IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2008-485-120

	BETWEEN	STEPHEN JAMES THOMAS Applicant
	AND	F.W.T. HOLDINGS LIMITED Respondent

Hearing: 29 June 2009

Appearances: P.S.J. Withnall - Counsel for Applicant
J.W. Tizard - Counsel for Respondent

Judgment: 9 July 2009 at 3.30 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 9 July 2009 at 3.30 p.m. pursuant to r 11.5 of the High Court Rules.

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Introduction

[1] The applicant, applies for an order pursuant to s 145A of the Land Transfer Act 1952 that caveats 7548049.1 and 7611176.1 (both Wellington Registry) he lodged against the land of the respondent should not lapse.

[2] The caveats claim an interest over land described as Lot 3 Deposited Plan 353669 at 134 Mitchell Street, Brooklyn, and against land contained in units 1-4 Deposited Plan 366870 at 42 Hoover Street, Brooklyn. The interest claimed in the caveats is described as that of a "beneficiary under a Constructive Trust held by the Registered Proprietor F.W.T Holdings Limited as Trustee". The respondent is the registered proprietor of the properties in question.

[3] The application is opposed by the respondent on the basis that the applicant does not have a caveatable or any beneficial interest in the respondent's land.

Background Facts

[4] In October 1999, the applicant entered into an arrangement with David Woodhouse and brothers, John Flynn and Brian Flynn to purchase and develop the property in Mitchell Street, Brooklyn. The applicant describes this arrangement as a "Property Partnership" but because the parties to the arrangement were all tradesmen, they were advised by an accountant that, due to tax implications, a company should be formed to acquire the property and undertake the development. That company, the respondent, was incorporated on 7 October 1999. John and Brian Flynn were appointed as its directors and shareholders and they held the 100 $1.00 shares in the capital of the company equally.

[5] The applicant and his business partners each paid $1000 in preliminary expenses for the setting up of the company and also contributed $5000 to the purchase price of the property in Mitchell Street, which was then rented out to service the mortgage. Substantial renovations and maintenance work were carried out to add to the capital value of the Mitchell Street property. In particular, the

applicant claims to be responsible for the renovation of the three flats, there, which included installing new bathrooms and kitchen fittings, relining a ceiling, fitting new windows and removing and replacing floors for plumbing.

[6] The parties to this arrangement later decided to expand the project by first subdividing the Mitchell Street property and then amalgamating the rear section of that property with both the rear section of a neighbouring property and another section in Hoover Street, which was owned by John and Brian Flynn. Ownership of this 970 square metre amalgamation of land ("the Hoover Street property") was transferred to the respondent, and development of the land began. The applicant deposes in his 29 January 2008 affidavit that all the properties in question were to be held by the respondent on trust for the parties "Property Partnership".

[7] It is not disputed that the applicant also made further financial contributions of $12,000 to the respondent as part of this arrangement. In addition, he undertook a number of tasks and responsibilities with respect to the development of the Hoover Street property.

[8] Subsequently, the applicant says he grew increasingly concerned about the progress and quality of work at the Hoover Street property, and thus he decided not to participate in the project any longer and to sell his interest in the arrangement to John Flynn. It was proposed that the applicant would receive a sum of $100,000 in return, but it appears that no payment has been made so far. In the meantime, the respondent has sold two of the six units that were built on the Hoover Street property.

Counsel's Arguments and my Decision

[9] The present application seeking an order that the caveats not lapse is made under s 145A of the Land Transfer Act 1952. It is well accepted, however, that the same principles apply to applications under that section as to applications made pursuant to ss 143 and 145.

[10] The general approach to these applications was settled in *Sims v Lowe* [1988] 1 NZLR 656 at 660 (CA):

> "The caveator seeks to clog or fetter the proprietary interest of another. As a matter of principle it seems right that he must justify the continued existence of his caveat. He will do that if he can show he has a reasonably arguable case for the interest he claims."

[11] The person seeking to sustain the caveat has the burden of establishing a "reasonably arguable case" that it has a caveatable interest in the property in question: *Castle Hill Run Ltd v NZI Finance Ltd* [1985] 2 NZLR 104 at 106 (CA). An order for removal of a 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 no such ground now exists: *Sims v Lowe* at 659-660. The Court therefore ought not finally determine the rights of the parties unless the facts are not in dispute and the law has been fully argued: *New Zealand Limousin Cattle Breeders Society Inc v Robertson* [1984] 1 NZLR 41 (CA).

