IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-001622

BETWEEN	SHAO XIA ZEN First Applicant
AND	LEON WU Second Applicant
AND	MAY ZHENG Third Applicant
AND	GEORGE LEE Fourth Applicant
AND	JIN LIN HAUNG Fifth Applicant
AND	TONY WU Sixth Applicant
AND	JASON SHAO Seventh Applicant
AND	KING JIN Eighth Applicant
AND	BORMAN RESIDENTIAL LIMITED Respondent

Hearing: 19 May 2009

Counsel: G W Hulse for applicants
M J Fisher for respondent

Judgment: 25 May 2009 at 3:30pm

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me 25 May 2009 at 3:30pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Foy & Halse, PO Box 26-218, Epsom, Auckland 1344 for applicants
Castle Brown, PO Box 9670, Newmarket, Auckland 1149 for respondent

[1] The applicants seek orders under s 148 of the Land Transfer Act 1952, permitting them to lodge a second caveat over properties in a subdivision owned by the respondent. The caveats are sought to protect claims to equitable liens for payments made under agreements for sale and purchase.

[2] The applicants variously agreed to buy one or more properties in the subdivision. They made payments to the respondent totalling 20% of the purchase price, but then did not settle the purchases. The respondent has cancelled the agreements. There is a dispute as to whether the respondent is entitled to forfeit all of the payments as deposits. The applicants lodged caveats shortly after the respondent cancelled one of the agreements and said that it was forfeiting the payments. Those caveats lapsed due to oversight in the office of the applicants' solicitors. The present application was made almost immediately.

[3] The applicants say that the agreements allow forfeiture of deposits up to 10% of the purchase price, and that the respondent should repay the additional 10% subject to any claim which it may ultimately establish for losses exceeding the forfeited amount. They seek the protection of a caveat (or, alternatively, some form of security for the additional 10%) until the respondent has established a loss greater than the sum they are claiming.

[4] The respondent contends that on a true construction of the agreements the whole 20% is forfeitable as a deposit. In the alternative, it invites the Court to exercise its discretion to decline the orders sought on the grounds that the caveats would not provide any benefit to the applicants. It says that it has clear equitable set-offs arising out of the applicants' failure to settle for amounts that will certainly exceed the applicants' claimed liens.

Background

[5] The eight applicants each entered into agreements with the respondent on 16 April 2007 to purchase properties in a subdivision on the outskirts of Hamilton, known as Chancery Estate.

[6] The agreements were negotiated together, and were in identical form except for lot number and price. One of the properties included a house. The remainder of the properties were vacant lots. The purchase price for each of the vacant lots was $180,000.

[7] The subdivision had not been completed at the time of the agreements. The agreements provided for settlement to take place after titles had issued. They were on the standard REINZ/ADLS form (Seventh Edition (3) July 1999) and contained extensive special terms, a number of which established the parties' respective rights and obligations pending issue of titles and completion of settlement.

[8] The agreements contained the following provisions relating to payment of a deposit (deletions shown are from the standard form):

a) Cover page:

> Deposit: (refer clause 2) ~~$,~~ special condition 28 and special condition 30 ….

b) General terms of sale:

> 2. Deposit
>
> 2.1 The purchaser shall pay the deposit to the vendor or the vendor's agent immediately upon execution of this agreement by both parties and/or at such other times as is specified in this agreement time being of the essence as to each such time.
>
> ~~2.2 The vendor shall not be entitled to cancel this agreement for non-payment of the deposit unless the vendor has first given to the purchaser three working days' notice of intention to cancel and the purchaser has failed within that time to remedy the default. No notice of cancellation shall be effective if the deposit has been paid before the notice of cancellation is served.~~

2.3 The deposit shall be in part payment of the purchase price.

2.4 Where this agreement is entered into subject to a condition expressed in this agreement, the person to whom the deposit is paid shall hold it as a stakeholder until this agreement becomes unconditional or is avoided for non-fulfilment of any condition under subclause 8.7(5).

c) Special Conditions of Sale:

28.0 **Deposit**

28.1 20% of the purchase price is to be paid by the purchaser to the vendor's solicitor ("the Stakeholder") as follows:

(a) First instalment: 5% of the purchase price payable immediately on signing of this agreement by the purchaser.

