

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

CIV 2009-404-003926

IN THE MATTER OF s 143 of the Land Transfer Act 1952

BETWEEN QIHUA MIAO
Applicant

AND UNIFIN INTERNATIONAL FINANCE
GROUP LIMITED (STRUCK OFF)
Respondent

Hearing: 10 July 2009

Appearances: D L C Liu for the Applicant
No appearance for the Respondent

Judgment: 15 July 2009 at 3:00pm

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
on 15 July 2009 at 3.00pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:

Yu Lawyers, DX CP 37 511, Balmoral, Auckland
Meredith Connell, P O Box 2213, Auckland

[1] On 30 June 2009 the applicant, Mr Miao filed an originating application seeking the removal of a caveat – registration number 6847250.1. The caveat was registered on 3 May 2006 against Certificate of Title NA19B/631 (North Auckland Land Registry). In the notice of originating application it was asserted that Mr Miao is the registered proprietor of the land, and that the respondent, Unifin International Finance Group Limited (“Unifin”) does not have a caveatable interest in the land.

[2] At the same time an application for abridgement of time was filed. Mr Miao is seeking to urgently secure a mortgage against the land in favour of his solicitors. Mr Miao is a party to other proceedings in this Court. Those proceedings are set down for a 12 day hearing due to commence on 20 July 2009, and the solicitors have apparently required security for anticipated legal fees to be incurred in those proceedings.

[3] The property subject to the caveat is also affected by an assets preservation order made in those other proceedings. Mr Miao has sought leave to make application to vary that order and this application, along with the application to vary the assets preservation order, were called before me on 6 July 2009. Both parties were seeking an urgent hearing given the pending trial. I therefore heard these applications together with the present application on the afternoon of Friday 10 July 2009. I have considered the matter over the weekend and my judgment now follows.

The caveat

[4] The caveat was exhibited through an affidavit filed by Mr Miao. It recorded that the caveator was Unifin (which company was then in liquidation). Its address for service was noted as being care of Jollands Callander, a firm of accountants, with offices in central Auckland. The estate claimed, and the grounds of which the caveat was lodged, were stated as follows:

By virtue of a beneficial interest in the land described herein as a beneficiary under an implied or resulting trust whereby one of the registered proprietors, namely Qihua Miao, is the trustee and a registered proprietor of the land described herein.

[5] Mr Miao denies any claim Unifin may have in regard to the land. He asserts his only relationship with Unifin was that he was a 6% shareholder in the company, and that he was employed by it as a marketing manager/chief financial analyst between August 2004 and November 2005.

Factual background

[6] The background can be stated reasonably short.

[7] In February 1997 Mr Miao purchased the property which is subject to the caveat. He borrowed monies to enable him to complete the purchase.

[8] In January 2003, Unifin was incorporated. Mr Miao commenced working for the company in August 2004. By that time he had already paid off the mortgage secured against the property.

[9] In February 2006, Unifin was placed in liquidation. Joint liquidators were appointed. They were a Mr P R Jollands and a Ms C J Jollands, both of Jollands Callander.

[10] The caveat was lodged by the liquidators on 3 May 2006.

[11] By July 2007 the liquidation had been completed. Mr and Ms Jollands filed a final liquidators' report. That report recorded that there was some 22 unsecured creditors with claims totalling \$813,490. Total funds received by the liquidators came to some \$56,069.40. They were in very large part used to meet the costs of the liquidation. Distribution to creditors amounted to only \$2,610.

[12] Unifin was struck off the register of companies on 25 August 2007 and Mr and Ms Jollands then ceased to be joint liquidators of the company.

Analysis

[13] Mr Miao's application is made under s 143 of the Land Transfer Act 1952.

[14] Mr Liu, appearing for Mr Miao, submits that if an application is made under that section, then the onus rests on the caveator to establish a reasonably arguable case – *Sims v Lowe* [1988] 1 NZLR 656. He argues that the proceedings were served on Unifin by post, and he refers to an affidavit which has been filed in that regard. He notes that one of the former liquidators – Mr Jollands – has filed a notice of opposition and an affidavit in support, but that no ground has been advanced by Mr Jollands to support any caveatable interest that Unifin may have had to sustain the caveat. On this basis he submits that the caveat ought to be removed because Unifin has failed to establish an arguable case. In the alternative, he asks the Court to exercise its residual discretion to remove the caveat, and in that regard he relies upon the decision of the Court of Appeal in *Pacific Homes Ltd (in receivership) v Consolidated Joineries Ltd* [1996] 2 NZLR 652.

[15] In my view there are fundamental difficulties in Mr Miao's way.

[16] Unifin, while registered, was a separate legal entity in its own right. As a legal entity, it continued in existence until it was removed from the Companies register – see s 15 of the Companies Act 1993.

[17] Once it was removed from the register in August 2007, it ceased to exist. I refer to the decision of the Hammond J in *Re Saxpack Foods Limited* [1994] 1 NZLR 605 at p 608. His Honour there noted as follows:

Individuals die. There is a significant ongoing debate as to whether they can be resurrected. If the answer is in the affirmative, it is by an Agency or Person with significantly greater powers than those of this Court. Companies are different. Notwithstanding that they have separate corporate personality, they can be struck off. This is effectively the death of the company. But because their creation was an act of law, they can be brought back to life again ...

