

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

**CIV 2009-404-004652**

UNDER Section 143 of the Land Transfer Act 1952

IN THE MATTER OF Caveat 8062345.1 over NA4B/474

BETWEEN KENETI APA AND TESSA APA  
Plaintiffs

AND HENRY DAVID LEVIN AND BARRY  
PHILLIP JORDAN  
Defendants

Hearing: 14 September 2009

Appearances: C Walker/M Smith for Applicants  
G A D Neil for Respondents

Judgment: 15 December 2009 at 12

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**JUDGMENT OF ASSOCIATE JUDGE ROBINSON**

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This judgment was delivered by me on 15 December 2009 at 12 pm,  
Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date.....

Solicitors: Gilbert Walker, PO box 1595, Auckland  
Meredith Connell, PO Box 2213, Auckland

[1] The applicants apply for an order under s 143 Land Transfer Act 1952 removing a caveat lodged by the respondents affecting the applicant's interest in their family home at 2A Pukehana Avenue, Epsom. The applicants hold their interest in that property as trustees of the Keneti and Tessa Apa Family Trust (the Apa Trust).

[2] The respondents as the liquidators of OPC Managed Rehab Limited (OPC) lodged the caveat on 3 February 2009. They claim an estate or interest in the land in the following way:

The registered proprietors, Keneti Apa and Tessa Louise Apa, are the registered proprietors of the above property as trustees of the Keneti and Tessa Apa Family Trust (trustees) and hold such property on trust for the Keneti and Apa Family Trust. The caveator, being a creditor of the trustees in their capacity as trustees of the Keneti and Tessa Apa Family Trust, is entitled to be subrogated to the trustees' right to be indemnified from the trust's assets, in respect of the indebtedness, and accordingly is entitled to a charge or lien over those assets to the extent of the indebtedness.

## **Background**

[3] Oceania Pacific Corporation Limited was incorporated on 23 March 1999. Patrick Ikiua and Keneti Apa were its directors and they each had half the shares in that company. On 25 March 1999 Oceania entered into a one year fixed contract with ACC to provide rehabilitation case management services from 1 May 1999 to 1 May 2000.

[4] OPC was incorporated on 11 April 2000 with Patrick Ikiua and Keneti Apa as directors. Oceania was the sole shareholder. On 15 May 2000 OPC entered into an agreement to provide rehabilitation case management services for members of the Pacific Island community for one year with the Accident Compensation Corporation. The agreement prohibited either party from assigning or otherwise transferring any benefits, rights, liabilities or obligations without the prior written consent of the other party. The agreement commenced in early June 2000 and until 23 June 2001.

[5] On 10 June 1999 Keneti Apa and his wife Tessa Apa established the Keneti and Tessa Apa Family Trust (The Apa Trust). They were trustees and together with various family members were discretionary beneficiaries.

[6] In December 2000 Patrick Ikuia and Keneti Apa established a trading trust known as the OPC Trust. The discretionary beneficiaries of that trust included trusts in which Patrick Ikuia and Keneti Apa hold beneficial interests as well as charitable institutions.

[7] OPC in breach of the agreement with ACC assigned its interests in the agreement to the trusts and the income earned by OPC from the ACC contract was treated as trust property.

[8] The contract with ACC was renewed on 24 June 2001 and expired on 22 August 2002. On the expiry of the agreement ACC conducted an audit and concluded there had been overpayments of \$695,190 excluding GST to OPC.

[9] On 13 August 2003 ACC issued a statutory demand on OPC for recovery of the overpayment. An application to set aside the statutory demand was declined in the High Court. On 4 October 2005 the Court of Appeal upheld the statutory demand in respect of a lesser sum of \$377,520 (see *OPC Managed Rehab Limited v Accident Compensation Corporation*) [2006] 1 NZLR 778. ACC had commenced proceedings for an order that OPC be put into liquidation. The failure of OPC to pay the amount of \$377,520 found to be owing by the Court of Appeal was the basis upon which the Court found OPC to be insolvent and was the ground for ordering the company to be put into liquidation on 26 June 2006 when the respondents were appointed liquidators.

