

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

**CIV 2014-463-000029  
[2014] NZHC 1617**

UNDER Section 145A Land Transfer Act 1952

AND

IN THE MATTER OF An application that caveats 9609595.1,  
9609530.1, 9609826.1 and 9609763.1 not  
lapse

BETWEEN HAN YOUNG CHAE  
Applicant

AND PLUTO NZ LIMITED  
First Respondent

TWIN KAURI LIMITED  
Second Respondent

Hearing: 9 July 2014

Appearances: W Lawson for the Applicant  
A M Swan for the Respondents

Judgment: 10 July 2014

---

**JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN**

---

*This judgment was delivered by me on  
10.07.14 at 4:30pm, pursuant to  
Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar  
Date.....*

[1] The applicant (Mr Chae) has lodged caveats against three properties owned by the first respondent (Pluto) and one property owned by the second respondent (Twin Kauri). Mr Chae claims a caveatable interest as a beneficiary under a cestui que trust.

[2] Mr Chae's claim of an interest concerns his business relationship with Joung Yun Park (Ms Park) which began in 2000 when Mr Chae began supplying Alpaca rugs to Mr Park for retail. He said the relationship developed into a partnership which ran several businesses. Through Ms Park, Mr Chae was introduced to Ian Young-Bin Park (Mr Park) whom he said was held out to be competent in the English language and as an expert in business accounting and, in how business is conducted in New Zealand.

[3] Mr Chae says that Pluto was one of the partnership ventures between him and Ms Park. When the company was incorporated Mr Chae was the sole registered director and shareholder but held 50 per cent of the shares in trust for Ms Park.

[4] Pluto purchased three commercial properties. That in Fenton Street was purchased for \$2,300,000 for which BNZ provided first mortgage funding of \$1.3M. The property in Kumeu was purchased for \$1,820,000 with first mortgage funding of \$1,456,000 provided by BNZ. The City Road property was purchased for \$1.2M for which BNZ provided first mortgage funding of \$600,000.

[5] Mr Chae says the deposits for these purchases was provided by the partnership and that other contributions (further funds) were made by the partnership, Mr Chae, Ms Park and several of their companies. In all \$944,000 was provided by these further funds.

[6] Regarding the Tauhi Street property purchased by Twin Kauri, Mr Chae says it was intended it be purchased by Pluto; that the partnership agreed the purchase price would be funded by a bank mortgage and \$100,000 from the partnership. Mr Chae said the vendor of Tauhi Street was the family trust of a Mr Lee who had misappropriated \$140,000 from Mr Chae's business interests; that he negotiated the settlement of the misappropriation by the reduction of the purchase price in Tauhi

Street. Before the purchase was finalised Mr Chae returned to Korea and left matters to Mr Park to be finalised. He was not aware the property purchase was completed by Twin Kauri of which Mr Park was and still is the sole director and half shareholder.

### **The law**

[7] A caveator bears the onus of showing he has a reasonably arguable case for the interest he claims; that a Court will not order the removal of the caveat unless it is patently clear it cannot be maintained either because there was no valid ground for lodging it or such valid ground as then existed, no longer does so.<sup>1</sup>

[8] Further elicitation of a caveator's responsibilities for proof was provided recently by the Court of Appeal in *Paugra Holdings Ltd (In liquidation) v Harvestfield Holdings Ltd*<sup>2</sup> when the Court described the requirements of institutional constructive trusts albeit in that case in the context arising when the proceeds of fraud are used to acquire an interest in land. The Court stated:

[37] (b) Second, an institutional constructive trust (which may be protected by a caveat) will arise when the proceeds of a fraud are used to acquire a registerable interest in land. The rationale for this rule is that those who have been defrauded of property and can (both factually and legally) trace the use of their funds to enable a third party to acquire other property should be regarded as beneficial owners of the property. The bribery case of *Attorney General for Hong Kong v Reid* (1994) 1 NZLR (PC) and *Trustees Executors Limited v Eden Holdings 2010 Limited* (2010) NZCA 626 are illustrations of that general proposition.

[9] This statement is of significance in our case because there is a dispute regarding many of Mr Chae's claims of financial contribution or a lack of recognition by Mr Chae of repayments made to him.

[10] Some of Mr Chae's affidavit statements are tinged with allegations of fraud, whilst in other respects fraud is not alleged.

---

<sup>1</sup> *Sims v Lowe* [1988] 1 NZLR 656 at 659 and 660.

<sup>2</sup> [2014] NZCA 164.

[11] It seems clear that fraud or not a party who alleges that a constructive trust has arisen must be able to trace the use of their funds to a third party which had been used to acquire a property.