[18] Here Mr Miao's originating application named Unifin as respondent. No application however has been made to restore Unifin to the register. As the situation currently stands, Unifin does not exist, and no legal proceedings can be brought against it. I refer to *Deutsche Bank und Disconto Gesellschaft v Banque des Marchands de Moscou* (1931) 158 LT 364 at 367. Proceedings brought against a company that has ceased to exist ought to be struck out.

[19] Mr Liu relies on an oral judgment given by Morris J in *Subway Properties Limited v Freeth & Resplendent Services No. 124 Limited* HC AK M1015-IM-02, 13 September 2002. In that case the plaintiff, Subway Properties Limited, was the registered proprietor of a block of land against which two caveats had been lodged. It had contracted to sell the land. One caveat had been lodged by the first defendant, Mr Freeth, and the other by Resplendent Services No. 124 Limited. Mr Freeth had been adjudicated bankrupt. Both the Official Assignee for Mr Freeth and Resplendent opposed the making of the orders. His Honour was hearing the application urgently, because the day for settlement had passed, but had been extended to the day of the hearing to enable the Court to rule on the matter. The price negotiated by Subway for the sale of the land was apparently a good one. His Honour was satisfied that the price was not unreasonable, and as high as could be expected on the then market. Subway undertook that if the caveats were removed, and the sale went through, it would place the net proceeds of sale in trust pending finalisation of the disputes between the parties as to their respective entitlements. That course was supported by the Official Assignee on behalf of Mr Freeth, but opposed by Resplendent. Mr Freeth had been a director of Resplendent, but Resplendent had been struck off the register for failure to file returns. It had applied to be restored. His Honour refer to the *dictum* from Hammond J noted above, and held that there were really only two parties before the Court, namely Subway and the Official Assignee on behalf of Mr Freeth. They were in agreement with the course that should be followed, and His Honour noted that in any event, it was a course which seemed to him to be the appropriate one. He therefore ordered that the caveats be removed on the undertakings of Subway and its solicitors to pay to the Registrar of the High Court the net proceeds of the sale. The money was to be held by the Registrar pending finalisation of the competing claims or further order of the Court.

[20] It is readily apparent from the report of the case recording the facts before the Court that the course taken was appropriate. It was a pragmatic response to a difficult situation. The present case however is in my view very different. Here Unifin is the sole respondent. It has been struck off. The present proceedings have been commenced against a party that does not exist. In *Subway*, one of the defendants was a natural person, represented by the Official Assignee, who was

capable of being served and who had been served. That defendant was a director of the company which had been struck off. Moreover the applicant undertook that the net proceeds of sale would be placed in trust so any disputes could be sorted out. None of this applies in this case. For myself, I prefer to follow Hammond J's *dictum* in *Re Saxpack*, and the approach taken by the English Court of Appeal in *Deutsche Bank und Disconto Gesellschaft*.

[21] There is a further difficulty facing Mr Miao. Section 143(2) requires that the Court be given proof that notice of the application has been served on the caveator, or the person on whose behalf the caveat has been lodged.

[22] Here Unifin, as the caveator, no longer exists. The joint liquidators have ceased to hold office. Unifin has no representative. Proof cannot be advanced by Mr Miao that Unifin, on whose behalf the caveat was lodged, has been served. The Court therefore has no jurisdiction under s 143 to remove the caveat. Nor can the onus pass to Unifin to establish an arguable case for the caveat, as no service has been effected.

[23] Mr Liu did refer me to what was s 139 of the Land Transfer Act. That section has been repealed, and it has not been replaced with any equivalent provision.

[24] In my view, these proceedings should be struck out, and I so direct.

[25] If Mr Miao wishes to advance matters, then he will have to apply to reinstate Unifin to the companies register. Application can be made under s 329 of the Companies Act 1993. *Inter alia* it can be made by any person with the leave of the Court. If such application is made, and the company is reinstated, then it will be open to Mr Miao to file his proceedings afresh.

[26] For the sake of completeness, I refer to the Court's residual discretion. That discretion has to be exercised cautiously, and a Court should make an order for the removal of a caveat in the exercise of its residual discretion only where the Court can

be completely satisfied that the legitimate interests of the caveator will not thereby be prejudiced – see *Pacific Homes Limited* at p 656.

[27] Here I note that Unifin was struck off the companies register almost two years ago. It owed substantial amounts of money at the time, and from the papers before me it is clear that its creditors have not been paid. Mr Miao now comes before the Court on an urgent basis, seeking to discharge the caveat, so that he can secure the property in favour of his new solicitors to meet anticipated Court costs in litigation due to commence in a week's time. I cannot, on the limited facts before me, be satisfied that Unifin (in the event it is reinstated), and its creditors, have no reasonable expectation of obtaining a benefit from the continuation of the caveat.

[28] In my view this is not a suitable case for the Court to exercise its residual discretion.

[29] The application is struck out.

Wylie J