IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2009-409-000500

BETWEEN	HAROLD WILKINSON SCALES AND BARBARA SCALES Applicants
AND	CHRISTOPHER HAROLD SCALES First Respondent
AND	MARY MARGARET SCALES Second Respondent
AND	ERNEST JOHN TAIT Third Respondent

Hearing: 11 May 2009

Counsel: S Price for Applicants
D Lester for Respondents

Judgment: 19 May 2009

JUDGMENT OF ASSOCIATE JUDGE OSBORNE

Background

[1] A family has come to litigation. Arrangements of mutual support between a father and mother and their son and daughter-in-law have broken down. By this proceeding, the Court is required to consider the legal nature of the parents' expectations.

The caveat

[2] This proceeding is an application for an order that a caveat not lapse.

[3] The applicants (the caveators) are Harold and Barbara Scales. The respondents are the three trustees of the family trust of their son and daughter-in-law, they being Christopher and Mary Scales and their solicitor, Ernest Tait. For ease of reference I will refer to the Scales family members by their first names.

[4] The estate or interest claimed in the caveat is:

> A life interest in the property granted to the Caveator by Mary Margaret SCALES being one of the registered proprietors of the land in the above described title.

[5] The property to which the caveat relates is a property at 90 St James Avenue, Christchurch.

[6] Harold and Barbara were living in the property until May 2008. The proceeding calls for an examination of the circumstances in which they came to be living at St James Avenue.

Chronology (All addresses are in Christchurch)

1990	Christopher and Mary own 28 Leander Street.
1990	Harold and Barbara live with Christopher and Mary at 28A Leander Street.
1990	Harold and Barbara lend $104,000 (or thereabouts) to Christopher and Mary to help with development of 28B Leander Street – Harold and Barbara move into 28B Leander Street.
1994	Christopher and Mary buy 39 Grants Road and build another house on the property – Harold and Barbara move into 39 Grants Road.
14/2/1997	Mary completes a codicil relating to 39 Grants Road

12/3/1997	Mary, Harold and Barbara execute an agreement relating to 39 Grants Road
2001	The Chris and Mary Scales Family Trust is established.
March 2004	Harold and Mary move into 90 St James Avenue.
14/4/2004	Harold, Barbara, Christopher and Mary execute a deed relating to a loan of $85,000.
May/June 2008	Harold and Barbara leave 90 St James Avenue and move to Auckland to live with a daughter (Alyson Martin).
1/12/2008	Trustees of Chris and Mary Scales Family Trust enter contract to sell 90 St James Avenue.
15/1/2009	Harold and Barbara caveat the title.
23/1/2009	Settlement date of the sale contract on 90 St James Avenue – purchasers move into possession.
8/5/2009	Contract on 90 St James Avenue cancelled by purchasers.
Various Dates	The original advance from Harold and Barbara was reduced by payments made by Christopher and Mary to or on behalf of Harold and Barbara, with $35,000 or thereabouts repaid.

Nature of application – the principles

[7] This application is made in reliance on s 145 Land Transfer Act 1952.

[8] I adopt the following principles as applying to an application of this nature:

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

(b) The caveator must show an 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: s 137 Land Transfer Act;

(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 patently clear that the caveat cannot be maintained either because there was no valid ground for lodging it or that such valid ground as then existed no longer does so.

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

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

The interest claimed – a life interest – the law

[9] Consistently with the interest claimed in the caveat, the submission of Mr Price for the applicants was that the applicants hold a life interest in St James Avenue.

[10] Counsel in their arguments focussed on the distinction between such a life interest (being an interest in land) and the respondents' contention that the applicants held a lesser interest, variously discussed as a mere licence to occupy, a personal or contractual right to accommodation, or a right in the nature of mere tenancy. The applicants do not suggest that such lesser interest would amount to an interest in land.

[11] The nature of a life interest is accurately summarised by the authors of Principles of Real Property Law, Hinde Campbell and Twist (2007), paragraph 3.012:

> The life estate is a freehold estate which ceases on the death of the person or persons (known as the life tenant or tenants) in whom it is vested. The estate gives the life tenant full rights of occupation and enjoyment of the land. The grant of a life estate does not normally impose express obligations upon the life tenant, such as responsibility for carrying out repairs and maintenance, though it may do so. Nevertheless the life tenant has certain obligations with regard to user of the property under the doctrine of waste. A life tenant may transfer or otherwise deal with his or her interest, although because it terminates on death it obviously cannot be disposed of by will.