(b) Second instalment: A further 5% of the purchase price payable within 60 days after the signing of this agreement by both parties.

(c) Third instalment. A further payment of 10% of the purchase price shall be paid by the purchaser to the vendor increasing the total deposit paid to 20% of the purchase price:

(i) within five working days of the vendor's solicitor giving written notice to the purchaser or the purchaser's solicitor of the issue of the S224C certificate for the subject property by the Hamilton City Council, or

(ii) upon the purchaser taking early possession pursuant to clause 30.5 following, for the lot or those lots of which the purchaser takes early possession.

(d) The parties acknowledge that a deposit of 20% of the purchase price is fair and reasonable in the circumstances, given the deferred nature of settlement and that purchaser is purchasing such a large proportion of the vendor's subdivision and therefore the vendor is forsaking the opportunity to sell the property to other parties.

…. (a further six subclauses)

[9] Titles were issued in or about December 2008. The respondent's solicitors gave notice to the applicants' solicitors calling for settlement in early January 2009. The applicants did not settle as required. The respondent issued settlement notices which expired (after an extension) on 16 February 2009.

[10] The respondent gave notice of cancellation to the first applicant (who was purchasing the property, which included a house) upon expiry of the settlement notice on 16 February 2009. In that notice the respondent advised that it was forfeiting all payments made. Three days earlier (on 13 February 2009), at the same time as extending the date of expiry of the settlement notices, the respondent had given notice to all applicants that on cancellation it would forfeit all payments made, in accordance with clause 28.1(b) (the subparagraph reference seems to be an error – it is more likely that it was meant to be cl. 28.1(d)).

[11] The applicants lodged caveats on 23 February 2009. The respondent requested the Registrar-General of Land to issue notices lapsing the caveats. The applicants applied for orders to sustain the caveats but due to oversight by their solicitors did not advise the Registrar-General of that application, and the caveats lapsed on 25 March 2009. The applicants filed the present application to lodge second caveats on 1 April 2009.

[12] The respondent proceeded to resell the property which included the house, and one of the vacant lots. The first applicant and the fourth applicant as respective purchasers of those properties do not pursue their applications to lodge a caveat over those properties.

[13] On 27 April 2009 the respondent formally cancelled the agreements in respect of the remainder of the properties.

Principles on application for leave

[14] The application is brought pursuant to s 148(1) of the Land Transfer Act 1952:

> **148 No second caveat may be entered**
>
> (1) If a caveat has been removed under section 143 or has lapsed, no second caveat may be lodged by or on behalf of the same person in respect of the same interest except by order of the High Court.

[15] An applicant for an order permitting a second caveat to be lodged must establish an arguable case for a caveatable interest: *Mortimer v Bayliss* (1991) 1 NZ ConvC 190, 846. If that case is established, the Court has an unfettered discretion whether or not to make an order. Factors which may be relevant to the exercise of that discretion include the strength of the case for the claimed caveatable interest, the reason for lapse or removal of the earlier caveat, and whether anyone may be prejudiced by the second caveat through having acted in reliance on the title free of the caveat: *Muellner v Montagnat* (1986) 2 NZCPR 520.

The competing contentions

[16] The applicants say that the agreements limit the amount which the respondent can forfeit following cancellation to 10% of the purchase price, relying on clause 9.4(1)(b)(i) of the general terms:

> 9.4 If the purchaser does not comply with the terms of the settlement notice served by the vendor then:
>
> (1) Without prejudice to any other rights or remedies available to the vendor at law in equity the vendor may:
>
> ….
>
> (b) cancel this agreement by notice and pursue either or both of the following remedies namely:
>
> (i) forfeit and retain for the vendor's own benefit the deposit paid by the purchaser, but not exceeding in all 10% of the purchase price
>
> ….

