific further terms of sale on the form, the need to cross out a no longer applicable option on the first page. As it is, Mr Withnall did not suggest, even assuming there was an offer of alternatives through the form of agreement on 24 August 2009, that that would have altered the clarity of the e-mail exchange on the subject of the proposed swap.

- In cases where all terms other than possession or delivery dates have been resolved, the law has long implied a reasonable date for delivery or possession into the contract: see *Hillas & Co Ltd v Arcos Ltd* [1932] All ER 494. Significantly that decision was referred to by the Court of Appeal in *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* at [58] as the first authority for the proposition that the Court, when it finds that the parties had an intention to enter a contract, will then do its best to give effect to their intention and, if at all possible, to uphold the contract despite any omissions or ambiguities.

[54] In these circumstances I find that there is through the exchange of the three e-mails on 21 August 2009 an appearance of consensus on sufficiently certain terms within the requirements of the law of contract.

[55] I must now turn to determine whether the parties intended that consensus or agreement to be immediately binding.

The intention of the parties to enter an immediately binding contract – the principles

[56] These are the principles I adopt in considering whether the parties intended to be immediately bound through the e-mail exchange of 21 August 2009.

(a) The reaching of agreement is not the same as the assumption of an immediate legal commitment: *Verissimo v Walker* at [29].

(b) The law recognises an absence of intention to be bound both when the parties have made expression to that effect and when such is to be implied by their conduct or as a natural inference.

(c) Cases involving express reservation include concepts such as "subject to contract" and "this acceptance is subject to my solicitors' approval": *Buhrer v Tweedie* [1973] 1 NZLR 517. Similarly, an expression such as "subject to a formal contract to be drawn up by our solicitors". It is correctly observed in *Law of Contract in New Zealand* at 8.2.2(a) that "if such terms have been used the courts will normally draw an inference that the parties intended their contractual liability be suspended until the formal document is drawn up and executed by both parties". It is said that in such cases the parties negotiated on the condition so expressed: *Carruthers v Whitaker* [1975] 2 NZLR 667 (CA) at 672.

(d) In other cases – especially in the negotiation of the sale and purchase of property – there may arise an ordinary (or "usual" or "natural") inference from the conduct of the parties that they intend to contract by a document which each will be required to sign – this formulation is derived from the judgment of Richard J in *Carruthers v Whitaker* at 671 and has been repeatedly recognised both judicially and academically: see *Verissimo v Walker* at [20] and [28]; *Law of Contract in New Zealand* at 8.2.2(a). The Courts have not limited the application of the ordinary inference to land transactions – it may be applied to complex business transactions involving substantial

sums which in normal commercial practice would be embodied in a formal contract: *Concorde Enterprises Limited v Anthony Motors (Hutt) Ltd* [1981] 2 NZLR 3835 (CA) (adopted in *Verissimo v Walker* at [32] – [33]); it has also been applied to agreements where the subject matter has been a mixture of land and shares: *Spengler Management Ltd v Tan* [1995] 1 NZLR 120. Once the natural inference is that the parties intend to be bound only by formal contract, it is for the contending party to satisfy the court that the inference has been displaced: *Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd* at p 389.

(e) An express term or ordinary inference that the parties do not intend to be bound until a formal contract has been executed is one which can be displaced: *Cromwell Corporation Limited v Sofrana Immobilier (NZ) Limited* (1992) 6 NZCLC 67,997 (CA) (a case in which the inference was displaced). For the inference to be displaced, it must appear that the parties have turned their minds to the question and that the Court can confirm objectively that the parties had a common intention that their consensus should constitute a binding contract: *Verissimo v Walker* at [34].

(f) When determining the intention of the parties, what matters is the message which was objectively conveyed by each to the other, discerned within "the factual matrix" – the subjective state of mind of the respective parties is immaterial. The words used and the factual matrix are important to the determination of intention: *Verissimo v Walker* at [31]. It is permissible when considering contract formation to look at the subsequent conduct of the parties towards one another, including what they said to each other after the date of the alleged contract: *Fletcher Challenge Energy Ltd v ECNZ* at [56].

The intention of the parties to enter an immediately binding contract - discussion

[57] The first discussion in this case involved the prospect of a land/shares swap. It soon led to the possibility of a land/shares swap with a cash equalisation payment.

[58] The e-mail of 18 August 2009 from Lindsay Williams to Frank Cazemier contained a clear expression of an intention not to be bound until a sale and purchase agreement was completed. The e-mail is expressed not to constitute an offer in itself. The other parties are invited to indicate that they "accept this proposal in principle" whereupon Lindsay Williams will have his solicitor prepare a standard sale and purchase agreement.

[59] The concept of preparing an agreement for sale and purchase was next the subject of discussion between Lindsay Williams and Frank Cazemier within the following forty-eight hours – the parties agreed to meet the legal costs of having Ms Peart prepare an agreement for sale and purchase. Pursuant to that agreement and in order that Ms Peart could prepare the documentation, Lindsay Williams e-mailed details to Ms Peart on the morning of Friday 21 August 2009.