[12] No particular form of words is required to create a life interest: Principles of Real Property Law, paragraph 3.013.

[13] Mr Price for the applicants advanced the submission that unless the wording of the grant clearly limits the grantee's rights to personal occupation by the grantee (and the grantee alone), a right of occupation under a life interest includes permitting the occupation by others and receipt of rents in relation to such by the grantee. He relied upon the decisions in *Holden v Allen* (1903) 6 GLR 87 and *Re Wharfe* [1981] 2 NZLR 700. Mr Price's submission in this regard is too broadly stated. The authorities upon which he relies (which in turn flow from English authorities) are encapsulated in the head note to *Holden v Allen* (above) which states:

> Where the right or liberty of occupation for life is given by a will, the use of the word "occupy" is equivalent to the grant of an estate for life unless there are words in the will which clearly cut down the right to that of personal occupation only.

The Courts attach special importance to the words used in a will. Issues of consistency and certainty of the use of testamentary expressions arise. In very many cases wills are carefully constructed by solicitors using tried and tested expressions. Chilwell J in *Re Wharfe* (above, page 704) referred to the "*simple but well constructed*" nature of the will in that case.

[14] Where the language which gives rise to some right of occupation is arrived at through conversation between the parties, the presumptions that apply to will construction are not directly applicable. The Court must take care to examine the

language used by lay people as understood by lay people. If, as in this case, those people subsequently go on to record some or all of their arrangements in a written agreement, then even with the involvement of a solicitor in that process there can be no automatic application of principles of will construction – the test remains a matter of contract interpretation – the intention of the parties as expressed in the words they used.

[15] With that in mind, Mr Price in his submissions emphasised the need for the Court to consider the parties' communications in the context of their background. Mr Lester for the respondents urged the same approach.

[16] In construing the arrangements between the parties, I accept that the Court should consider the discussion between the parties in the light of the background knowledge that each would have had including anything which would have affected the way in which the language they were using would have been understood by a reasonable man.

[17] Against that background I turn to examine the evidence.

The applicants' evidence

Harold Scales

[18] The evidence of Harold relating to the creation of the initial arrangement and later development of the arrangement is contained in the following paragraphs in his affidavit:

> 3. In 1990, Barbara and I moved from Auckland to Christchurch. At that stage Barbara was 65 and I was 66. We are now 84 and 85 respectively. When we arrived in Christchurch, we lived with Chris (our son) and Mary (his wife) at their property at 28A Leander Street, Christchurch.
>
> 4. At that time, Chris and Mary were involved in residential property development. They, Barbara and I agreed that we would lend them $104,000 to help them with their residential property developments. The first of these developments was for a townhouse at 28b Leander

Street, with the intention that Barbara and I would live there for the remainder of our lives.

5. During or around October 1994, Chris and Mary purchased a property at 39 Grants road, Christchurch. This comprised of a large section and an existing villa. They built a second home on that property and Chris, Mary, Barbara and I agreed that instead of living at the Leander property, Barbara and I would instead move to the 39 Grants road property.

6. Other than the (agreed) substitution of property, Barbara and my life interest never changed – to the contrary, Chris and Mary expressly told us that our life interest continued, and would continue, on.

7. In early 1997, some discussion took place between all of us about documentation of the life interest. I cannot recall why it came up, nor who raised it. Mary (whom I understand to be the then sole owner of the property) provided us with a copy of a codicil to her will and then a deed in relation to our life interest (dated 4 February 1997 and 12 March 1997 respectively). True copies of the codicil dated 4 February 1997 and deed dated 12 March 1997 are annexed and marked "C:" and "D".

8. In about 2002, Chris and Mary purchased a property at 90 St James Avenue, Christchurch. They developed it into a house at the rear (88 St James Avenue) and another house at the front (90 St James Avenue), during which time Barbara and I continued to live at the Grants road property.

9. In about March 2004, Chris and Mary asked us again to change properties – this time to 90 St James Avenue. We did so. Again, not only was there never any suggestion that this would end our life interest but rather that our life interest was expressly reconfirmed to us by Chris and Mary.

10. In April 2004, at Chris and Mary's request, we went to the offices of Malley & Co and were presented with a document to sign entitled "Deed of Acknowledgment of Debt". Following assurances by Chris and Mary (and I believe Mr Tait, although they may have just been made by Chris and Mary in his presence) that our life interest would continue, we signed that deed. Another member of Malley & Co witnessed our signatures. There was no suggestion that we could (or should) get independent legal advice. Annexed and marked "E: is a true copy of the deed dated 19 April 2004.

