IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-004541

UNDER	Section 145A of the Land Transfer Act 1952
BETWEEN	BEST OF LUCK LIMITED Applicant
AND	TUEHI RATAPU Respondent

Hearing: 25 November 2009

Appearances: L F A Yaqub/R Hucker for Applicant
E St John for Respondent

Judgment: 25 November 2009

ORAL JUDGMENT OF ASSOCIATE JUDGE ROBINSON

Solicitor: Hucker & Associates, PO Box 3843, Auckland
Sandford & Partners, PO Box 99, Rotorua
E St John, Barrister, PO box 105 270, Auckland

[1] Pursuant to a caveat registered in the Land Transfer Office at Auckland the applicant, Best of Luck Limited claimed an interest in property owned by the respondent, Tuehi Ratapu under an agreement for sale and purchase dated 16 March 2008 between the respondent, the registered proprietor as vendor and the applicant as purchaser. That caveat was registered on 5 May 2008. The applicant in July 2008 brought these proceedings for an order preserving the caveat. By order of this Court dated 14 August 2008 there was a direction that the caveat was not to lapse pending further order of the Court. At that time directions were made relating to the filing of affidavits in reply. Following the making of that order the parties entered into negotiations which resulted in a variation to the agreement for sale and purchase.

[2] When the parties entered into the agreement for sale and purchase in March 2008 settlement was to take place at a time specified on the front page of the agreement which refers to further terms of sale as per clause 15. The purchase price was $275,000. A deposit of $25,000 was payable. Of the balance $162,000 was to be paid in cash and $113,000 by Barter Card trade dollars. By that I assume that the applicant was to arrange for an assignment of credits with the Barter Card system to the value of $113,000. The applicant lodged this caveat because of concern that the respondent would not proceed with settlement of the sale to the applicant but would sell the property to another. According to the evidence of the applicant at the time these proceedings were brought the applicant had been advised of the respondents purported cancellation of the agreement for sale and purchase.

[3] Following the bringing of these proceedings the parties negotiated a variation of the original agreement for sale and purchase. The variation is contained in a letter of 17 November 2008. The relevant parts of that letter are as follows:

> 2) My instructions are to confirm acceptance of a payment in contribution to Mr Ratapu's costs in the sum of $1,750.
>
> 3) That being now accepted I confirm that the settlement agreed between our respective clients comprises the following:
>
> a) Settlement of the agreement for sale and purchase on or before 12 December 2008.

b) Balance payable on settlement is the sum of $140,000.

c) Best of Luck Limited to have reasonable access to Ratapu's property for any valuer and/or financier with such valuer and financier to fully respect the considerations of Mr Ratapu's tenant in the property in order to comply with the Residential Tenancies Act. Such access to be between now and 12 December 2008.

4) Contemporaneous with settlement Best of Luck Limited makes payment to Ratapu a contribution of Ratapu's costs in the sum of $1,750 such payment to be made direct to Ratapu's solicitors Sandford & Partners, Rotorua. Those funds being additional to the settlement funds in the sum of $140,000.

5) The application to sustain the caveat is withdrawn with no issue as to costs arising. The caveat is withdrawn whether or not Best of Luck Limited settles as required under these terms on or before 12 December 2008.

7) If Best of Luck Limited fails to complete settlement on or before 12 December 2008 such failure is to be treated and is accepted as being a default permitting the vendor to cancel the agreement. Upon such cancellation Ratapu will retain by way of offset funds equal to his legal costs incurred up to any default in settlement from funds already paid in part settlement by Best of Luck Limited. Upon clearance of Ratapu's legal costs in this manner the balance of funds will be refunded to Best of Luck Limited. This will be considered a full and final settlement of any and all obligations of either party to the other under the agreement for sale and purchase or otherwise. For completeness there will be no basis for the continued lodgement of the caveat against the properties title.