[17] They say that this interpretation is open (notwithstanding the reference to a 20% deposit in clause 28 of the special terms) because only section 9.4(1)(b)(i) deals expressly with forfeiture following cancellation.

[18] They contend that the factors considered by the Court in *Muellner v Motagnat* all support exercise of the Court's discretion in their favour. The lapse of the first caveat was a result of an oversight in the solicitors' office and not because they did not intend to pursue their rights. They say that the respondent cannot claim

prejudice as it knew that the applicants had applied to sustain their (first) caveats, and the applicants took steps to bring the present application as soon as they learnt of the lapse of those first caveats.

[19] The respondent accepts that the lapse was due to error and did not indicate a lack of intention to assert a caveatable interest. It does not claim that it or any other party has acted in reliance on the lapsing of the caveat. It opposes the application on two grounds. First, the applicants have not established an arguable case for the caveatable interest (because all of the payments made are forfeitable as a deposit on a proper interpretation of the agreement). Secondly, the Court should not exercise its discretion in favour of the applicants because the caveats will be of no practical benefit to them. It claims an equitable set-off for losses arising out of the applicants' failure to settle which will exceed the 10% of the purchase price which the applicants are seeking to protect. It also takes issue with the applicants' lack of response to the request to provide personal information to allow sums to be lodged in a solicitors' trust account in the event of sale before the dispute is resolved.

[20] These competing contentions give rise to two issues for the Court to determine. The first is whether the applicants have established an arguable case for a caveatable interest. This will depend on the proper interpretation of the agreement and particularly whether the relevant provisions in clause 28 should prevail over clause 9.4(1)(b)(i). The second issue is whether the Court should exercise its discretion to permit lodging of the caveats particularly having regard to whether it can reasonably see that the caveats have a practical advantage for the caveators.

Is there an arguable case for the caveatable interest?

[21] The respondent accepts that the applicants are entitled to an equitable lien which can support a caveat in respect of any payments that it is not entitled to forfeit. The applicants accept (at least for the purpose of this application) that the respondent has cancelled the agreements and is entitled to forfeit half of the money paid on each agreement (being 10% of the purchase price). The first question to be answered, therefore, is whether the respondent is precluded from forfeiting the other 10% by

reason of clause 9.4(1)(b)(i). This question depends in turn on whether the provision for a deposit of 20% is inconsistent with the limitation in clause 9.4(1)(b)(i).

[22] Before addressing this question I will consider what the agreements say about a deposit. Although the agreements do not state expressly that the applicants are to pay a deposit of 20% of the purchase price it is clear from the terms of the agreements that that is what they intended:

a) The cover page of the standard form agreement has provision for a specific sum to be inserted for the deposit, with the terms for payment and treatment of the deposit set out in clause 2 of the general terms. Instead of a specific amount, the cover page refers to special condition 28 and special condition 30 as defining the deposit.

b) The amount of the deposit is then to be found in clause 28.1, namely 20% of the purchase price paid in three instalments.

c) Clause 28.1(c), defining the third instalment, makes it clear that the sum of the three instalments (20%) is "the total deposit".

d) Subclauses 28.2 to 28.7 provide for the treatment of the deposit in various circumstances. The particular clauses are not directly relevant to the issue before the Court, but they have a general relevance in that all of them refer to "the deposit", supporting the interpretation that the 20% of purchase price identified in clause 28.1 was intended to be "the deposit" for each agreement.

e) Clause 30 of the special terms deals with the parties' rights and obligations in relation to settlement and possession. The only reference to deposit is in clause 30.2 under which the purchaser authorises release of "the deposit" to the vendor immediately upon issue of titles. Read together with clause 28.1, the clause suggests that the three instalments totalling 20% are released as the deposit.