[12] Mr Chae's current applications to sustain his caveats are part of a summary procedure which Courts have recognised is unsuitable to determine disputed questions of fact. On the other hand the Court need not accept claims of events that are not sufficiently supported by other evidence when it should be, i.e. more than mere assertion may not be enough.

### **Mr Chae's claims of an interest**

[13] Mr Chae says that he partly funded the purchase of all of the properties and is able to trace those funds. Regarding the sale of his shares in Pluto Mr Chae says that was not a bona fide transaction but was set up to have that appearance by the transfer to him of \$400,000 by Ms Park but he says that sum was not paid to him and was eventually returned to an agent of Ms Park. He said he signed share transfers but did not know what he had signed because he was ill.

[14] Mr Chae says the purchase of Tau Street included \$140,000 paid by him.

[15] Mr Chae's claims of caveatable interests are explained by Mr Lawson as occurring:

- (a) because the partnership was a beneficial owner of the Pluto properties and has a beneficial interest in Tau Street;
- (b) these interests are assets of the partnership;
- (c) Mr Chae has a beneficial interest in the partnership assets;
- (d) the unconscionable actions of Ms Park have removed the assets from the partnership which leads to an institutional constructive trust of which the partnership is the beneficiary; and

(e) Pluto and Twin Kauri are trustees of 'that Trust' being fixed with knowledge of the controlling minds of Ms Park and Mr Park.

[16] Mr Lawson submits there was no challenge that a business partnership was formed between Mr Chae and Ms Park and that that partnership was an umbrella for significant financial pooling towards various business ventures and interests.

[17] Because the Pluto properties were purchased with finances from the partnership in the character of a purchaser, then there is a presumption those properties are held in Trust. Because it was always intended that the partnership would be the beneficial owners of the Pluto properties then those properties were owned by the partnership and therefore the Pluto properties were held on a resulting trust for the partnership.

[18] Regarding the Tauhi Street property Mr Lawson submits that the partnership's part performance in purchasing that property and its absorption of a debt to reduce the purchase price gave the partnership an interest in the property.

[19] By these claims Mr Chae says he has a beneficial interest in the nature of realising his share in the determination of that partnership and until then he has a beneficial interest in the partnership's assets being used for the benefit of the partnership. He says the partnership has not been dissolved due to issues between him and Ms Park and the Court is advised that those issues are the subject of other substantive proceedings. In those other proceedings it is his claim that Ms Park unconscionably removed the Pluto properties and the interest in Tauhi Street from the partnership; that the unconscionable actions of Ms Park and Mr Park in depriving the partnership of its assets and their denial of the partnership's interests in those are sufficient for the imposition of a constructive trust. Ms Park is (now) the sole director and shareholder of Pluto. Mr Park is the sole director and half shareholder of Twin Kauri. Mr Lawson submits that through the knowledge of their principals that knowledge is fixed to the company interests. For Mr Chae it is submitted Ms Park unconscionably removed him from the share register of Pluto.

[20] Mr Chae's evidence is that he and Ms Park and their companies provided (after BNZ borrowings) the remainder sum of \$1,964,000 to purchase the Pluto properties of which sum \$1,020,000 paid the deposits, and \$944,000 was applied as further funds. Mr Chae claims by his second affidavit that he provided the majority of the further funds. Of those further funds he says about \$400,000 was advanced through various companies of Mr Chae and Ms Park; that \$298,535 claimed to have been advanced by Ms Park was indeed advanced by himself; and that a sum of \$100,000 purportedly paid by Ms Park had in fact been advanced by his own company Hyeon Company Limited. Therefore he says he invested \$780,435 of the \$944,000 of further funds used to purchase the Pluto properties.

[21] In support of Mr Chae's claims of unconscionable conduct by Ms Park and Mr Park, Mr Chae deposes that in August 2011 the Commerce Commission began investigating him and several of his companies for alleged breaches of the Fair Trading Act 1986. He says during that investigation he was diagnosed with Non-Hodgkin malignant lymphoma for which he received chemotherapy treatment in Korea. His doctor described Mr Chae as being "under very serious distressed condition, emotionally and physically during the chemotherapy period".

[22] Mr Chae says at the time he was in communication with both Ms Park and Mr Park in respect of his business interests and that they persuaded him that he was too unwell to look after his business interests and they said they would do that for him. Further he said he needed to protect his assets from the Commerce Commission prosecution that he and two of his companies were facing.

[23] He says they advised him to transfer his interest in Pluto to Ms Park who would hold them on trust for him; that whilst receiving treatment in Korea he was emailed documents to sign including the transfer of his share in Pluto and providing his resignation as a director of that company.

