

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-005417

BETWEEN THREE CHICKS LIMITED
 Applicant

AND NZ BUILDING AND PROJECTS
 LIMITED
 Respondent

Hearing: 15 September 2011

Appearances: S A Grant and E A James for Applicant
 G Bogiatto for Respondent

Judgment: 30 September 2011

JUDGMENT OF ASSOCIATE JUDGE MATTHEWS

*This judgment was delivered by me at 2.00 pm on 30 September 2011
pursuant to Rule 11.5 of the High Court Rules*

Registrar/Deputy Registrar

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[1] The applicant is the registered proprietor of a property in Browns Bay, Auckland. On 14 June 2010 it entered a contract with a building company to erect on the property a residential dwelling. In November 2010 the building company assigned the contract to the respondent. The respondent continued with the building and by June 2011 construction was at an advanced stage, though there is a dispute between the parties about whether all work under the building contract has been completed, and whether some work has been satisfactorily undertaken. The respondent maintains that there is a sum of money still owing under the building contract; conversely the applicant maintains that it is owed monies by the respondent which exceed any residual sum owing under the contract, because it has expended monies repairing what it believes to be faulty workmanship and completing some works which were specified under the contract but remained incomplete by June. It was common ground that in June the respondent left the site and has not returned.

[2] On 7 August 2011 the applicant entered an agreement to sell the property to a third party. On 26 August the respondent lodged a caveat against the title claiming an estate or interest in the land in the following terms:

A beneficial interest in the land arising from a constructive trust and/or resulting trust in which the registered proprietor Three Chicks Limited is the trustee and the caveator NZ Building and Projects Limited is the beneficiary.

[3] This application for an order removing the caveat from the title was filed on 2 September 2011. It was heard on an urgent basis but after due time for the applicant and the respondent to file and serve affidavits pursuant to timetabling directions.

[4] It is convenient to refer first to the argument presented by the respondent in support of its position that it has a caveatable interest in the land.

The respondent's argument

[5] Although the caveat itself states alternative reliance on a resulting trust, Mr Bogiatto rested his case entirely on there being a remedial constructive trust in

favour of the respondent. By reference to *Sims v Lowe*,¹ Mr Bogiatto submitted that there exists an arguable basis for the imposition of a remedial constructive trust, and if that arguable case is found the caveat should remain, the test being that removal should not be ordered “unless it is patently clear that the caveat cannot be maintained”.

[6] The basis upon which Mr Bogiatto argued that a remedial constructive trust had arisen may be summarised largely in his words thus:

- (i) The applicant has received the benefit of the respondent’s labour and materials supplied.
- (ii) The applicant has sold the property and will be receiving payment.
- (iii) The applicant is intending to retain the benefit of the labour and materials supplied to the respondent.
- (iv) This results in an enrichment of the applicant in respect of the respondent’s labours to the detriment of the respondent and in the absence of juristic reason for the enrichment.
- (v) The circumstances therefore give rise to an unjust enrichment or unconscionability by the applicant to the detriment of the respondent.
- (vi) It is submitted that these circumstances prick the conscience of the applicant such that the Court may impose a remedial constructive trust in favour of the respondent against the applicant.

[7] Mr Bogiatto drew my attention to *Commonwealth Reserves I, LC v Chodar*² and *Fortex Group Ltd (in receivership and liquidation) v MacIntosh*.³

¹ *Sims v Lowe* [1988] 1 NZLR 656

² *Commonwealth Reserves I, LC v Chodar* [2001] 2 NZLR 374

³ *Fortex Group Ltd (in receivership and liquidation) v MacIntosh* [1998] 3 NZLR 171

The applicant's case

[8] The applicant's position is that the dispute between the parties is based upon a contract, and the provision of work and materials pursuant to that contract does not create a situation where equity will find a constructive trust in favour of the provider. Mrs Grant drew my attention to *Re PT Steven Earthmoving Pty Ltd's Caveat*,⁴ where Stable J said:

The central fact is whether the caveator, an earthmoving contractor, has by virtue of his contract and work done under it an estate or interest in the land on which he is working to enable him to put a caveat upon it, ... such a contractor, who has been granted possession of the site to enable him to execute the works, has no estate or interest in the land ...