[23] Counsel for the respondent referred to the rationale for forfeiture of a deposit following cancellation, namely that the deposit was the amount that the parties recognised was a reasonable estimate of the vendor's loss in the event of the purchaser's default, and subject to forfeiture following cancellation as liquidated damages. He submitted that clause 28.1(d), properly construed, was an agreement between the parties that the respondent was entitled to forfeit the full 20% deposit in the event of cancellation for default by the applicants. He argued that if that was the correct interpretation, there was a conflict between that clause and clause 9.4(1)(b)(i). He relied on clause 1.3(3) of the general terms, which provides that an inserted term shall prevail over a standard term in the event of conflict.

[24] Counsel for the applicants submitted that there was no inconsistency between the clauses, and that they could stand together. He relied on the fact that only clause 9.4(1)(b)(i) dealt expressly with what was to happen to the deposit on cancellation. He said that clause 1.3(3) applied only if the inserted term gave the respondent the right to forfeit the full 20%, and there was no such express right. He contended that clause 28.1(d) could not be construed in that way (it was merely expressed as an acknowledgement, and there was nothing in the remainder of the clause relating to a right to forfeiture). He said that clause 28.2 was specifically addressed to entitlement to interest on the deposit and clauses 28.6 and 28.7 applied only where the purchaser failed to pay the deposit or any instalment of the deposit.

[25] The starting point for determining whether or not there is an inconsistency is to determine the meaning of clause 28.1(d). I do not accept the submission of counsel for the applicants that this had no meaning for forfeiture following cancellation. I accept the submission of counsel for the respondent that the purpose of the clause was to record the parties' agreement that the three payments stipulated in the earlier part of clause 28.1 (totalling 20% of the purchase price) was their pre-estimate of the respondent's loss in the event of a default by the applicants. The clause was clearly intended to negate any argument that any part of the total sum paid was irrecoverable as a penalty. That issue would only arise in the event of a purported forfeiture following cancellation.

[26] Contrary to the argument of counsel for the applicants, I find some support for this interpretation in clauses 28.2 and 28.7 of the agreements:

a) Clause 28.2 provides for "the deposit" to be paid to a stakeholder who is to hold it in an interest-bearing account. The parties agree that the stakeholder may release the deposit to the vendor on date of issue of title. If the agreement is cancelled for default by the purchaser the net interest (after deduction of withholding tax and any handling charges) is to be paid to the vendor. It would be illogical to pay all interest to the vendor if only half of the deposit (10% of the purchase price) was forfeitable.

b) Clause 28.7 applies where the vendor cancels because the purchaser has failed to pay the deposit or any instalment of the deposit (and is thereby entitled to cancel immediately pursuant to clause 28.6). The clause provides that in that event:

> **…** the vendor may forfeit and retain the entire deposit then paid and the Net Interest, and the purchaser acknowledges and agrees that such sums have been determined to equate to genuine and valid pre-estimates of the vendors loss.

This clause reinforces the interpretation I have reached as to the purpose of clause 28.1(d), namely a pre-estimate of loss on cancellation.

[27] I note the specific provision in clause 28.7 for forfeiture in the event of failure to pay the deposit or part of it. I do not regard the lack of a similar provision earlier in clause 28 in relation to the applicants' failure to settle as determinative of the proper interpretation. The draftsman may well have considered that the party's intentions were made sufficiently clear in subclauses 28.1 and 28.2 (as I have found).

[28] The agreements provide (clause 1.3(3)) for an inserted term to prevail where it conflicts with the General Terms of Sale. That clause reflects the common law: *Chitty on Contracts* 28th Ed Vol 1 para 12-070 and Lewison, *The Interpretation of Contract*, 2007, 9.10. I find that clause 28.1(d) conflicts with the limitation in clause

9.4(1)(b)(i). Accordingly, clause 28.1(d) is to prevail, and the respondent is entitled to forfeit all payments made pursuant to clause 28.1 following cancellation of the agreements, as a consequence of the applicants' breach.

[29] Although this finding determines the application, I will also consider the respondent's alternative grounds ground for opposing the application.