[24] Mr Chae says he did not have the capacity to understand what he was signing and not just because of the effects of chemotherapy but also because of his limited understanding of English. He said that upon his return to New Zealand on 14 February 2014 he requested the return of his shares but this was refused by Ms Park.

[25] In summary it is Mr Chae's claim that he contributed about \$780,000 of the \$944,000 of further funds contributed to the purchase of the Pluto properties including those advances made by his separate companies including \$200,000 from Deer NZ Research Limited, \$174,000 from his company Duvet 2000 Limited.

[26] Mr Chae says quite clearly he would not have accepted \$500,000 for the transfer of his shares in Pluto when the records indicated Pluto had equity of \$1,964,000.

[27] In relation to that share transfer Mr Chae says he trusted the advice and assistance given by Ms Park and Mr Park but that trust was betrayed in circumstances when he was unwell. Mr Chae also says that in any event the sum paid by Ms Park for the transfer of his shares in Pluto has been returned to her because from his bank account that sum was then paid into a bank account of an ally of Ms Park and from there he says it must have been on paid to Ms Park.

[28] In overview of all of these claims it is submitted that whilst Ms Park and Pluto claim Mr Chae's interests have been fully paid out to him, in fact he has received nothing at all.

### **Considerations**

[29] Pluto says the payment of \$500,000 equated with Mr Chae's half share of the equity in Pluto at the time a commitment was made to pay that sum to him and when on 1 May 2012 Mr Chae signed the share transfer form.

[30] Ms Park says she was never refunded the \$500,000 for the shares; that Mr Chae is unable to trace his funds to show that either Pluto or Twin Kauri used his funds to acquire any of the properties.

[31] For Mr Chae to sustain his claims of a beneficial interest in the properties it is necessary for him to trace the use of his funds to purchase the properties. As regards the further funds (as opposed to the initial funds) provided for the purchase of the

properties it has been Mr Chae's claim he contributed \$780,000 of the \$944,000 of those further funds.

[32] Of assistance to the Court in this regard is the affidavit of Mr Park sworn on 6 March 2014. Annexure "A" attached to the affidavit provides Mr Park's summary of contributions to the payment of further funds. That schedule recorded there had been loans to Pluto by:

	\$
(a) Deer NZ	200,000
(b) Duvet 2000	174,000
(c) Mr Chae	7,900
(d) Ms Park	525,535
(e) Wild Nature NZ	100,000

[33] That schedule also provides details of repayments of those loans, significantly most of them on 14 May 2012 and the others after that date.

[34] That schedule contains the very same material supplied by Mr Park to Mr Chae the contents of which Mr Chae quite clearly, by his first affidavit, accepted as being accurate. Importantly he had not before the swearing of his second affidavit on 15 April 2014 in reply to the affidavit of Mr Park, previously challenged claims that those further funds of \$944,000 had been repaid to those entitled to repayment. In paragraph 8 of his reply affidavit Mr Chae deposes:

[8] ...Ian Park is correct that on the surface this is what occurred. However, the reality is that these amounts were paid back to the companies and then transferred to my personal bank account and then transferred to [Ms Park]. So it looks like Pluto was repaying these particular loans back to my companies but in fact it was for the appearance of Pluto paying for my shares.

...

- (d) This \$400,000 was then sent to Han Ki Sung on 11 June 2012... Mr Sung then transferred this amount to [Ms Park's] agent Kim Sung Jung...
- (e) The money was sent to Han Ki Sung as he was a trusted business partner of mine in Korea at this time and he was a New Zealand citizen.

...

[10] Therefore, Pluto did not repay these loans I made to it of just under \$400,000. Nor did I receive any consideration for my shares in Pluto. [Ms Park] kept the \$400,000 and my Pluto shares.

[35] Whilst in his first affidavit Mr Chae accepted that the further funds contributions had been repaid. In his second affidavit he qualifies that claim significantly. As for the share transfer payment (which Mr Chae says was \$400,000) he says that although it was received to his account it was paid out to the account of Mr Sung. In his first affidavit Mr Chae describes Mr Sung as Ms Park's agent. In his second affidavit he deposes Mr Sung was his trusted business partner. There is no evidence at all of those funds being returned to Ms Park, only Mr Chae's unsupported claims that she received them.

