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

CIV-2009-404-007159

UNDER Section 145A of the Land Transfer Act
1952

BETWEEN CLAVERDON DEVELOPMENTS LTD
Applicant

AND HOUSING NEW ZEALAND LTD
Respondent

Hearing: 18 February 2009

Appearances: P F Chambers for Applicant
A Ho for Respondent

Judgment: 19 February 2010 at 4:00 pm

JUDGMENT OF ASSOCIATE JUDGE BELL

*This judgment was delivered by me on 19 February 2010 at 4:00 pm
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date:

Solicitors/Counsel:

James D Thompson, PO Box 33197, Auckland
Gilbert Walker, PO Box 1595, Shortland Street, Auckland

P F Chambers, PO Box 41351, Auckland

[1] Claverdon Developments Limited is a west Auckland developer. It has lodged a caveat against the title to land at Claverdon Drive, Royal Heights, Massey, where it has a development project. The site is Lot 8 DP 195654 with an area of 2.4231 hectares, identifier NA124B/840. The caveat 8301195.1 describes the estate or interest claimed:

Interest claimed in reliance upon the provisions of a conditional agreement for sale and purchase dated 21 November 2005 which provides for Claverdon Developments Ltd as vendor to transfer title to the property to the purchaser, Housing New Zealand Ltd, whilst including future obligations by the vendor to deal with the title to the property to satisfy the outstanding conditions of the agreement for sale and purchase.

[2] The registered proprietor is Housing New Zealand Limited. At its request, on 19 October 2009, the Land Transfer Office gave notice under s 145A Land Transfer Act 1052. Claverdon filed its application under s 145A to sustain the caveat on 3 November 2009. The Court made an interim order that the caveat not lapse pending further order of the Court on 19 November 2009.

[3] Originally, Claverdon owned the land. On 21 November 2005 it signed an agreement with HNZ for the development of the site. The agreement provided for Claverdon to obtain subdivision consent and any other resource consents to build a number of houses and convey title to each lot in the subdivision to HNZ, upon issue of a new certificate of title for each residential lot, the issue of a certificate of practical completion for each house, and the issue of a code of compliance certificate and similar requirements. Claverdon received payment on transfer of each lot with the completed house built on it. The total contract price was \$12,750,000 including GST.

[4] On 2 December 2005 the parties entered into an amendment agreement. The main changes in the amendment agreement were to the times of transfer of title and of payments. The first payment to Claverdon was \$2,565,513, on the transfer of the land to HNZ. There were further progress payments totalling \$2,594,484, and a final payment of \$7,590,003 payable on the "Residents Settlement Date", a date when a number of requirements had been satisfied. While the amendment agreement did not say this expressly, with HNZ taking title early, Claverdon remained responsible for completing the subdivision into residential lots.

[5] Claverdon then transferred the land to HNZ.

[6] Claverdon also put in evidence an undated agreement for sale and purchase in the ADLS form between Claverdon as vendor and HNZ as purchaser. It provides for the sale of all the land in identifier NA124B/840 in one lot. Both parties have signed it, but it does not give a purchase price and does not give a settlement date. There is a special clause 14:

This contract is conditional upon Housing New Zealand Limited allowing the Vendor and Contractor possession of the land to complete houses as per Agreement with Housing New Zealand Limited relating to title NA 124B/940 Lot 8 Deposited Plan 195654 Area 2.4231 hectares more or less.

[7] I accept the submission of Mr Chambers, counsel for Claverdon, that any gaps in this agreement can be filled in by referring to the other agreements. Apart from clause 14 there are no provisions in any agreement put in evidence reserving any property rights to Claverdon after the transfer of title to HNZ.

[8] Differences have arisen between the parties. Claverdon issued a payment claim under the Construction Contracts Act 2002 for the sum of \$219,161.25. This is for alleged variation costs in making single storey dwellings into two storey dwellings on seven named lots. No payment schedule from HNZ was put in evidence, but HNZ says that it disputes the amount claimed. HNZ issued a notice of default against Claverdon and followed it with a notice cancelling the contract. Mr Chambers advised that his client would pursue adjudication under the Construction Contracts Act. I am not required to decide substantive issues arising out of the payment claim, the notice of default or HNZ's cancellation notice.

[9] Mr Chambers correctly submitted that the principles followed on these applications are:

- i) The burden of establishing that the applicant has a reasonably arguable case for the interest claimed is upon the caveator;
- ii) The caveator must show an entitlement to or beneficial interest in the estate referred to in the caveat, by virtue of an

unregistered agreement of an instrument or transmission or of any trust expressed or implied: s 137 Land Transfer Act;

- iii) 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;
- iv) 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; and
- v) The Court has jurisdiction to impose conditions when making orders.

To that I would add that the Court requires that the caveat must state the nature of the estate or interest claimed with sufficient certainty under s 137(2)(b) of the Land Transfer Act.

[10] On this point I do not regard the caveat in this case as satisfying that requirement. It does not say what interest Claverdon is claiming by way of an estate in freehold, or a lease, or a mortgage, or an easement, and so on.

[11] In Mr Chambers' submission the interest his client was claiming arose in these ways:

- a) to protect Claverdon's rights as builder to carry out works on the land, especially to protect against cancellation under the contract or under s 225 of the Resource Management Act 1991;
- b) to protect Claverdon's rights as an unpaid builder; and

- c) to protect Claverdon's rights as consent holder under the Resource Management Act .

[12] None of these give Claverdon a caveatable interest. Under the agreements, HNZ took equitable title and under the transfer, legal title to the land. Apart from the possession provision in special condition 14 of the agreement for sale and purchase, the agreements did not reserve any interest in the land for Claverdon. If the parties had intended that Claverdon should retain some ownership interest in the land after the transfer to HNZ they had to provide for it expressly in the agreements.

[13] As the judgment of Mahon J in *Mayfield Holdings Ltd v Moana Reef Ltd* [1973] 1 NZLR 309 shows, a standard building contract, involving the supply of services and materials on the land of another, gives a builder a licence to go onto the land to carry out contract works, but that licence is not irrevocable and is not coupled with an interest in land. If the employer wrongly brings the contract to an end the builder's remedy is in damages. So a standard building contract does not give rise to a registerable interest in the land. Insofar as Claverdon's claim relates to the building contract aspects of this project, it did not have a caveatable interest. Any termination of the contract by HNZ, be it under the contract or under s 225 of the Resource Management Act, gives Claverdon only a monetary remedy.

[14] Claverdon claims that HNZ owes it money under its contract, but at best it is an unsecured creditor, and that does not give it a caveatable interest.

[15] In this case, Claverdon also had the job of carrying out the subdivision into residential lots. A resource consent is not real property (s 122 of the Resource Management Act). A land use consent and a subdivision consent attach to the land and may be enjoyed by the owner of the land for the time being (s 134 of the Resource Management Act). So when HNZ became owner, it was the one entitled to exercise the subdivision consent. At that stage Claverdon was HNZ's contractor for carrying out the subdivision, but work to complete the subdivision did not give Claverdon an interest in the land any more than its building work. When it lodged its caveat, it was no longer the consent holder.

[16] Accordingly I find that Claverdon does not have a caveatable interest in the land. I order:

- a) Claverdon's application for an order that caveat 8301195.1 do not lapse is dismissed;
- b) Caveat 8301195.1 shall be removed from the title; and
- c) Claverdon shall pay HNZ costs of \$4,040, including disbursements.

R M Bell
Associate Judge