[12] Although the applicant's interest must be a proprietary interest in land, it is sufficient that it be an equitable interest which gives relief against the land itself*: Wellesley Club Inc v Wellesley Property Holdings Ltd* (2007) 8 NZCPR 421.

[13] It has been held that, once the applicant has met the initial onus, s 145 provides the court with a residual discretion whether to make an order removing the caveat or not, but that this discretion must be exercised cautiously. The Court of Appeal in *Pacific Homes Limited (In Receivership) v Consolidated Joineries Limited* [1996] 2 NZLR 652 (CA) commented on this discretion as follows (at 656):

> "An order will be made for removal only where the Court is completely satisfied that the legitimate interests of the caveator will not thereby be prejudiced. If, on the facts of the case, it can be seen that the caveator can have no reasonable expectation of obtaining benefit from continuance of the caveat in the form of the recovery of money secured over the land or specific performance of an agreement or if the caveator's interests can be reasonably accommodated in some other way, such as by substituting a fund of money under the control of the Court, then it may be appropriate for the caveat to be removed notwithstanding that the right to the claimed interest is undoubted."

[14] The applicant claims that he has a caveatable interest in the land because it is held in trust for him by the respondent, and because he has a beneficial interest in the land arising from substantial works and improvements to the land carried out by him. The two caveats lodged pursuant to s 137 describe the applicant's interests as that of a "beneficiary under a Constructive Trust held by the Registered Proprietor F.W.T Holdings Limited as Trustee".

[15] Section 137(1)(a) of the Land Transfer Act provides:

> "(1) Any person may lodge with the Registrar a caveat [[in the prescribed form]] against dealings in any land or estate or interest under this Act if the person—
>
> (a) claims to be entitled to, or to be beneficially interested in, the land or estate or interest by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied, or otherwise; or
>
> (b) is transferring the land or estate or interest to any other person to be held in trust."

[16] It appears that the applicant's claim for a caveatable interest in the properties is based on constructive trust, resulting trust and on promissory estoppel.

Resulting Trust

[17] The grounds upon which a resulting trust can arise are well settled. In essence, where property is purchased in the name of one party with money provided by another in the character of a purchaser, there is a presumption that the property is held on trust for that other person: *Bateman Television Ltd (in liquidation) v Bateman and Thomas* [1971] NZLR 453. An expressed intention by the settlor to dispose of the beneficial interest is unnecessary because the law presumes an intention to retain the beneficial interest which the settlor has never effectively alienated: *Potter v Potter* [2003] 3 NZLR 145 at [14]. It follows that a person contributing to the purchase price is presumed to retain "an equitable interest in the property conveyed to the extent of his contribution", as long as there is nothing to indicate a contrary intention: *Cossey v Bach* [1992] 3 NZLR 612 at 630.

[18] Insofar as the applicant's claim relates to direct or indirect contributions made after the properties were purchased, it should be based on a constructive rather

than a resulting trust: *Smyth v Wadland* HC AK CIV 2005-404-3459 16 July 2007 at [81]; *Lankow v Rose* [1995] 1 NZLR 277 at 294.

[19] While the parties appear to me to be in agreement about the fundamental legal principles that govern the imposition of a resulting trust, their opinions diverge on whether the applicant here made the financial contributions "in the character of a purchaser". In his affidavit, the applicant refers to a sum of at least $17,000 which he paid in contribution to the purchase price of the Hoover Street and the Mitchell Street properties. He submits that the payments were clearly provided for the purpose of purchasing the properties, and that a resulting trust should therefore be imposed on the respondent as the trustee. The respondent, on the other hand, argues that the applicant is merely an equitable shareholder of the respondent, and that a shareholder has no beneficial interest in property owned by that company even if it is the only asset which the company owns.

[20] I accept that holding shares in a company which owns a property does not in itself create a caveatable interest in that property: *Waiteitei Angora Farm Ltd v Cann* HC AK M 333-89 17 April 1989. A shareholder has neither a legal nor an equitable proprietary interest in the assets of the company. The issue remains, however, whether the applicant's interest here is in fact an interest in the shares of the respondent, or whether the applicant has an interest in the land itself. No clear documentation between the parties exists to assist in resolving this issue.