[36] Also in his second affidavit Mr Chae claims that of the sum recorded by Mr Park as having been advanced by Ms Park to Pluto, \$298,535 of that, Mr Chae claims, were in fact loans made by Mr Chae to Pluto. In support of this claim Mr Chae annexes a spreadsheet showing payments by his wife and his daughter to the accounts of three people each of whom he describes as "an agent" of Ms Park. Copies of bank statements were annexed to show the payments of these sums of money by his wife and daughter to the persons concerned albeit that it appears the names of those persons concerned have been written onto the bank statement copies.

[37] Mr Chae deposes that Ms Park's agent then transferred the total sum to two Korean companies which in turn transferred the total sum (approximately \$298,000) to Pluto as a loan. It is apparent from Mr Park's affidavit in reply that the evidence given by Mr Chae is misleading as to what the exhibits evidence. Mr Chae's evidence is far short from supporting claims that the sum of \$298,000 in question from Mr Chae was paid to Pluto.

[38] Regarding the sum of \$100,000 identified by Mr Park's schedule as a loan from Wild Nature and which was repaid on 14 May 2012 Mr Chae deposes, in his second affidavit, that that sum was lent to Pluto through a company called Hyeon Company Limited. Mr Chae provides no support for his claim. Indeed an exhibit to his second affidavit appears to show that the sum in question was paid by Wild Nature to Pluto on 12 May 2011. If Wild Nature borrowed the funds from Hyeon then that is a matter for those companies to resolve. The acceptable evidence is that Pluto's repayment was made to the account of Wild Nature.

[39] In his evidence Mr Chae claims the amount paid in respect of the share transfer was \$400,000. The evidence of Mr Park annexes a copy of the transfer and confirms the sum of \$500,000 was paid by a Mrs Kim on behalf of Ms Park.

[40] Mr Chae does not dispute he received that payment but he said it was repayment of a debt, not by Ms Park but of a debt due by Wild Nature Limited. In support of this claim Mr Chae exhibits a document entitled 2011 Wild Nature Transaction details.

[41] Of that document Mr Swan observes that both of those entries relating to the payment in question do not form part of the schedule but have been inserted outside of the schedule.

[42] The Court agrees, as Mr Swan submits that there is proper reason to query the original document from which a copy was obtained for exhibit to Mr Chae's second affidavit. More importantly, this is, by Mr Chae's second affidavit, a belated challenge to claims that the October payment in question was for the shares transferred.

[43] With reference to the Tauiri Street property Mr Chae claims that one of his companies, New Zealand Prime Limited gave "The remaining \$140,000 to Jong Myung Lee. This \$140,000 went to New Zealand Wool World 2012 Limited to clear the debt Jong Myung Lee owed to that company".

[44] Regarding that Mr Chae deposed:

[56] Therefore I know I contributed \$140,000 to the purchase price of the 32 Tau Street property.

[45] This statement is to be compared with Mr Chae's second affidavit wherein Mr Chae deposes:

Jong Myung Lee has misused funds from my company Duvet 2000 Limited.

[46] Mr Swan submits and the Court agrees that Mr Chae seems to be talking about a claim he has against Mr Lee via another of Mr Chae's companies involved.

[47] In his second affidavit Mr Chae deposed that because Mr Lee had misused funds from his company Duvet 2000 and could not repay those that it was agreed Pluto would purchase Mr Lee's family trust property for \$840,000 or \$140,000 less than Mr Lee could have expected but for his misappropriation of funds.

[48] This claim has to be compared with the fact that Twin Kauri paid \$1,150,000 for the property. As Mr Swan observes this sum obviously did not include any discount for the \$140,000 claimed to have been misused by Mr Lee.

[49] In the Court's view the evidence of Mr Park which provides full details of the purchase of Tau Street by Twin Kauri, including the funding sources for that purchase, appears to show clearly that Mr Chae never had an interest in Twin Kauri or Tau Street.

### **Conclusions**

[50] By his first affidavit Mr Chae accepted without question that all further funds advanced loans by himself, Ms Park and their companies, had been repaid.

[51] There has been a significant swing in the approach adopted by Mr Chae's second affidavit. Now he suggests that further advance contributions by Ms Park were indeed provided through the bank accounts of his wife and daughter to three other persons through whom the further advance contributions were in fact made on behalf of Mr Chae.

[52] Mr Swan is correct when he submits Mr Chae has had notice of the sources regarding Pluto's purchase of its properties and of the funding and the repayments of that funding since January 2012, but he has not in his first affidavit raised any issues with that funding or the repayments and in fact, as this judgment has earlier noted, Mr Chae confirmed the accuracy of Mr Park's repayment schedule.