[4] Following that agreement the applicant did pay $100,000 on account for the purchase. The payment was not in cash but by an assignment of Barter Card dollar credits, if I could use that expression, to the respondent. The applicant did not withdraw the caveat as required by the agreement of 17 November 2008. The applicant has not settled. There is no evidence that the respondent has elected to treat the applicant's failure in this regard as a cancellation of the agreement but it is clear from the evidence that the applicant does not intend to proceed with the purchase.

[5] It is accepted that the respondent must refund some of the $100,000 which has been paid by the applicant but it appears that there are two areas of dispute with

regard to the refund. The first is that the respondent claims the refund is to be by assignment to the applicant or the applicant's nominee of Barter Card credits and not by payment of cash. The second is that the applicant contends the respondent is only entitled to deduct the costs of $1,750 referred to in paragraph 2 of the agreement recorded in the letter of 17 November 2008 whereas the respondent claims to be entitled to deduct extra costs up to the date of intended settlement on 12 December 2008 together with the extra costs involved in opposing the application to sustain the caveat.

[6] It is argued on behalf of the applicant that the obligations on the applicant to withdraw the caveat are interlinked with the obligations on the respondent to refund the monies payable in terms of paragraph 7 of the agreement of 17 November 2008. In other words the applicant contends that withdrawal of the caveat can only be required on payment by the respondent of the monies that have to be refunded. The applicant also contends that the interest it claims still arises out of the agreement for sale and purchase as varied and consequently is included in the interests that flow to the applicant referred to in the caveat it has lodged. Furthermore the applicant contends that it has a clear right to this caveat and that the Court should not prejudice that right by ordering a lapse of the caveat.

[7] The respondent on the other hand contends that the obligation on the applicant to remove the caveat is completely independent of any obligation on the respondent to refund monies paid in terms of paragraph 7 of the agreement of 17 November 2008. It is also contended on behalf of the respondent that the applicant's claim prior to cancellation of the contract was as the purchaser under an agreement for sale and purchase whereas following the applicant's decision not to proceed the applicant's claim to an interest arises out of a lien for monies that have been paid but have to be refunded. Finally it is submitted that there is no clear cut basis for the applicant's claim to an interest in the property and consequently the Court in its discretion should discharge the caveat. In this respect it is pointed out that the applicant has not issued any proceedings for recovery of the monies which it claims must be refunded, that these proceedings to sustain the caveat are not appropriate to resolve the disputes between the parties as to the amount of refund and the method of

payment of refund. The correct forum being probably the District Court in its civil jurisdiction.

[8] It is I conclude very clear from the wording of the agreement of the parties entered into on 17 November 2008 that within a reasonable time of that date the applicant was to withdraw these proceedings to sustain its caveat with no issue as to costs which would have resulted in the caveat being withdrawn. Clearly the applicant is in default of its obligations under that part of the agreement. It is simply not logical for the Court to conclude that such withdrawal would be on the basis that any refund of monies paid by the applicant following the applicant's decision not to proceed with the purchase would also be made. It must be borne in mind that at the time the parties entered into their agreement they must have anticipated the applicant would proceed with the settlement of the purchase on 12 December 2008. Consequently, there can be no basis for concluding that the applicant could continue to seek the protection of the caveat in case there was a failure to settle conferring on the applicant a right to a lien for money that had been paid.

[9] Consequently, the agreement clearly establishes that any interest the applicant may have in the respondent's land arising out of the agreements was not to be preserved by a caveat. I also conclude that the interest the applicant now seeks to preserve differs considerably from the interest the applicant was seeking to preserve when the caveat was lodged. In this respect the case is virtually indistinguishable from the decision of *Joy v Roskam & anor*, Master Faire 12 June 2003, CIV 2003-419-000331. In that case the caveat was worded as follows:

> A claim to "an interest in the land as purchasers by virtue of an agreement for sale and purchase between the caveators as purchasers and Leonard Ernest Joy and Gwenda Daphne Joy registered proprietors as vendors and also by virtue of a constructive trust".

The purchase did not proceed but the caveators attempted to persuade the Court to continue the caveat on the basis that the caveators were entitled to a lien for the deposit and other monies paid.