[21] Before me, the respondent relied on the Court of Appeal decision *Simperingham v Martin* CA 5-95 2 June 1995, and in particular on the following passage from the Court's judgment, as being analogous to the facts of the present case:

> "The Judge held [a caveatable interest] was not established. He referred to and rejected several bases on which it was contended a caveatable interest existed. He did not accept that a resulting trust arose from the use by the company of funds provided by Mr Simperingham in purchasing the property because, on Mr Simperingham's own evidence, he believed that if the development went ahead the company would be the real and beneficial owner of the property and Mr Simperingham would own seventy-five percent of the shares. The Judge considered his evidence supported a claim to a resulting trust only if the venture did not proceed and in June 1987 the agreement to acquire the shares was still on foot."

[22] As in the present case, Mr Simperingham was involved in a business venture to purchase and develop a property. It was Mr Simperingham's role to provide funding for the purchase. A company was founded as part of this venture, and the parties to the venture agreed that Mr Simperingham was to receive 75% of shares in the company in return for payment of a deposit. Mr Simperingham paid the deposit and made further payments in relation to the purchase of the property, but the shares were never transferred. As part of a negligence suit against his solicitors for failing to advise him to lodge a caveat, the plaintiff was required to show that he had a caveatable interest with respect to the property whose purchase he had effectively funded.

[23] However, the Court of Appeal was inclined to agree with the High Court's conclusion that the company's use of the funds did not give rise to a resulting trust. According to Gault J, it was simply unclear whether the plaintiff's payments were made in the character of a purchaser of the land. Some payments were expressly made as a part payment for the purchase of shares and therefore did not give rise to a proprietary interest in the land. And although other payments were applied to the purchase of land and were not expressly recorded as relating to the purchase of shares, Gault J considered there to be a strong inference that they were further payments for the acquisition of shares. In the end, the Court of Appeal was not required to conclusively rule upon this matter, but expressed a strong belief that it was not reasonably arguable that, in the absence of any transfer to Mr Simperingham of shares, the payments that were not expressly made for the shares and were used for the purchase of the land gave rise to a caveatable interest.

[24] The applicant submits, however, that, unlike in *Simperingham v Martin*, his interest here could not be classified as an interest in shares of the respondent. As I have noted, the sole shareholders in the respondent were and are Brian and John Flynn, and the applicant contends there was never an implied or express trust or agreement that he was to receive shares in return for his contributions. While the respondent appears to dispute this and says that it was understood that the applicant was to receive shares "at a later stage", the applicant's evidence is to be accepted as correct for present purposes: *Macrae v Rapana* HC AK M633/94 17 June 1994. And indeed as Robertson J. stated in similar caveat proceedings in *Aegean*

Developments Ltd v Love High Court Auckland, M1620 – IM99, 17 March 2000 at para. [2]:

> "[2] There was no dispute between counsel as to the relevant legal principles. The procedure is a summary one. The Court will not determine disputed questions of fact (*Sims v Lowe* [1988] 1 NZLR 656). I adopt the reasoning of Master Kennedy-Grant in *Dudley v Jacobson* (M5 IM99, Auckland High Court, 23 March 1999) that unless the Court is persuaded that a caveator's evidence is unworthy of credit and is otherwise unable to resolve matters between the parties it ought to sustain the caveat rather than remove it."

[25] Based on the evidence provided in the present case by the applicant, I agree that *Simperingham v Martin* is distinguishable from this case to the extent that there was here no indication that the applicant would receive shares in return for his payments, and that at this point his interest thus cannot be categorised as an interest in shares. Until quite recently the applicant on his evidence was never provided with company accounts or information concerning the respondent company. Mr. Turner, the accountant who set up the respondent company, perhaps surprisingly, provided no evidence to the Court to confirm the company's incorporation arrangements and the respondent's contention that it was its shares which were held in trust for the parties and not the properties. And, as noted by the applicant, it may also be of relevance in this regard that the applicant's contributions were made to the respondent and not to the shareholders, the Flynns, which suggests that the payment did not constitute advance consideration for an interest in the shares. The applicant contributed $5000 to the purchase of the Mitchell Street property, and $12,000 to the purchase of the Hoover Street property. The contribution of $1000 to the respondent for preliminary expenses is not relevant in this context.

[26] I am therefore satisfied that the applicant has established a rebuttable presumption that his financial contributions here gave rise to a resulting trust. Apart from contending that the applicant was merely a beneficial shareholder, the respondent did not provide directed evidence in an attempt to rebut this presumption. No evidence was put before me to suggest that the applicant's intention was that he would not have an equitable interest in the properties despite his financial contributions to their purchase prices. No argument was raised, for example, that the purpose of the arrangement was simply that the applicant would share in the profits from the development of the land instead of obtaining a proprietary interest in the

properties. For the purposes of the present caveat application, in my view the applicant has done enough to show a reasonably arguable case to support his claim that a resulting trust exists here and his present application therefore must succeed.