[10] In the course of the liquidation the respondents found that all money earned by OPC from the contract with ACC had either been distributed to the various beneficiaries of the OPC Trust or used to meet day to day operating expenses.

[11] The respondent issued proceedings against Patrick Ikuia, Keneti Apa, Tessa Apa, Mark Crosbie and David Smith seeking to recover some or all money

distributed to the various trusts established by Patrick Ikuia, Keneti Apa and Tessa Apa. The causes of action relied upon by respondents were:

- a) OPC disposed of property to insiders, during the relevant specified period, for inadequate consideration (s 298 Companies Act 1993).
- b) Money had and received.
- c) A right of subrogation to the indemnity of the trustees of three trusts all of whom received distributions as beneficiaries of the OPC Trust. Included in the three trusts is the Apa Trust.
- d) Breach of directors duties.

[12] For reasons set forth in the judgment Heath J concluded that the claims brought by the respondents premised on the proposition that Patrick Ikuia and Keneti Apa operated an “empty shell” policy in a manner that defeated ACC as a creditor could not succeed. Consequently, claims seeking to impose liability on Patrick Ikuia and Keneti Apa for carrying on the business of OPC in a reckless manner in breach of s 135 Companies Act 1993, failed to act in good faith and in the best interests of OPC (s 131 Companies Act 1993), failed to exercise powers or perform duties with reasonable care and skill (s 137 Companies Act 1993) and failed to exercise powers for a proper purpose (s 133 Companies Act 1993) all failed. A separate claim for breach of fiduciary duty against Patrick Ikuia and Keneti Apa also failed.

[13] Patrick Ikuia and Keneti Apa were however both found liable for distributions of \$4,000.40 to the Ikuia Family Trust and \$4,000.40 to the Big Planet Corporation Limited after they had become aware of ACC’s claim that OPC had overcharged for its services and judgment was entered against them both as directors for those amounts.

[14] Although the claims brought by the respondents against Keneti and Tessa Apa were in personam in nature it relies upon long established trust principles relating to trustees rights of indemnification and trust creditors rights of subrogation.

It was asserted that all the assets of the Apa Trust which included the property at 2A Pukehana Avenue, Epsom were charged to the extent of the claims made against the trustees. It is on this basis that the respondent claims a caveatable interest in the Pukehana Avenue property.

[15] Heath J in the course of his judgment concluded that Mr Ikuia and Mr Apa acting on advice from their accountant and solicitor exercised appropriate care in embarking on the establishment of the OPC Trust believing it was a genuine method of carrying on business. He also concluded they had no intention to defeat OPC's creditors and indeed were careful to ensure all known creditors were paid in full before authorising distributions to the recipient trusts. He also concluded that neither Patrick Ikuia nor Keneti Apa knew or ought to have known that a debt was accumulating to ACC. Consequently, after ensuring current creditors were paid they were entitled to distribute wealth to beneficiaries of the OPC Trust.

[16] Relying upon the decision of Heath J in their favour, the applicants claimed that the respondents can no longer justify seeking an interest in the Pukehana Avenue property based on a right to subrogate to the trustees right to be indemnified from trust property and consequently bring this application to discharge the caveat.

[17] The respondents have appealed Heath J's decision. It is contended on their behalf that the balance of convenience justifies dismissing the applicants application as the respondents could suffer considerable loss if their appeal is found to be successful following an order discharging the caveat.

### **Applicants Case for Removal of Caveat**

[18] Counsel for the applicants submitted that the principles to be applied in determining whether the respondents caveat should be discharged are set forth in *Kiwi Freeholds Queen Street Limited & Ors v Shanty Holdings Limited & Ors* (2007) 8 NZCPR 517. It is submitted that in that decision Associate Judge Doogue accurately summarised the principles as follows:

- a) A successful party is prima facie entitled to the fruits of the judgment.