[60] Against that background, there was not merely a natural inference but an express discussion recognising that the parties would not be immediately bound through their e-mail or other discussions. A signed contract using the standard form was required.

[61] The parties then came to the Friday evening (21 August 2009). Leaving to one side the telephone discussions that evening between Frank Cazemier and Lindsay Williams, the e-mail exchange (one e-mail from Lindsay Williams and one e-mail each from Karen Cazemier and Wendy Hewitson) do not clearly displace either the natural inference or the express stipulation that the parties will not be immediately bound without a written contract. While Lindsay Williams does not repeat the statement in the first e-mail that it does not constitute an offer in itself, he continues to refer to a "proposal" and to the requirement for Ms Peart to prepare an agreement (on Monday for signing the same day). Lindsay Williams adds his signature to the e-mail. While that signature connotes the addition of a greater formality to the amended proposal he is making, there is no other suggestion in the e-mail that Lindsay Williams is cutting across the expectation set in place on the

Tuesday (18 August 2009). Karen Cazemier certainly accepted that at the very least there was still to be a document prepared by Ms Peart and signed on Monday, as she stated that in her reply e-mail.

[62] The Court, however, must consider not only how the parties expressed themselves in writing that evening but also what they said to each other. When it comes to the content of those discussions, there is a dispute in the evidence which the Court cannot resolve in this summary context. Of critical relevance is whether the parties discussed the concept of a binding deal and to what extent they took that discussion further. The two people involved in the critical telephone discussions – Frank Cazemier and Lindsay Williams – have clearly recognised the importance of the issue as it is the subject of some detail in each affidavit. Mr Williams' position is that Frank Cazemier said that he was keen to make sure they had a binding deal so that he could advise the real estate agent accordingly so as to decline the third party offer. The fact that Lindsay Williams then added his signature to the e-mail which he sent shortly afterwards might be taken as some degree of corroboration of a deliberate change in the formality of the status of the e-mails.

[63] As against that, Frank Cazemier says that at no stage during the discussion was there any suggestion by either party that they had created a binding deal. He says that he does not accept that he said that his wife or Mrs Hewitson had a deal with Lindsay Williams. He says that Lindsay Williams never raised the issue that he believed that there was a binding offer at that point.

[64] Thus, it is Lindsay Williams' evidence that Frank Cazemier said that they had a deal and it is Frank Cazemier's evidence that there was never any suggestion that they had created a binding "deal". There is more to the detail of the discussion in each affidavit. But the conclusion that whether the concept of a deal already in place (or otherwise) was discussed is extremely important. It may when a trial court looks at the matrix be the turning point. Frank Cazemier's denial of the suggestion of a "deal" having been created is not plainly untenable. When the full picture is looked at, particularly the presence of the third party offeror with the consequential ability for the vendors to get increased offers from both, it might appear less likely that Frank Cazemier would have been speaking in terms of an immediate deal. The

opportunity which confronted him made it hugely attractive that he keep all negotiating options open.

[65] The finding which the trial Court makes as to the exact discussions concerning any "deal" may be critical. The Court may conclude, even if a "deal" discussion occurred, that it was at the level of agreed terms and not at the level of an immediately binding contract. This is the distinction noted by the Court of Appeal in relation to a case where the trial Judge accepted that the parties had agreed that they "had a deal": *Dryden v Hemingway* (CA70/95, 15 November 1995) per McKay J at p 10.

[66] The other areas of difference in the evidence of Frank Cazemier and Lindsay Williams which I have discussed above – as to the discussions as to changes in shareholding arrangements and as to a second telephone conversation on 21 August 2009 – do not assume the pivotal significance of the "deal" issue but are indicative of significant discussions which might affect a trial court's view of the contractual issues by reason of there being relevant matters of background.

[67] I conclude that it is reasonably arguable that through the events of the evening of 21 August 2009 the intention for parties (objectively measured) was to enter an immediately binding contract. Put another way, it is reasonably arguable that the initial understanding or inference that the parties would not be bound until the standard form of agreement for sale and purchase was signed was displaced by the events of that evening.

Subsequent conduct

[68] In relation to contract formation, the Court is entitled to consider subsequent conduct.

[69] Mr Withnall in his submissions took me to the terms of the agreement which Ms Peart prepared on the Monday, the e-mail report which she wrote to all parties that day, and the discussions which occurred after that. His submission was that

those matters indicated that the parties had not intended to be bound until a formal contract was executed.