Is there any practical advantage to the applicants from the caveats?

[30] The Court has a discretion to remove a caveat, even if a caveatable interest exists, if on the facts of the case the caveator can have no reasonable expectation of obtaining benefit from continuance of the caveat: *Pacific Homes Limited (in receivership) v Consolidated Joineries Limited* [1996] 2 NZLR 652 and *Stewart v Kaipara Consultants Limited* [2000] 3 NZLR 55. Although the Court of Appeal in those cases was addressing applications for removal of a caveat and for an order sustaining a caveat respectively, I regard the same consideration as a relevant factor when assessing whether or not to exercise the Court's discretion to permit the lodging of a second caveat.

[31] The respondent says that it has a claim to damages against each of the applicants arising out of their breach, and following cancellation of the agreement. This entitlement flows from clause 9.4(1)(b)(ii). Under clause 9.4(3) the damages claimable include any loss incurred on bona fide resale within one year of due date for settlement. The respondent has produced evidence of sale of one of the vacant lots at a reduced price of $152,000, together with its interest entitlement under its agreement with the fourth applicant, legal fees, outgoings and resale costs. After allowing for the 20% of purchase price paid by the fourth applicant, there was a loss of $17,775.

[32] If the respondent was limited to forfeiture of only 10% of the purchase price ($18,000) the applicants would have a prima facie claim for return of the other 10%, being $18,000. However, on the figures produced in respect of the one vacant property that has been resold, the respondent has an equitable set-off of

approximately that amount. The slight credit seemingly due to the applicants on these figures is likely to be absorbed by further interest given that no further sales have yet been settled.

[33] Counsel for the applicants accepted that the respondent would be entitled to damages but argued that as yet there was no evidence of the losses for the properties that were still to be resold. He submitted that the potential loss was still a matter of conjecture, and the appropriate course was for the 10% of purchase price in dispute to be secured either by the caveats or in some other way pending the actual loss being quantified.

[34] I accept that the respondent has an equitable set-off which is likely to equate to or exceed the sum that the applicants are seeking to protect by the caveats. The properties are all in the same subdivision. Valuation evidence produced by the respondent establishes that the sections still to be sold are comparable in value to the one section that has sold. Whilst I accept that there could be some small variance in resale price achieved between the various properties, the valuation evidence suggests that the market price is close to that achieved by the one already sold. In light of current economic conditions, and a property market which is likely to be flat (at best) for a while to come, I accept the evidence provided as a realistic indicator of likely losses on resale. On the basis of that evidence, and the fact that interest is continuing to accrue, I accept that there is no practical advantage to the applicants in the caveats they are seeking.

[35] I also take into account that the respondent has mortgage obligations in respect of these properties. It will be prejudiced by any further caveats. Counsel for the applicants submitted that the caveats need not prevent resales, as the sum in dispute could simply be reserved from the proceeds of sale pending identification of the losses on resale and hence the sum that might ultimately be repayable to the applicant. However, that will not cure all of the prejudice. The respondent will still be having to meet interest payable to its financier on the part of the sale proceeds that cannot be used to repay its loan.

[36] Counsel for the respondent also invited me take into account, in the exercise of my discretion, a failure by the applicants to provide personal information needed to fulfil an arrangement contemplated by the parties to hold the disputed sum in a joint account (the information was needed to meet the Law Society requirements for funds held in trust accounts, and pursuant to the Financial Transactions Reporting Act 1996). I do not consider that to be a relevant factor. I do not accept that there was any need for the applicants to provide this information. It is doubtful that the information would be required under the Financial Transactions Reporting Act (as there is no question as to the source of these funds).

Decision

[37] In all the circumstances, I come to the view that even if the applicants had shown an arguable case for a caveatable interest, the Court should exercise its discretion against allowing second caveats to be lodged. The application is dismissed.

[38] As the successful party, the respondent is entitled to costs of and incidental to the application on a 2B basis together with disbursements as fixed by the Registrar.

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Associate Judge Abbott