11. I note that the Deed states that we had previously advanced funds, that such funds had been repaid, and that we had advanced $85,000 for the building of a house at 90 St James Avenue. By that time, some (but not all) of the original advance of $104,000 had been repaid. We had not advanced any new money to Chris and Mary. Some further repayments were then made following the signing of the Deed and approximately $69,000 of the original $104,000 is still unpaid.

(The remaining paragraphs of Harold's affidavit deal with events from May 2008 when arrangements broke down. He deposes to Christopher and Mary putting pressure on Barbara and himself to leave the property.)

Barbara Scales

[19] Barbara simply confirms the contents of Harold's affidavit.

Harold Scales in reply

[20] Having read the respondents' affidavits, Harold swore a further short affidavit of which paragraph 3 deals in part with the nature of the arrangement:

> 3. In relation to the sale of the properties at 28 Leander Street, Grants Road and 70 and 72 St James, I wish to clarify that Barbara and I never received any proceeds from the sale of these properties. We were of course not surprised about this because this was in line with the agreement that Chris, Mary, Barbara and I had reached in that Barbara and I would have accommodation for the remainder of our lives in return for the money that we had lent to Chris and Mary.

Children/children-in-law of the applicants

[21] Four children or children-in-law of the applicants swore brief affidavits "in reply". Their affidavits were similar in nature. On the issue of the nature of the interest the three children used virtually identical words, such as:

> I was told by my brother Chris that he and Mary had undertaken to provide our parents with accommodation for the remainder of their lives in return for money lent by our parents to Chris and Mary some 18 years ago.

[22] The evidence of the son-in-law is that he spoke to Christopher after differences had arisen in 2008 and that:

> Chris also told me that while he had undertaken to provide a home for Barbara and Harold for the rest of their lives, it was now the "Government's turn".

The respondents' evidence

[23] Christopher traverses the purchase and construction of properties at Leander Street, Grants Road and St James Avenue. He deals with the loan made (he says $100,000) in 1990. He does not refer to any discussion with his parents as to a right of accommodation at Leander Street, Grants Road or St James Avenue. He simply refers to his parents moving into and living in the various properties. When it comes to St James Avenue (owned by the family trust) he says this:

> 14. At no time did the Trust have any discussion or come to any arrangement of any nature regarding Mum and Dad living in the St James Avenue property.
>
> 15. There was no agreement in relation to any life interest. In my mind I simply felt that I had a moral obligation to allow my mother and father to live in a property in Christchurch until they needed to go into a rest home or they could not be fully independent in the home or until they wished to move.

[24] Towards the end of his affidavit he responds to particular passages in his father's affidavit in these terms:

> Paragraph 4
>
> The amount advanced was $100,000.00
>
> Paragraph 5
>
> It was not that we asked my parents to move – they wanted to and it was a mutual discussion.
>
> Paragraph 6
>
> No such discussion took place.
>
> Paragraph 10
>
> There was never any discussion by anyone in the April 2004 meeting about any life interest and no discussion about any life interest continuing. It was indicated to Harold and Barbara that the document could be left with them for them to obtain advice if they wanted.

Mary Scales

[25] Mary Scales deposed:

2. I refer to exhibit "C" of the Affidavit of Harold Wilkinson Scales. That Codicil was prepared by a Mr Horgan of Papanui Law who at that time was acting for my husband and I. Brownie Wills had also previously acted for us. As I understood it I was providing protection for Chris' mother and father so that if I were to die they could live in that property. That was dependent on my death.

3. I refer to exhibit "D" of Harold Wilkinson Scales Affidavit. I believe this document was also prepared by Mr Horgan of Papanui Law. It was not prepared by my present solicitors Malley & Co. It records that so long as there was money owed by Christopher and myself to Harold and Barbara then Harold and Barbara could live at 2/39 Grants road. It indicated that if they stopped living there then the amount then outstanding would be paid within six months of them leaving the property. There was never any arrangement that went beyond that.

4. The only agreement entered into by the Trust with Harold and Barbara was the agreement of 19 April 2004. In the April 2004 meeting there was no discussion at all in relation to any life interest. Harold and Barbara were told that the document could be left with them for them to get advice. At no time did the Trust discuss anything resembling a life interest with Harold or Barbara or amongst the Trustees.