[9] Even though the contract in question in that case contained a clause expressly stating that possession of the site conferred on the contractor a right only to such degree of possession as should be reasonably necessary to execute the contract works, the Court did not place any reliance on this; the learned author of S Lindsay, *Caveats against dealings in Australia and New Zealand* (The Federation Press, 1995) at 120 expresses the view that such a clause does no more than state the position that would apply in any event in the absence of an express provision.

[10] Counsel then drew my attention to *Twenty-sixth Shackle Pty Ltd v Drever*.⁵ In that case Twenty-sixth Shackle Pty Limited carried out extensive work building three townhouses on a property, and was to receive title to two of the lots on the plan. It had the right to possession of the land under the contract. It lodged a caveat claiming an interest in the two lots it was to buy. Quite apart from having an interest as purchaser, Beach J expressed the view that the company had a caveatable interest as a consequence of having possession of the land and carrying out work on it. He said:⁶

In the present case [the caveator] entered into possession of the land the subject of a caveat and thereafter expended a sum of approximately \$750,000 on the construction of the three townhouses on the property. In that situation I consider it is strongly arguable that [the caveator] has had a

⁴ *Re P T Stevens Earthmoving Pty Ltd Caveat* [1975] QdR 69 at 70

⁵ *Twenty-sixth Shackle Pty Ltd v Drever* (1994) V Conv R 54-493

⁶ At 65,700.

caveatable interest in the property from the time it took possession of the property, even though its contract to purchase two of the townhouses was conditional upon the approvals being given to the plan of subdivision.

And further:⁷

Clearly [the caveator] has an interest in the land if for no other reason than it is in possession of townhouses two and three and has expended \$750,000 in erecting the three townhouses on the land.

[11] The learned author of *Caveats against dealings in Australia and New Zealand* noted that the Judge considered that the caveator's interest arose from the contract of sale rather than the joint venture, but expressed the view:⁸

It is difficult to see why it cannot be argued that a similar interest should be inferred in favour of a builder who has made substantial improvements to land.

[12] Mrs Grant distinguished this case on the basis that under the arrangement between the parties Twenty-six Shackle Pty Ltd was to obtain title to the land, with the purchase price being satisfied by the construction of the townhouses, and a large sum of money had been expended pursuant to that obligation, whereas in the present case there is no contract of sale to the caveator and no joint venture agreement, nor a charging clause in the contract between the applicant and the respondent. Thus she submitted that there is no basis upon which an equitable interest in the applicant's land had arisen. She submitted that all the respondent ever had was a licence to enter the land which was revocable at will and which had, in any event, terminated when the respondent left the site.⁹

[13] Mrs Grant advised that she had not been able to find any case law where a caveat had been upheld in favour of a contractor on land for services and materials supplied, as in the present case; neither did the respondent cite any supporting case to me, and my own research has not located any case where this has occurred.

⁷ At 65,700

⁸ Above [9] at 121

⁹ *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605; *Chermer Productions Pty Ltd v Prestest Pty Ltd* (1991) 7 BCL 46

[14] There is authority in New South Wales that the existence of a debt owed to a builder is a personal contractual claim and does not create an estate or interest in land which would support a caveat; *Frankcombe v Foster Investments Pty Ltd*.¹⁰

[15] Mrs Grant submitted that there are sound policy reasons for the Court to find that in the circumstances of this case there is not a constructive trust in favour of the respondent of an interest in the applicant's land. The reasons she cited are:

- (a) An argument that a constructive trust arises in favour of a contractor who works on a property would apply equally to any contractor, for example plumbers, electricians, painters and landscapers, and thus be of wide-ranging effect.
- (b) If the parties had intended the respondent to be entitled to a charge or interest over the property in relation to a disputed debt, an express charging clause could have been included in the contract, but was not.

[16] Thus Mrs Grant submitted that the claim to a constructive trust by the respondent based on an alleged debt for work and services under a building contract is not supported by any authority, is contrary to Australian authority, and cannot be supported on policy grounds.

Discussion

[17] The starting point is the statutory authority for registration of a caveat. Section 137(1) of the Land Transfer Act 1952 provides:

137 Caveat against dealings with land under Act

- (1) Any person may lodge with the Registrar a caveat 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

¹⁰ *Frankcombe v Foster Investments Pty Ltd* [1978] 2 NSWLR 41

- (b) is transferring the land or estate or interest to any other person to be held in trust.