[70] I have summarised the subsequent events above at [18] and following. To the extent that Ms Peart (acting on behalf of all parties) added additional terms to the agreement, I do not consider that assists the Court's consideration of the objective intention of the parties the previous Friday. Similarly I do not find Ms Peart's reporting letter to the parties – which Mr Withnall submitted clearly indicated that she regarded the terms as not settled – as being of particular assistance. The letter represents Ms Peart's views and advice and does not inform the Court as to the objective intention of the parties themselves the previous Friday. While Lindsay Williams made a handwritten amendment to one of the provisions in the document which Ms Peart had drafted, it in fact relates to one of the provisions which Ms Peart had added and does not inform the Court as to the objective intention of the parties as to the agreement and its terms on the Friday night.

[71] The subsequent conduct in this case contains no evidence of such clarity as to cut across the arguable position as at the night of the e-mail exchanges (21 August 2009).

Subjective understanding of the parties

[72] In places the deponents, particularly Frank Cazemier and Lindsay Williams, spoke in terms of their understanding of the arrangements. The intention of the parties at the time of an alleged contract is to be measured objectively by what each conveyed to the other. I have disregarded evidence as to the subjective state of mind of the parties.

The caveatable interest

[73] The estate or interest claimed by the applicant is said to arise from an agreement for sale and purchase of 23 Willow Place. It was not submitted for the respondents that such an agreement, if found to exist, did not create a caveatable

interest. Similarly, Mr Withnall stated that no issue was taken as to whether the writing requirements under s24 Property Law Act 2007 were met in this case.

Conclusion – arguable case

[74] Lindsay Williams has discharged the burden of establishing that he has a reasonably arguable case for a caveatable interest as claimed.

Discretion

[75] The Court retains a residual discretion to make an order removing a caveat even where the caveator establishes an arguable case for the interest in the land claimed. The discretion is to be exercised cautiously: see *Pacific Homes Limited (In Receivership) v Consolidated Joineries Ltd* [1996] 2 NZLR 652 (CA) at 656.

[76] Situations where a court might exercise its discretion include:

(a) If on the facts of a case it can be seen that the caveator can have no reasonable expectation of obtaining benefit from the continuance of the caveat;

(b) If the caveator's interest can be reasonably accommodated in some other way, such as substituting fund money: see *Pacific Homes Ltd* at 656; and

(c) If there has been delay by the caveator, particularly if there has been specific prejudice: see *Varney v Anderson* [1988] 1 NZLR 478 (CA) at 480.

[77] Mr Withnall made submissions that in the event the Court found the caveator had established an arguable case, then the discretion ought to be exercised in favour of the vendors.

[78] First, Mr Withnall submitted that there is uncertainty as to whether the contract is capable of performance at all, having regard to the pre-emption provisions affecting shares in Terrace Junction. In a related submission he suggested that specific performance might not be available at all because of difficulties of performance of a share transfer. I do not view either form of submission as meritorious in this context. The parties made the agreement conditional on a successful passage through the pre-emption process. If a contract came into existence, both parties were required to do all they could to see the condition fulfilled. At present nothing can be done because the vendors refused to complete.

[79] Secondly, Mr Withnall submitted that this was a case of applicant's delay and that the discretion should be exercised on that basis. He noted the passage of time from the date of the alleged agreement, 21 August 2009, to December 2009. He noted that no substantive proceeding had been commenced within that time. I do not consider that any criticism as to delay in this case approaches delay of a degree to attract the exercise of the discretion. Lindsay Williams promptly caused his nominated purchaser (Ecos) to caveat the title. It transpired that that caveat was misconceived but in the period that followed the caveat lapsing procedure operated smoothly and the parties were able to co-operate by using the Court's allocated date for the initial caveat application to be used for the amended application. Even had there been some inappropriate delay, Mr Withnall was unable to point me to a significant prejudice. Karen Cazemier and Wendy Hewitson entered into their contract with the third party purchasers on 25 August 2009 with Lindsay Williams (through Ecos) registering a caveat on 28 August 2009. The reality of many caveat situations is that there are competing purchasers. Where arguable cases arise the respective rights should normally be resolved at a full hearing. To the extent that the vendor may suffer damage through a caveated claim, the vendor has rights of compensation in that regard.

[80] Fourthly, Mr Withnall submitted that Lindsay Williams will have his appropriate remedy in damages if his contractual claim is vindicated. Mr Withnall submits that this is not a contract for personal occupation but is simply a purchase of an investment property, given that the property although residential was being purchased subject to an existing tenancy. A caveat lapsing procedure is not the

context in which to determine the answer to the caveator's choice of remedy. The importance of remedial choice is recognised in specific performance cases. If the purchaser's remedial choice is not to be acted upon, that should generally occur only after a full hearing.

Judgment

[81] Lindsay Williams has an arguable case that he has an interest in 23 Willow Place, Queenstown pursuant to an agreement for sale and purchase made between the registered proprietors, Karen Lee Cazemier and Wendy May Hewitson, as vendor, and himself as purchaser.

[82] I order that Lindsay Williams' caveat registered against the title to the said property shall not lapse.

[83] I reserve leave to counsel to apply for further directions if such are considered appropriate.

Costs

[84] I reserve costs.

Solicitors:
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