

#58

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

CIV 2008-404-005972

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

AND

IN THE MATTER OF Caveat No 7890986.1 (North Auckland Registry)

BETWEEN AKV2 LIMITED
Applicant

AND AUCKLAND CONCRETE HOMES LIMITED
Respondent

Hearing: 17 October 2008

Appearances: D Smyth for applicant
L Herzog for respondent

Judgment: 24 October 2008 at 4:00pm

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

*This judgment was delivered by me on 24 October 2008 at 4:00pm,
pursuant to Rule 540(4) of the High Court Rules.*

Registrar/Deputy Registrar

Solicitors:
Harris Tate, PO Box 1147, Tauranga 3015

Counsel:
D Smyth, PO Box 105270, Auckland 1001
L Herzog, PO Box 1001, Auckland 1001

[1] The applicant (AKV2) has applied for an order removing a caveat lodged by the respondent (ACH) over AKV2's land at 6B Kingsview Road, Mt Eden.

[2] ACH has not filed any opposition to the application. Its counsel says that it had not intended doing so on the understanding that there would be no order as to costs.

[3] At the commencement of the hearing counsel for AKV2 sought both an order removing the caveat and costs on a 2B basis. Counsel for the respondent initially sought an opportunity to file evidence on the point but subsequently sought adjournment of the hearing and leave to file opposition to the substantive application.

[4] I reserved my decision on the adjournment, and hence on the respondents applications for removal of the caveat and costs.

Background

[5] AKV2 currently owns three lots in a five lot subdivision of land at 6 Kingsview Road, Mt Eden. It was incorporated specifically to construct houses on that land.

[6] On or about 20 August 2007 AKV2 entered into a written contract (the contract) under which ACH agreed to build a house on Lot 1 (6B Kingsview Road). The contract incorporated terms set out in an earlier letter of offer made in October 2006 by ACH to AKV2's director, Mr Younan.

[7] The contract provided for staged payments, with the final payment due on issue of a code compliance certificate. The contract provided for liquidated damages on a daily basis for late completion. The October 2006 offer letter stipulated that completion was to be no more than 30 weeks from the start date.

[8] The code compliance certificate for Lot 1 was issued on 24 June 2008. The same day ACH issued an invoice for its final contract payment for the sum of \$28,085 (GST inclusive). The following day AKV2 issued to ACH a payment schedule pursuant to s 21 of the Construction Contracts Act claiming that no funds were due (having regard to various credits and a claim for liquidated damages).

[9] The contract made provision for ACH to demand a mortgage to secure money due under it, and to register a caveat against the land in circumstances where ACH was entitled to demand a mortgage.

[10] On 1 July 2008 ACH gave written notice to AKV2 that it intended to place a caveat over 6B Kingsview on the basis that the final payment was due and payable. It also gave notice that it was referring the non-payment of the account and other issues to arbitration. On 25 July 2008 ACH lodged a caveat against the title to 6B Kingsview, relying on the agreement to mortgage in the contract.

[11] On 26 August 2008 counsel for AKV2 wrote to ACH contending that there was no payment due to support the caveat, by reason of AKV2's payment schedule. He advised that AKV2 was prepared to lodge the sum sought under the final payment certificate into an interest bearing account pending resolution of the dispute. He invited ACH to withdraw its caveat on that basis and gave it notice that AKV2 would apply ex parte for removal of the caveat and for solicitor/client costs if ACH did not withdraw the caveat.

[12] ACH did not withdraw the caveat. On 11 September 2008 AKV2 filed its application to remove the caveat together with a written undertaking to the Court from AKV2's solicitors to hold the sum of \$28,085 in its trust account on an interest bearing deposit pending resolution of the dispute or order of the Court.

[13] The application was made ex parte. The Court directed that it proceed on notice. It was called in the caveat list on 29 September 2008. Counsel appeared for ACH at that hearing. Orders were made that ACH file any opposition to the application by 3 October 2008 and that the application be heard on a defended basis on 17 October 2008 (with prior exchange of synopses of argument).

Application for adjournment

[14] Counsel for both parties advised the Court prior to the hearing that the application would not be proceeding on a defended basis. The case officer contacted both counsel by email on 10 October 2008 after advice from counsel for ACH that fixture time was not required and asked counsel to provide a memorandum as to the status of the fixture, including any need for a short mention for orders to be made or to deal with costs. No memorandum was filed, but counsel for the applicant responded orally, informing the case officer that a hearing would still be needed, even if only for a short time given that there was no opposition. On that basis the hearing was brought forward to 12:45pm that day.

[15] At the hearing counsel for AKV2 sought orders for discharge of the caveat, and for costs on a 2B basis. Counsel for ACH initially did not oppose an order discharging the caveat on the basis of the undertaking provided, but sought an opportunity to file evidence and make submissions on costs. When pressed on his failure to do so by the time of the hearing, counsel altered his position and sought an adjournment of the application and extension of time to file opposition on the ground that he had been misled into believing that the applicant would not be seeking costs.