- b) The Court has an inherent jurisdiction to make orders ensuring the position to ensure that any appeal is not rendered nugatory.
- c) The fact that one remedy (eg specific performance) may not be available if a caveat is removed does not render an appeal nugatory if other relief (eg damages) is still available.
- d) Other relevant considerations will include:
  - i) Whether the appeal is brought bona fide.
  - ii) Whether the successful party will be injuriously affected by the maintenance of the caveat.
  - iii) The overall balance of convenience.

[19] It was submitted on behalf of the applicants that the respondents cannot reasonably argue that they are creditors of the applicants or that they are entitled to relief under the Companies Act 1993.

[20] Furthermore, it is submitted that even if the respondents can successfully argue to be creditors of the applicants such a finding does not give them a proprietary interest in the assets of the Apa Trust. Relying upon *Lewin on Trusts*, 18<sup>th</sup> Edition, paragraphs 20-40 and 21-41 it is submitted that the proper course is for the respondent to pursue proceedings against the applicants personally and leave it to the applicants to exercise the right of indemnity from the Trust. Whilst it is accepted that creditors of a trustee may be entitled to subrogate to the trustees right to be indemnified from trust assets and consequential equitable lien over those assets in the event that the trustee is insolvent such a situation does not apply in the present circumstances there being no evidence that the applicants are insolvent.

[21] It is also submitted on behalf of the applicants that removal of the caveat would not deprive the respondents of the fruits of a successful appeal. The respondents have no specific interest in the Pukehana Avenue property. If the respondents succeed in the Court of Appeal it is pointed out that they will be able to

obtain the declaration they seek even if the Pukehana Avenue property is sold. The only change resulting from a sale of that property will be in the constitution of the pool of assets which will be subject to the respondents charge.

[22] It is finally submitted on behalf of the applicants that having regard to the weakness of the respondents claim to an interest in the property, the fact that there is no evidence that the applicants intend to dissipate trust assets pending appeal or that they have inadequate funds to meet any judgment, the overall justice requires the caveat to be discharged. It is emphasised that continuation of the caveat prevents the applicants from disposing of their property in order to reduce their mortgage commitments.

### **Case for Respondents**

[23] Counsel for the respondents accept that the factors to be considered in determining whether the caveat should remain pending the appeal are set out in *Kiwi Freeholds Queen Street Limited v Schofield*. Based on evidence establishing that the applicants will be unable to satisfy the respondents claim if the respondents appeal is successful, it is submitted that the respondents have a strong case for subrogation with consequential right to an interest in the Trust property including the Pukehana Avenue property.

[24] Counsel for the respondents submit that the appeal is brought in good faith and has merit.

[25] Finally it is pointed out that continuation of the registration of the caveat will not prejudice the applicants. The respondents are prepared to consent to a removal of the caveat to enable the applicants to dispose of the property on receipt of an undertaking to hold the net proceeds of sale in trust pending the final determination of the proceedings. Having regard to the evidence establishing lack of financial resources on the part of the applicants it is submitted that there is a real possibility that removal of the caveat enabling the applicants to dispose of the property will result in any successful appeal being nugatory.

## Decision

[26] In the circumstances of this case the principles to be applied in determining whether the caveat should be removed are conveniently set forth in *Kiwi Freeholds Queen Street Limit & Ors v Shanty Holdings Limited & Ors*. Consequently, a primary consideration must be that because the applicants have been successful in their defence to the respondents claims they are prima facie entitled to the fruits of their judgment.