[18] It will be noted that a right to a caveat is based on a claim “to be entitled to, or to be beneficially interested in, ...”. This is stated in the present tense: there must be an existing interest before the right to lodge a caveat is given. Frequently the right will be derived from an undisputed instrument, for example an agreement for sale and purchase, or a mortgage. That is not, however, necessarily the case. Interests for which protection by way of caveat is sought may be in dispute. This is covered by the use of the verb “claims” in respect of the entitlement or interest upon which the caveat is based. In this circumstance the protection of a caveat is given if it can be shown that the claim to the interest or entitlement is reasonably arguable: *Sims v Lowe* (above). On resolution of the dispute the interest or entitlement will be found to have existed at the time the caveat was lodged, or it will be rejected. The crucial point is that the Court will determine whether there was or was not a valid claim at the time the caveat was entered. Thus confirmation of the existence of the interest or entitlement may be after the caveat is lodged, but the interest or entitlement must be found to have existed before the caveat was lodged in order to come within s 137.

[19] Against this summary of the fundamental principles of entitlement to a caveat the basis of the caveat claimed in this case must now be examined. The starting point is *Fortex Group Ltd v MacIntosh* (above). Certain passages from the judgment of Tipping J are instructive, the first at page 172, line 36:

For present purposes, these three types of trust can be described as follows. An express trust is one which is deliberately established and which the trustee deliberately accepts. An institutional constructive trust is one which arises by operation of the principles of equity and whose existence the Court simply recognises in a declaratory way. A remedial constructive trust is one which is imposed by the Court as a remedy in circumstances where, before the order of the Court, no trust of any kind existed.

The difference between the two types of constructive trust, institutional and remedial, is that an institutional constructive trust arises upon the happening of the events which bring it into being. Its existence is not dependent on any Order of the Court. Such order simply recognises that it came into being at the earlier time and provides for its implementation in whatever way is appropriate. A remedial constructive trust depends for its very existence on the Order of the Court; such order being creative rather than simply confirmatory.

[20] Then at page 175, line 15 his Honour said:

The question of existence and certainty of subject-matter has to be viewed in a different light in the case of a suggested remedial constructive trust. As indicated at the outset, this kind of trust does not exist at all until the Court imposes it. Thus all that is necessary, from the point of view of subject-matter, is for there to be some asset or assets in the defendant's hands in respect of which the Court considers it appropriate to impress a trust in favour of the plaintiffs. Clearly there are such assets in the present case. But before the Court can contemplate declaring that assets owned in law by A should, by way of remedy, be held by A in trust for B, there must be some principled basis for doing so, both vis-à-vis A and vis-à-vis any other person who has a proper interest in the subject-matter which would be affected by the imposition of the trust.

[21] From this passage it will be seen that the crucial element of a remedial constructive trust is that it is created by order of the Court upon resolution of the dispute. The trust is imposed upon the asset in the hands of the party whose conduct is in question, as a matter of remedy. At page 175, line 42, the remedy is granted if:

the plaintiffs [are] able to point to something which can be said to make it unconscionable – contrary to good conscience – for the secured creditors to rely on their rights at law. If such can be shown, equity may restrain the exercise of those rights to the extent necessary to afford the plaintiffs appropriate relief.

[22] For “secured creditors” in this passage, one might substitute registered proprietor in a case such as the present. Thus, if imposed in this case, the rights of the present applicant might be restrained by the imposition of a remedial constructive trust in favour of the respondent, if the right to such a constructive trust were established. However, the crucial point is that the remedial trust is imposed at the time of judgment on the substantive claim, and it does not arise by way of a declaration as to an existing right, as in the case of other forms of equitable interests in property (including the examples noted above, purchaser or mortgagee) or under other forms of trust, including institutional constructive trusts.

[23] That is sufficient to dispose of this case. The defendant's claim is to a remedial constructive trust; if a claim were to be brought in this Court to an entitlement to a remedial constructive trust in the property based on contributions to the property or an increase in its value, and if the Court found that it was appropriate to award this remedy, a remedial constructive trust thus imposed would exist from

the date of judgment and not before. It follows that it could not have existed at the time the caveat was lodged and, accordingly, the caveat was lodged at a time when an interest in terms of s 137 did not exist. Mr Bogiatto's argument that the caveat should remain if there is a reasonably arguable case for a remedial constructive trust cannot succeed, because the remedy sought cannot by definition have existed when the caveat was lodged. Accordingly the caveat must necessarily be removed.