[16] As I had a funeral to attend, I reserved my decision after hearing from counsel.

[17] Having reflected on the submissions I am not prepared to extend time for filing of notice of opposition, for the following reasons:

- a) ACH was represented by counsel when I directed that notice of opposition (and affidavits in support) be filed by 3 October 2008;
- b) Counsel for ACH informed me at the hearing that he had informed counsel for AKV2 within 3 days of the first call that ACH would not be opposing the application given the undertaking that had been provided;

- c) Although counsel for ACH contended that it was his understanding that AKV2 would not seek costs, he did not record in writing that understanding, or the basis for it, as a condition of ACH not filing notice of opposition;
- d) Counsel for ACH sought to justify the lack of steps taken on the basis that counsel for AKV2 was to prepare a memorandum, but did not do so.
- e) The decision not to oppose the application was an appropriate one given the undertaking and the decision of the Court of Appeal in *Stewart v Kaipara Consultants Limited* CA [2000] 3 NZLR 55.
- f) Counsel's initial advice to the Court, the lack of any request for extension of time ahead of the hearing, and the initial stance of counsel for ACH at the hearing indicated that what is really at issue is a dispute over costs rather than any genuine and considered basis for maintaining opposition to the substantive application.

[18] The application for extension of time, and for adjournment of the substantive application, are declined.

The application for removal

[19] The Court must be satisfied that there is a proper basis for the application to remove the caveat notwithstanding the lack of opposition.

[20] There does appear to be merit in AKV2's contention that ACH can only caveat the property in respect of a sum due, and there is no sum due because of the issue of the payment schedule. However, it is not appropriate that I should determine that issue on this application.

[21] Counsel for AKV2 put the case for removal instead on the grounds that ACH's caveatable interest was a pecuniary one only, and that was fully and appropriately protected by the undertaking given by AKV2's solicitor.

[22] This is the very position that was before the Court of Appeal in *Stewart v Kaipara Consultants Limited*. The following passage from the judgment in that case is apposite:

[27] The grant of a specific remedy to a person claiming an interest in land lies in the discretion of the Court. It is a discretion to be exercised in accordance with settled principles. But where the particular piece of land does not have attributes giving it a personal value to the claimant, unable easily to be measured and substituted in economic terms, then the Court in balancing the interest of the defendant and other affected parties (especially those who have entered into independent commitments which will be affected by the delay in establishing the claim) will properly lean in favour of freeing the title from the claim if a fund can be created which suffices to protect the claimant's legitimate interest. This interest is to be measured by the valuation evidence rather than mere speculation about possible advantages to be gained by leaving a caveat in place.

[23] I am satisfied that ACH's legitimate interests will not be prejudiced by removal of the caveat, given the undertaking.

Costs

[24] AKV2 seeks costs on the basis that the application has been successful in removing the caveat. Counsel for ACH argued that costs should not be awarded as ACH had not opposed the application. He sought the opportunity to file evidence to explain why ACH did not withdraw the caveat when invited to do so by counsel for AKV2. He also argued that counsel for AKV2 should not be entitled to rely on his own letter of 26 August 2008 in support of his claim for costs. I see no substance to that objection where the letter is being relied on merely to support the fact of an indisputable open offer to lodge money in an interest bearing account as a basis for seeking withdrawal of the caveat.

[25] AKV2 seeks costs on a scale 2B basis only, not the solicitor/client costs foreshadowed in the letter of 26 August 2008.

[26] There is no evidence before me that ACH was given notice that funds had in fact been lodged into the solicitors' trust account and the undertaking been given prior to filing of the application. Had that been the case, I would have considered that a sufficient basis for awarding costs on the application on the grounds that the prima facie basis for lodging the caveat fell away with that undertaking, and the costs of the application could thereby have been avoided. I do not consider that I would be helped by any further evidence as to the other disputes between the parties.

[27] As there is no evidence that this occurred I consider that the appropriate course is to reserve costs pending the outcome of the arbitration over the disputed final contract claim. If it turns out that there was no sum in fact payable, ACH would have had no basis for lodging the caveat. I would then be able to take into account both that and any further evidence in relation to securing the fund in determining the costs of this application.

Decision

[28] I make the following orders:

- a) Caveat No. 7890986.1 registered against the land comprised in identifier 27586 (North Auckland Registry) is to be removed, having regard to the undertaking provided by the solicitors for the applicant (Harris Tate) to the Court that that firm will hold the sum of \$28,085 in its trust account in the joint names of AKV2 Ltd and Auckland Concrete Homes Ltd on interest bearing deposit pending resolution of the dispute between those parties, mutual agreement of the parties, or order of the High Court at Auckland.

- b) Costs of this application are reserved pending determination of the dispute between the parties over the respondent's final contract claim of 24 June 2008. I grant leave for either party to bring the issue of costs back before the Court on 7 days notice.

Associate Judge Abbott