Constructive Trust

[27] In light of this conclusion that the properties were arguably held on a resulting trust, it is not strictly necessary for me to also consider the non-financial contributions that the applicant has effected to the properties and to determine whether these contributions, and the circumstances of the parties' arrangement, can give rise to a constructive trust. For the sake of completeness, however and in case I may be wrong on the earlier resulting trust aspect, I will now deal briefly with this argument.

[28] To succeed in a constructive trust claim, the claimant must establish that it would be unconscionable for the respondent to assert an exclusive beneficial interest in the properties because the respondent's conscience requires the recognition of the applicant's beneficial claim: *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180 at 193 (CA).

[29] There is clearly an overlap between claims that are based on resulting trusts and constructive trusts respectively. To the extent that I have already concluded that there is a reasonably arguable case for a resulting trust here, it would come as no surprise if the wider circumstances of the present case also warranted the imposition of a constructive trust. There is of course no need to impose a constructive trust if a resulting trust is made out. It is therefore more helpful to approach the claims in the alternative, and to proceed with this analysis on the hypothetical assumption that the financial contributions did not give rise to an arguable resulting trust. I will proceed to consider this aspect on that basis.

[30] The applicant submits that the understandings surrounding formation of the respondent company were simply that it provided a means to hold the land on behalf of all four business partners, and he says that he carried out substantial work on both properties in reliance on these understandings. Although not specifically addressed

by either party in this manner, the underlying issue with respect to this claim appears to be whether, by virtue of the parties' arrangement and the applicant's involvement in the development, the applicant now has an interest in the properties themselves, or whether his interest is limited to the proceeds of the development. The nature of the arrangement is therefore significant.

[31] In *Aegean Developments Ltd v Love*, the caveator made no financial contribution to the purchase of the land. Instead he alleged that the landowner held the land as trustee under a constructive trust because there was an agreement between the parties that he would have an interest in the land and the development. The caveator was involved in funding arrangements and other business activities in connection with the development. The Court concluded that, even if there was a partnership, this would not necessarily give the caveator an interest in the land. There was no term in the agreement that the land would become part of the partnership, and:

> "[t]he fact that partnership profits are made out of property belonging to one partner does not change that property to joint property." (at 6)

[32] Moreover, in *Aegean Developments Ltd* Roberston J concluded that any beneficial interest in partnership assets would not have been caveatable because the caveator's share in the partnership gave rise to an interest in the proceeds of sale, but not to an interest in specific assets themselves.

[33] Based on *Aegean Developments Ltd v Love*, the applicant would have to show here that there was an arrangement akin to a partnership, or even a fiduciary relationship, and that his share in the arrangement gave rise to an interest in the properties themselves. Considering the history and purpose of the respondent company, the first point may not be difficult to satisfy in the circumstances. The latter point, however, has been the subject of contention in a number of cases.

[34] In *Watson v Arted Ltd* HC AK CIV 2005-404-1895 19 July 2005, the applicants entered into a business venture to purchase and develop a property. As in the present case, the property was to be purchased in the name of the respondent, which was a company that had been created for the purposes of this particular

venture. After receiving $5000 from the applicants, the other parties to this venture decided that they wished to proceed with the development alone and returned the payment. The applicants subsequently lodged a caveat over the property, claiming that there was an express trust that the property would be acquired in the name of the respondent on behalf of both the applicants and the respondent.

[35] Venning J was satisfied that the applicants had a reasonably arguable case for the interest claimed and concluded that there was a declaratory trust based on the payment of half the deposit by the applicants. Alternatively, however, Venning J was prepared to impose a constructive trust on the basis of fiduciary duty, relying on the parties' negotiations that envisioned the land being purchased in the name of the respondent company and being held by that company for the applicants and their business partners jointly. He distinguished *Aegean Developments* on the basis that, in that case, there was no evidence of a clear and unequivocal representation that the applicant would own part of the land.