Ernest Tait

[26] Mr Tait is the co-trustee of the Chris and Mary Scales Family Trust. His evidence in relation to the interest claimed by the applicants was:

3. As at 19 April 2004 I understood that Harold and Barbara Scales had been living in properties owned by Christopher and Mary Scales for a number of years. At no time was it suggested to me that there was to be a life interest in 90 St James Avenue, Christchurch. That matter was never raised by Harold Wilkinson Scales or Barbara Scales or anyone else at that meeting or prior to the meeting. I believed that the agreement fairly set out the position as I then understood it. No-one said to me that there was a life interest that would continue and no such discussion occurred in my presence. As a Trustee of the Christopher and Mary Scales Family Trust I was not aware of any agreement to provide or providing a life interest to Harold Wilkinson Scales and Barbara Scales in the property at 90 St James Avenue, Christchurch.

Examination of the documents

[27] I now turn to consider the three documents which came into existence during the applicants' residence in Christchurch. First I will examine those to which the applicants were parties.

[28] An agreement (not expressly described as a deed but executed in deed form) was entered into between Harold, Barbara and Mary on 12 March 1997. Its contents were as follows (references to "Scales" being to Harold and Barbara):

> WHEREAS:
>
> MARY owns the property at Flat 2, 39 Grants road and wishes to make provision for SCALES to reside in that house in return for the loan of $90,000 made by SCALES to MARY.
>
> IT IS AGREED AS FOLLOWS:
>
> 1. That the SCALES and MARY both acknowledge that the SCALES have lent and MARY has borrowed $90,000.
>
> 2. That the sum of $90,000 has been lent interest free so long as the SCALES reside at Flat 2, 39 Grants Road.
>
> 3. That MARY agrees to allow the SCALES to reside at flat 2, 39 Grants Road so far as she has still borrowed the $90,000.00 or part sum thereof and while the SCALES are residing there MARY shall pay all insurance and rates.
>
> 4. MARY shall have the right to repay the SCALES if they so require it at a maximum of $4,000 per annum which shall be deducted off the principal owed. This payment shall only be made if required by the SCALES.
>
> 5. In the event that the SCALES shall leave Flat 2, 39 Grants road then the amount so owing at that stage shall be payable by MARY within six months of SCALES leaving the Grants Road property.

[29] There is then a deed dated 19 April 2004 between Harold and Barbara on the one hand and the three respondents as trustees of the Chris and Mary Scales Family Trust on the other hand. The deed contained the following:

> A. The lender has previously advanced funds to CHRISTOPHER HAROLD SCALES and MARY MARGARET SCALES personally and such funds have been repaid.

B. The lender has advanced funds for the building of a house situate at 90 St James Avenue Christchurch viz the sum of $85,000.00.

C. No other funds are due by the Borrower (or by CHRISTOPHER HAROLD SCALES and/or MARY MARGARET SCALES personally) to the Lender.

D. The Lender has agreed to leave the sum of $85,000.00 owing as a debt from the Borrower to the Lender.

E. The parties wish to record their agreement in writing.

[30] On Harold's copy of the deed which he exhibited to his affidavit he had recorded his understanding of the balance of the loan at various times being:

$82,000 as at 13 August 2004

$77,000 as at 20 July 2005; and

$67,000 as at 1 December 2005.

These figures reflected various payments which Christopher and Mary had made over those periods.

[31] There is in evidence also a codicil of Mary. It was executed on 14 February 1997. Being Mary's codicil there is no other party to the document. However, as seen above in Harold's affidavit (paragraph 7), Harold says that Mary provided a copy of the codicil to his wife and him at the same time as she provided the document which became the 12 March 1997 agreement.

[32] By the codicil Mary permits Harold and Barbara:

> … to have the free use of, occupation and enjoyment of a life interest in 39 Grants Road or any other property which I own where they may be residing at the time of my death. (The codicil goes on to attach conditions to the life interest.)

Further background

[33] The Court has considered also the more general background information provided in the affidavits. This includes evidence given by Christopher as to the

immigration of the family to New Zealand in 1962 and his promise made to his grandmother at that time that he would look after his mother (Barbara) in her old age.

Circumstances of estrangement and legal correspondence

[34] I will return below to the events of 2008 and thereafter. It is possible that what was said in that later period may further inform the judgment of the Court as to the nature of the arrangements entered into in the earlier years. However, I first examine the affidavit evidence of the parties as to how those arrangements were expressed when they came into existence and what the documents establish.

The arrangement

[35] The Court is required to focus on the interest claimed in the caveat. It is that caveat which is either sustained or not.

[36] What then is the evidence to establish that a life interest in St James Avenue was granted to Harold and Barbara by Mary?