[24] However, as this case has raised an argument which is not the subject of any decision in New Zealand, as far as I am aware, I will make further brief observations.

[25] The decision in *Fortex* was considered by this Court in *Commonwealth Reserves I, LC v Chodar* (supra). After citing the passages from *Fortex* which I have set out above, the learned Judge at paragraphs [40] to [45] noted that while the question of whether a remedial constructive trust should be "confirmed" as part of New Zealand law remains open, after *Fortex*, it is nonetheless clear that there must be a principled basis for the imposition of such a remedy (reflecting Tipping J, quoted in [20] above). The Judge identified two potential bases for the exercise of the Court's discretion to grant a remedial constructive trust, unjust enrichment and unconscionability. Then, if a proper foundation is made out, and a remedial constructive trust is potentially available as a remedy, it is still not inevitable that the remedy would be awarded. As a proprietary remedy in favour of the applicant, proprietary rights of others stand to be affected. The Judge noted that reliability and certainty are primary considerations of any system of property rights and, as she put it, "unprovoked alteration of those rights is to be avoided where possible". Thus the Judge said the Court must carefully examine the reasons why other forms of relief are inadequate, the interests of any third parties, and the other circumstances of the case, and consider whether proprietary relief can be justified.

[26] I have referred to these principles to demonstrate the range of issues which a Court would consider before deciding to impose a constructive trust as a remedy, for conduct found to be unconscionable. Certainly, in a case such as the present, it is not a matter for a party in the position of the respondent merely to apply for relief by way of remedial constructive trust and to expect to receive that relief, as a direct consequence of having made contributions to the applicant's property in the ways

alleged. The range of factors to be considered by a Court before imposing this particular remedy to a victim of unconscionable conduct serves to demonstrate with clarity that the imposition of a remedial constructive trust, though prospective only in effect, is the result of a retrospective analysis of events and circumstances, and is far removed from an inevitable acknowledgement of an existing equitable right.

[27] Against this analysis, the observation by the learned author of *Caveats against dealings in Australia and New Zealand*, that it is difficult to see why it cannot be argued that an interest capable of supporting a caveat should be inferred in favour of a builder who has made substantial improvements to land, must be considered with circumspection. There are two steps in the analysis, the first being to determine whether grounds exist for equity to intervene (unjust enrichment, unconscionability) and the second an assessment of the appropriate remedy. Equity might support the finding of a basis for relief, in the circumstances of a particular case, and then find a remedial constructive trust to be the appropriate remedy, but even if the remedy is declaration of a remedial constructive trust, it will not support a caveat until it is declared.

[28] The need for circumspection is more evident when one reviews policy considerations in the context of a building contract. As noted above counsel for the applicant referred to two factors which might be taken into consideration (paragraph [15]). A further consideration is the fact that the rights of the parties to the contract in this case, which incorporates the terms and conditions in the widely used NZS 3910.2003 contract, are clearly spelt out and, further, there are specific dispute resolution mechanisms provided in the Construction Contracts Act 2002. These, of course, provide for remedies in personam, whereas an equitable remedy by way of a remedial constructive trust is a proprietary remedy. A proprietary remedy may, however, be available by way of a charging order pursuant to Part 17 subpart 5 of the High Court Rules. An interim order may be granted before judgment, and will in itself support a caveat (r.17.54(3)). These are examples of matters that might be considered before a Court would decide to grant a remedy by way of a remedial constructive trust, as predicated in *Commonwealth Reserves I, LC v Chodar*, ([25] above). Plainly the scope for equity to intervene with a remedy of this kind in this contractual and statutory setting would need further careful consideration.

Outcome

[29] On 15 September I directed that Caveat 8847464.1 be removed from Title 271412, with a specified fund from the sale proceeds being set aside. Dissipation of that fund is to follow my decision on this application. I direct that the fund from the proceeds of sale of the property held in the trust account of Peter Jacobson of Blockhouse Bay Law as stakeholder, be paid to the applicant.

[30] The applicant is entitled to costs on a 2B basis with disbursements to be fixed by the Registrar.

J G Matthews
Associate Judge