[36] A similar issue arose in *Laing Property Developers Limited v Sanders* HC CHCH CIV-2006-409-824 22 June 2006, where the Court was asked to determine whether the nature of the relationship between the parties was such as to grant an interest in land, or whether it was no more than a joint venture arrangement whereby each party was to share in the profits from the development of the land. The caveator argued that the joint venture gave rise to a constructive trust because the applicant breached its fiduciary and equitable duties, thereby entitling the caveator to proprietary relief. Before embarking on an examination of the caveator's claimed interest, Christiansen AJ clarified that, because the joint venture was the development and on-sale of the land, the caveator was required to point to an agreement whereby she was to become entitled to an interest in the land itself as opposed to the profit from its development. While the caveator clearly had an interest in the development of the land, she was not able to provide evidence of such an agreement.

[37] Based on the evidence before me, and discounting the considerations that have led me to find that there is a resulting trust, one view is that it is doubtful whether there was a "clear and unequivocal" representation that the applicant would

own part of the land. There is no clear evidence to suggest that the applicant and his business partners negotiated and concluded that the properties were to be held by the respondent for the applicant and the other parties jointly.

[38] The second view on the other hand is that, unlike the situation in *Laing v Sanders*, the purpose of the arrangement here was the purchase as well as the development of the land, and this indicates that the applicant may have an interest in the properties and in the proceeds of the development. Moreover, the respondent was set up for the sole purpose of acquiring and developing the properties to thereby avoid unfavourable tax implications, and the rental income from the Mitchell Street property was used to service the respondent's mortgage. In this context, the applicant's work on the properties combined with his financial contributions to the company, whether they were used to fund the purchase of the properties or not, would suggest that the applicant could have reasonably expected to own part of the properties.

[39] These are conflicting considerations, and due to this, I would have been inclined to conclude that the applicant by a small margin had done enough here to show he had a reasonably arguable claim based on constructive trust, had I been required to decide this issue. And, because the elements of modern equitable estoppel are essentially the same as those which need to be considered when determining whether to impose a constructive trust, I do not think that the applicant's estoppel argument adds anything to the constructive trust argument: see *Gillies v Keogh* [1989] 2 NZLR 327; *Smyth v Wadland* at [131].

Residual Discretion

[40] I turn now to consider a final issue raised in this matter. This relates to the residual discretion the Court has to allow a caveat to lapse, even if the Court accepts, as I do here, that the applicant has a reasonably arguable case for the interest claimed.

[41] As I have noted above, to exercise this residual discretion and make an order for removal of a caveat, the Court is required to be completely satisfied that the

legitimate interests of the caveator will not thereby be prejudiced – *Pacific Homes Ltd (in receivership) v Consolidated Joinery Limited*. The discretion is also always to be exercised on a cautious basis – *Stewart v Kaipara Consultants Limited* [2003] NZLR 55 (CA) and *Pacific Homes*.

[42] In considering aspects of prejudice, at this point there is no suggestion made by the respondent that the presence of the caveats is preventing any sales, pressing needs to refinance or other dealings with the properties in question in the mean time. As David Woodhouse notes in his 8 February 2008 affidavit, plans for the development of the remaining four units on the land in question are currently only just before the Council for approval. Given this, I do not see that the respondent would suffer undue prejudice if the caveats are to remain in place. If any prejudice is to be caused here, in my view it would be to the position of the applicant by ordering removal of the caveats and the present protection they provide to his claims. That said, I am not satisfied that in this case it would be appropriate to exercise the discretion to remove the caveats at this time.

Result

[43] The application before me therefore succeeds. The interim order made by this Court on 12 February 2008 that caveats 7548049.1 and 7611176.1 shall not lapse pending further order of the Court is confirmed. The caveats are to remain.

[44] It is clear the Court in exercising its jurisdiction under s145A Land Transfer Act 1952 has power to make orders on conditions – *BP Oil New Zealand Limited v Van Beers Motoers Limited* [1992] 1 NZLR 211, 218, Hinde McMorland & Sim *"Land Law in New Zealand"* 10.020(g).

[45] The order noted at [43] above is made on the condition that the applicant is to issue proceedings by 9 August 2009 to have the substantive issues between him and the respondent determined. The applicant is to diligently pursue those proceedings.

[46] If this condition is not satisfied, the way is open to the respondent to apply to this Court on notice for a discharge of this order.

[47] As to costs, the applicant has been successful in his application and, in my view, is entitled to an order for costs in the normal way. Costs are therefore awarded against the respondent with respect to this application calculated on a 2B basis, together with disbursements if any as approved by the Registrar.

‘Associate Judge D.I. Gendall’