[53] Mr Chae offers two challenges to claims of a payment of \$500,000 for his shares. One of those is that the sum in question was never received by him because the funds paid ended up in the account of another, a Mr Sung, through whom it was returned to Ms Park. The other challenge concerns the amount of \$500,000 claimed to have been paid. Mr Chae had significant health difficulties at about the time on 1 May 2012 when he signed the share transfer documents. He says in any event that the equity in the three properties was almost \$2,000,000 and therefore it would not have made sense for him to accept about a quarter of that amount in payment for half the shares in Pluto.

[54] The Court does not accept any of Mr Chae's claims regarding the \$500,000.

[55] Ms Park says the sum she paid for the shares was not returned to her. There is a complete absence of evidence to prove otherwise. Mr Chae's assertion that the money was returned to Ms Park by another appears to be without any foundation at all.

[56] The clear evidence suggests that as at 1 May 2012 the only equity in Pluto comprised the deposits of \$1,020,000 paid for the three properties because as at 1 May 2012 none of the further advances by Mr Chae and Ms Park and their companies had been repaid – as Mr Lee's schedule clearly shows. In that result the sum agreed of \$500,000 was about half the equity in Pluto at that time Mr Chae signed the share transfer form. It was only after that date that those further advances were repaid and when the equity in Pluto would have increased. There was no evidence regarding the source of funds to repay those further advances but that is of no significance for the Court's present purposes.

[57] In support of claims that it was he through his companies and that it was not Ms Park who contributed about \$298,000 of those further advances, Mr Chae provides for the first time by his second affidavit a schedule of transaction details in support of these claims. But, the only entries on that of significance to Mr Chae's claims have been added to the right-hand margin of the document he has provided as proof of his claims. There is no reason provided for this change to the document provided by Mr Chae. There appears nothing in that document to support claims made for the first time after about two years, that it was he and not Ms Park who made the further advances in question.

[58] Significantly only since the provision of Mr Park's affidavit has Mr Chae seized the opportunity in his second affidavit to raise questions about the sources of that funding. But there appear to be significant gaps in that evidence. The Court accepts Mr Swan's submission that that evidence is inconsistent with the contemporaneous documentation supporting the share transfer and the purchase of the properties and the schedules of the sources of the funds.

[59] It does seem unusual that from the time of the transfer of Mr Chae's shares in May 2012 there has been no documentary evidence, emails, correspondence or otherwise to show that he ever disputed he sold the shares or that the transaction was genuine. The challenge to the transaction appeared for the first time nearly two years later in February 2014 and by his first affidavit in this application.

[60] Regarding the Tau Street property the clear evidence is that the purchase price was not discounted at all much less due to claims by Mr Chae that the former owner of the property had misappropriated the sum of \$140,000 from him.

[61] The Court has considerable issue with documents provided by Mr Chae in support of his claims. No further comment is needed in that regard. Those apart, the documentation supporting the sale of the shares, resolutions and the like undermine Mr Chae's claim. Further those documents were prepared at Mr Chae's instruction and he has not disputed he gave those instructions.

[62] To succeed upon his application to sustain his caveats Mr Chae must show a “reasonably arguable” case to support his claim that he has a proprietary interest. It does not matter whether this is through an interest in partnership assets or whether directly to a third party who acquires the property. Mr Chae’s responsibility with his claims is that he must show a contribution that can be verified i.e. traceable.

[63] As earlier noted this Court should resist any temptation to resolve disputes over facts. Those disputes are usually better left for trial.

[64] The burden Mr Chae bears by his application to sustain his caveats is to satisfy the Court that there is a reasonably arguable claim of an interest in the properties in question. He must establish sufficient basic facts to raise at least a prima face case. He may fail in that object if insufficient details supporting his claims have been provided. In the circumstances pursued by his application Mr Chae bore the responsibility of providing credibility to claims of payments he said were made by him. But, in this case many of Mr Chae’s claims are quite unsupported except by assumption or speculation on his behalf. Whereas, it seems clear to the Court there is sufficient substance to the oral and written evidence provided in support of Ms Park’s claims that she did pay Mr Chae \$500,000 for his shares and that that sum was equal to about half of the equity in Pluto at that time Mr Chae agreed to transfer his shares to her.

[65] The evidence of Mr Chae appears inconsistent. It lacks precision and it is contradicted by undisputed contemporary documents.

[66] The Court does not consider Mr Chae has raised a reasonably arguable case of proprietary interest in any of the four properties concerned. Therefore his applications fail.

## **Judgment**

[67] The application to sustain caveats is dismissed.

[68] Costs and disbursements are payable by Mr Chae on a 2B basis. The Court will determine these if counsel cannot agree with their calculations.

---

**Associate Judge Christiansen**