[37] The specific focus of enquiry is upon an agreement entered into by Mary in relation to St James Avenue. The first focus is upon events around March 2004 – a commitment in relation to St James Avenue could not have occurred before then.

[38] I therefore look to see what the evidence is specifically as to discussions at that time and I will then put them in the context of the earlier discussions.

[39] The words used by Harold must be given importance. He says of this period that:

> There was never any suggestion that this [shift to St James Avenue] would end our life interest but rather that our life interest was expressly reconfirmed to us by Chris and Mary.

[40] The difficulty in attaching particular weight to the reference to "*our life interest*" is that this is clearly the terminology which Harold uses to refer to the concept that he says was expressed and agreed at the outset. That concept was that: "*Barbara and I would live there* [at Leander Street] *for the remainder of our lives*". This wording is important because it is the arrangement that Harold says was put in place and then continued through later years. Thus when he refers to the shift to Grants Road, it is his evidence that he and his wife were told that "*our life interest continued and would continue on*". Similarly, when we come to March 2004 the evidence is that there was never any suggestion that the 2004 move "*would end our life interest*". Clearly the reference is back to the original arrangement.

[41] The evidence of Barbara takes the matter no further as she simply confirms the accuracy of her husband's evidence.

[42] I turn then to the other evidence called by the applicants. The four witnesses, called to describe the way in which Christopher had put the arrangement, speak of the arrangement being that Christopher and Mary would provide our parents with accommodation for the remainder of their lives. There is a striking consistency between the way in which Christopher is said to have described the arrangement and the way in which Harold refers to the intention. That is that he and Barbara would live at Leander Street for the remainder of their lives. The document executed in the intervening period, on 12 March 1997, accords with the concept of an accommodation right. The recital refers to Mary making provision for her parents-in-law to reside in Grants Road in return for the loan. Clause 2 speaks of the period during which Harold and Barbara reside at Grants Road.

[43] In the light of the recital, Mr Lester submitted that the applicants are estopped from denying that the arrangement was a mere right of residence. He invoked the doctrine of estoppel by deed. Such an estoppel arises where a person has by deed entered into a solemn agreement as to certain facts. The person will not be permitted to deny any matter which has been asserted in the deed. Recitals in deeds commonly contain statements which give rise to such an estoppel: *Taylor v Knapman* (1884) NZLR 2 SC 265 at 271. While the 12 March 1997 agreement was not expressly stated to be a deed it has the structure of a deed with a recital and operative clauses

and is signed and witnessed as a deed. This leads the Court to the conclusion that the 12 March 1997 document is a deed. The Court also concludes that the recital binds the applicants as to the intention Mary had in 1997 in relation to the accommodation being provided to them.

[44] That does not fully determine the outcome of the Court's conclusion as to the specific nature of the interest conveyed. The 1997 deed predates by some seven years such arrangement as was entered into in relation to St James Avenue. However, the evidence which the deed provides is compelling. The caveat expressly limits itself to the commitment given by Mary. The applicants' case is put upon the basis that there was a consistent commitment flowing through the years from 1990 onwards. The 1997 deed shows that at that point the commitment was to allow residence in return for the loan.

[45] I turn to consider four aspects of the case which Mr Price submitted were important to a correct understanding of the arrangement.

[46] First is the codicil, a copy of which was provided to Harold and Barbara. As a testamentary document it falls to be construed in accordance with the approach enunciated in *Holden v Allen* (above paragraph [13]). By the codicil an estate for life is to be granted. But the evidence which I have reviewed above indicates that the interest to be provided by the codicil went beyond the commitment expressed between the parties and relayed to relatives. That may be a drafting issue as between solicitor and client. It may relate to the fact that Mary is providing for the specific situation should she die before her husband. The codicil does not alter the arrangement as agreed between the parties.

[47] Secondly, Mr Price drew attention to the extent to which the evidence of Christopher Scales in particular traversed many factual matters without significantly addressing the fundamental issue of the nature of the arrangement. The criticism is fair. But that said, Christopher did state on oath that there had been no agreement in relation to any life interest and he saw the matter in terms of a moral obligation. The Court has the impression that Christopher chose to be less than comprehensive in addressing the specific content of discussions that must have occurred with Harold

and Barbara over the years. In this application, however, it is still for Harold and Barbara as the applicants to provide or point to the evidence to establish a reasonably arguable case as to the interest claimed.