[10] In coming to the conclusion that the caveat could not support the claim to a lien the Court at paragraphs 8 and 9 of the judgment stated:

> Unfortunately counsel had not specifically researched the position that arises where the contract for the sale of land does not proceed. That raises the possibility that the purchaser may become entitled to recover from the vendor the amount of the deposit paid and, perhaps, other sums. In that case the purchaser has an equitable lien on the land for such amounts. *Kimberley NZI Finance Ltd v AR Barr Investments Pty Ltd* (1990) ANZ ConvR 438 (FC of A). The reason for such a lien was explained by Wynn-Parry J in *Combe v Swaythling* (1947) Ch 625. The purchaser is regarded as a secured creditor. The purchaser is therefore entitled to take execution based on the security against the land. The lien will support a caveat. *Frankcombe v Foster Investments Pty Ltd* [1978] 2 NSWLR 41, 57.

[11] The particular problem in this case, however, is that the caveat is not drawn claiming a lien against the land. Rather it alleges that an interest is claimed as purchaser under the sale and purchase contract. In my view D W McMorland, *Sale of Land*, *2000* at page 202 is correct where he says

> "after cancellation of the contract to buy the purchaser no longer has a caveatable interest based on the contract. Any such caveat must be withdrawn and replaced with a caveat based on the lien.

I am satisfied that the situation referred to in *Joy v Roskam* applies in this case. Not only has the applicant agreed to withdraw the caveat but following failure to settle the only basis for the applicant's claim is to a lien in respect of monies that have to be refunded under the agreement.

[12] On the basis of the decision I have referred to the applicant's existing caveat cannot be sustained but the applicant may be entitled to a lien for monies paid that should be refunded. However to sustain a caveat the applicant will need to specify that the claim to an interest is based on that lien and not based on the applicant being the purchaser under the agreement for sale and purchase.

[13] In any event, I am satisfied that in the circumstances of this case it would not be an appropriate exercise of the Court's discretion to allow this caveat to continue. The purpose of the caveat is to protect the applicant's interest until such time as the Court can determine the rights of the applicant and the respondent in independent proceedings brought for that purpose. Normally applicants to sustain caveats will have commenced those proceedings. If the order is made today preserving the caveat then it would be accompanied by a condition requiring the applicant to commence

the proceedings within a reasonable time. The applicant has had, however, plenty of time to issue proceedings. There is some suggestion that the applicant chose not to issue proceedings until February because of some lack of response by the respondent. Even if I accept that the applicant has had some nine months to issue these proceedings but has chosen not to do so. Consequently, even if I am wrong then in the exercise of the Court's discretion having regard to the fact that the applicant has still not issued proceedings I consider the caveat should be discharged.

[14] Another factor which must be taken into account is the respondent's offer to assign to the applicant the Barter Card credits that he received from the applicant. It may very well be that the applicant considers payment should be in cash. The purpose of the lien is to provide security. That security to a certain extent could be satisfied by the assignment of Barter Card credits to the applicant or its nominee. There was some suggestion that the applicant may not be entitled to an assignment of the Barter Card credits in which event it may be possible for the applicant to adopt the suggestion of the respondent which was to arrange for those Barter Card credits to be assigned for a consideration to a third party and in this way the applicant could receive payment. If it transpires that the applicant cannot receive the full dollar value on the assignment then that may be a matter for the Court to take into account when considering any relief the applicant might be entitled to. However, to mitigate its loss the applicant might be well advised to accept the respondent's proposal subject to the applicant's rights to any further relief not being prejudiced. That however is something that I cannot decide in these proceedings. It may also be possible for the applicant to lodge a further caveat based on the lien I have referred to in this judgment. That indeed was referred to by the Judge in *Joy v Roskam*.

[15] The respondent being successful the respondent is therefore entitled to costs. In the circumstances therefore I now make the following orders:

a) The application to sustain the caveat is dismissed.

b) The order preserving the caveat is discharged.

c) There is an order that the applicant pay the respondent's costs assessed on a 2B basis with disbursements as fixed by the registrar.

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Associate Judge Robinson