[27] However, in the exercise of the Court's inherent jurisdiction the Court can refuse to order the removal of the caveat to ensure that any appeal is not rendered nugatory (see *Attorney-General for Hong Kong v Reid No 2* [1992] 2 NZLR 394 Court of Appeal). The evidence adduced on behalf of the respondent establishes that the Pukehana Avenue property is the only known remaining asset of the Apa Trust. That property was purchased by the Apa Trust on 26 October 2004 for the sum of \$920,000. Since purchase renovation work has been undertaken to the property during 2006. The Apa Trust has disposed of property at 72 Robertson Road, Mangere on 18 July 2006, property at 1/7 Gilfillan Street, Blockhouse Bay on 12 May 2005, property at 5 Gilfillan Street, Blockhouse Bay on 18 August 2005, property at Park Avenue, Titirangi on 23 November 2005 an apartment in the Grand Chancellor complex, 1 Hobson Street, Auckland on 27 November 2003 and a property at Dodds Road, RD4, Waikato on 29 November 2006. In evidence before Heath J on 19 February 2009 there appears the following record relating to Keneti Apa's financial position.

Mr Apa My Learned Friend asked you questions about personal assets if a judgment against you as a trustee of the family trust how would you repay that...I have a good collection of Stargate could sell on trademe. I wouldn't be able to meet the obligations personally.

In your capacity as trustee would you be able to meet the obligation...Obviously one of the decisions would be filing for bankruptcy I mean my family has to have a place to live and have a roof over their head.

[28] In his evidence in support of the application for removal of the caveat Keneti Apa gives no evidence as to his current financial position. He does however confirm that he intends to sell the property.



[29] For the respondents to be able to sustain their caveat they must establish not only that they are creditors of the applicant but also that they are entitled by subrogation to have a right to stand in the place of the applicants and enforce their liabilities against the Trust property. As pointed out by Wilson J in *Zen Ridgeway Proprietary Limited v John Adams* [2009] QSC 117 at paragraph 13:

However, the right of access to the trust assets by way of subrogation is inchoate unless the trustee is insolvent or it is otherwise reasonable to assume that obtaining a judgment against the trustee would be pointless.

Because the Court found in that case there was nothing to suggest the judgment debt could not be recovered there was therefore nothing to suggest that there is a matured right of subrogation. In contrast to the situation in *Zen Ridgeway v Adams* there is evidence in this case that the applicants are insolvent. Neither applicant has produced evidence to establish that they are financially able to meet the respondents claim if the respondents appeal is successful. The only evidence adduced is the evidence referred to of Keneti Apa before Heath J to the effect that he wouldn't be able to meet the obligations personally and would be considering filing for bankruptcy. Consequently, I conclude that if the respondents appeal is successful the respondent is likely to be able to sustain their claim to be subrogated to the rights of the applicants in respect of the Pukehana Avenue property.

[30] The evidence of the respondents satisfies me that the appeal is brought in good faith and their counsel has advanced a well reasoned argument in support of the appeal.

[31] The applicants contend that the existence of a caveat is preventing them from selling the property, discharging the mortgage and re-investing the proceeds in a cheaper property which will thereby reduce their mortgage commitments. In this way they say that the caveat causes them hardship. However, an agreement for the release of the caveat on condition that a fresh caveat was lodged against the property being purchased in substitution for the Pukehana Avenue property would enable the applicants to proceed with the sale of that property without prejudicing the interests of the respondents. Such an arrangement would of course depend upon there being sufficient equity to satisfy the respondents claim in the event of their appeal being

successful. Consequently, any prejudice to the applicants could be met by such an arrangement.

[32] For the above reasons I am satisfied therefore that this application cannot succeed. However, rather than dismiss the application I will adjourn the application pending the outcome of the respondents appeal. Should the appeal be dismissed then there will need to be an order discharging the caveat. In the meantime the applicant may choose to apply for further directions should the applicants wish to sell the property and be unable to come to a suitable arrangement with the respondents for the caveat to be discharged on the basis that another caveat claiming the same interest is lodged against any property acquired in substitution for the Pukehana Avenue property.

[33] As the respondents have been successful they are entitled to costs which I assess on a 2B basis with disbursements as fixed by the Registrar.

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**Associate Judge Robinson**