[48] The criticism of Christopher's evidence also has to be considered in the context of the evidence given by his wife, Mary. It was she who was named in the caveat as the person who promised the life interest. For her part, she recognises an arrangement to which she was party at the time of Grants Road (that is at the time of the 12 March 1997 deed). She recognises an arrangement that so long as there was money owed by Christopher and herself to Harold and Barbara then Harold and Barbara had the right to live at Grants Road. That is largely consistent with the arrangement as described by Harold and by Harold's other family witnesses. The single difference is whether the period of accommodation was to be so long as the loan was outstanding or for the remainder of Harold's and Barbara's lives. Mary points to her interpretation of the 1997 deed (residence so long as the loan is outstanding); the alternative view is that it was an arrangement that there was to be accommodation for life. The Court does not need to determine which is correct: the difference in those approaches is simply an issue as to how long the interest was to last and not as to the nature of the interest. Neither of the two approaches amounts to an interest in land.

[49] Thirdly, I turn to the evidence as to Christopher's statements and actions from 2008. There are differences between the parties as to the circumstances in which Harold and Barbara came to leave St James Avenue and to move to Auckland. While those circumstances may give rise to an arguable case as to breach of the accommodation arrangement, they do not affect the nature of the interest.

[50] Fourthly, I consider the correspondence entered into by the lawyers from 15 January 2009. Mr Price for the applicants submitted to the Court that there was substantial significance to be attached to the use by the respondents' solicitors of the term "*life interest*" in their correspondence. I do not find it particularly helpful to the correct construction of arrangements entered into between Mary and her parents-in-law to place great emphasis upon Mr Tait's references to "*the life interest*". The applicants' solicitors had commenced by referring to "*life interest*" and Mr Tait

responded by reference to "*the life interest*". His correspondence cannot be construed as accepting (whether on behalf of Mary or otherwise) that the interest which Mary is said to have granted in fact existed.

The nature of the interest – conclusion

[51] The Court concludes that the applicants have failed to establish a reasonably arguable case that they were granted a life interest in St James Avenue by Mary Scales.

Other grounds of opposition – Property Law Act 2007

[52] The respondents, in addition to denying that a life interest had been granted, opposed the application upon the basis that if there had been an agreement to grant such an interest it was unenforceable as an oral agreement.

[53] Had it been necessary for the purpose of determining this case, I would have found that the contract asserted did not satisfy the writing requirements of s 24(1)(a) Property Law Act 2007. The case law on the predecessor provision (s 2 Contracts Enforcement Act 1956) established that there had to be a written memorandum of all material terms: *Barrett v IBC International Ltd* [1995] 3 NZLR 170 (CA). The requirement for the terms of the contract to be evidenced in writing is now express in the new s 24 Property Law Act. In this case, the only documents signed by Mary fall far short of establishing the terms of an agreement to grant a life interest (and in fact in the 12 March 1997 deed contradict such a concept).

[54] To meet this difficulty, Mr Price submitted that the doctrine of part performance applied. The doctrine of part performance is preserved under s 26 Property Law Act 2007. Mr Price made brief submissions as to part performance. Mr Price's submissions in this regard were at the most general level. The difficulty with the applicants' assertion of part performance lies in the timing of the arrangement upon which the applicants must rely. The arrangement contended for relates to St James Avenue and could therefore have come into existence no earlier

than March 2004. But by that time the loan which the applicants say was their consideration had been in existence for some 14 years. The continued existence of the loan could have a number of explanations. Its nature is equivocal. Similarly, the moving of the applicants into St James Avenue is equivocal. The acts of part performance relied upon do not establish the existence of the contract on the balance of probabilities, see *T A Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88.

[55] Therefore, the Court would have also refused this application for the reason that the non-compliance with s 24 Property Law Act 2007 was not saved by part performance.

Disposition

1. The Court dismisses the applicants' application for an order that the caveat not lapse.

2. The order of this Court dated 31 March 2009 that caveat No. 8046388.1 not lapse until further order of the Court is hereby rescinded.

3. I reserve leave to the respondents to apply for any further order in relation to the removal of caveat No. 8046388.1 if such an order is still required (as sought in paragraph 4 of the Notice of Opposition dated 20 March 2009).

4. I reserve costs. The preliminary view of the Court is that costs should be on a 2B basis, together with disbursements. In the event the parties cannot resolve costs by agreement, the respondents are to file and serve a memorandum and the applicants are within five working days thereafter to serve their response.

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Solicitors:
Minter Ellison Rudd Watts, Auckland, for Applicants (Counsel: S Price)
Malley & Co, Christchurch, for Respondents (Counsel: D Lester)