

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

**CIV-2011-409-002514
[2012] NZHC 799**

UNDER the Land Transfer Act 1952

IN THE MATTER OF an application under s 145A of that Act for
an order that caveats not lapse

BETWEEN PHILIP DEAN THOMAS
Plaintiff

AND NORMAN DEAN THOMAS
Defendant

Hearing: 17 April 2012

Appearances: N R W Davidson QC for the Plaintiff
G M Brodie for the Defendant

Judgment: 24 April 2012

JUDGMENT OF ASSOCIATE JUDGE MATTHEWS

[1] On 19 December 2011 the Court made an Order sustaining Caveat 8628917.1 on condition that the caveat would not prevent registration of a transfer from the defendant, to the defendant, having the effect of severing the joint tenancy of the plaintiff and the defendant. That transfer has since been registered; the parties are now registered as tenants in common on the titles to certain properties against which the caveat remains registered. This judgment determines the substantive application to sustain the caveat.

[2] As a preliminary issue, the plaintiff no longer seeks to sustain the caveat over Certificates of Title CB13A/1098, CB21K/1034, CB396/99, and CB7A/401. The defendant, solely, is the registered proprietor of the properties to which these titles

relate. The plaintiff does not seek to sustain an interest in these properties. Accordingly the caveat over these properties will now lapse.

[3] The defendant and the plaintiff are father and son. In 1983 when the plaintiff was 25 years they entered a written partnership agreement. They farmed in partnership until February 2011. The lands farmed are substantial, comprising seven farms with a total estimated value of approximately \$20m.

[4] Since the age of 10, but principally from the age of 16, the plaintiff has worked on the family farms, and further farms have been accumulated during that time. The farms are recorded in the partnership accounts as partnership assets though, as I understand Mr Brodie's submission, there may be an issue on whether all or at least some of the properties have in fact been correctly thus recorded.

[5] The caveat registered by the plaintiff claims an interest in the properties on three bases, the first two arising from the partnership agreement dated 21 April 1983, and the third being expressed thus:

... and in the alternative the above-named caveator claims a beneficial interest in Norman Dean Thomas's share in the land contained in the above Certificates of Title as cestui que trust of which Norman Dean Thomas is trustee and the caveator as beneficiary.

[6] The two grounds for the caveat arising from the partnership agreement were not pursued in argument. Mr Davidson, who did not represent the plaintiff in earlier hearings, submitted that the basis on which his client claims an interest in the properties can be more precisely defined thus:

An interest in Norman Dean Thomas's share, if any, in the land in the above certificates of title by virtue of his interest in such share being partnership property and by virtue of a constructive trust arising out of an equitable estoppel or otherwise in equity.

[7] In submissions Mr Davidson outlined the principal facts upon which his client relies as establishing an arguable case to an interest in the whole of the defendant's share in the land, pursuant to a constructive trust. I need to summarise this only briefly, as Mr Brodie accepted that provided certain protections were given

to his client, which I will discuss below, it was acceptable for the caveat to remain on the titles to the properties.

[8] In essence, the plaintiff maintains that he has devoted his entire working life, without preservation of any significant amount of leisure time, to the operation and expansion of the partnership farming business, against a background of promises that he would receive recompense later, that time away from the property should be extremely limited (and indeed appears to have been resented) that if he left the farming operation there would be nothing for him to return to, and that any assets that he sought to purchase were to be placed into partnership ownership at the defendant's direction, because in due course he would own them outright. He gave evidence about various arrangements being made to provide for his sisters from other properties on the basis that upon the dissolution of the partnership, whether by his father's death or otherwise, he would receive all of the properties, and indeed other partnership assets, outright.

[9] If the plaintiff establishes these facts in evidence at trial the foundation would have been laid for the imposition of a constructive trust in his favour, and there is sufficient material before the Court to satisfy me that, arguably (I need put the matter no higher than that, and do not do so) the defendant holds his share of the properties within the partnership on a constructive trust for the plaintiff.

[10] On this basis, therefore, the plaintiff is entitled to sustain the caveat he has lodged over the properties until his entitlement, if any, is established at trial.

[11] In accepting that to be the position Mr Brodie, however, raised three issues. First he sought leave to return to the Court in relation to the caveat remaining on the properties, in the event there should be a material change of circumstance. Secondly, he submitted there should be a requirement that the plaintiff give an undertaking to pay damages, as a condition of the caveat being sustained. Thirdly, proceedings he has issued (but not yet served) seeking resolution of issues arising on dissolution of the partnership should be maintained under tight Court control to ensure they are brought to resolution at the earliest available time.

[12] In the circumstances of this case it is appropriate to make an order that the caveat be sustained until further order of the Court, or agreement between the plaintiff and the defendant. Whilst, in deference to the defendant's views, I am prepared to reserve leave to him to bring back to the Court issues relating to the caveat, I make it clear that I am satisfied that the plaintiff has an interest in the land capable of sustaining the caveat, and that finding is not susceptible to review on any future consideration of issues arising in relation to the caveat. This is reflected in the Orders I set out below.

[13] On making an Order to sustain a caveat the Court has power to impose a condition that the caveator give to the Court an undertaking to pay such damages, if any, as the Court shall assess as arising from the caveat having remained on the title. Mr Brodie submitted that continued registration of the caveat has potential to cause significant loss and damage to the defendant. The properties are of substantial value and accordingly, he submitted, there are substantial commercial interests at stake. Mr Thomas wishes to continue farming and wishes to enter into partnership with his grandsons despite his age and health (referred to in the earlier judgments on this proceeding). He wishes to introduce all or some of the land which he owns into a future partnership, and that land may include all or some of the land he owns in a tenancy in common with the plaintiff. Mr Brodie indicated that future dealings may include gifting and transferring land to other of his children and his grandchildren.

[14] Mr Brodie submitted that all these activities are prevented if the caveat remains, and this gives rise to potential significant losses by the defendant and others with whom the defendant might seek to enter into such arrangements. He cited *BP Oil New Zealand Ltd v Van Beers Motors Ltd*,¹ in which Barker J reviewed cases on the jurisdiction of the Court to impose a condition by way of requiring a caveator to give an undertaking to pay damages. The learned Judge determined that there was jurisdiction for such a condition to be imposed, though the imposition would be discretionary. He noted, however, that in many cases there could be little argument but that the discretion should be exercised in favour of the registered proprietor.

¹ *BP Oil New Zealand Ltd v Van Beers Motors Ltd* [1992] 1 NZLR 211.

[15] Mr Davidson opposed the imposition of a condition as sought by Mr Brodie. He submitted that there is no risk of any potential transaction being held up, because the defendant could not be dealing with the properties anyway given that they are partnership assets.

[16] I am not satisfied that the order sustaining the caveat should be made on condition that an undertaking to pay damages is provided by the plaintiff, for two reasons. First, the postulated bases for damages possibly being incurred are not of apparent substance, and are in my view likely to amount to little more than inconvenience. Secondly, it is evident from the material before the Court that the plaintiff is of considerable financial substance, and able to meet any judgment that may be entered for damages. I do not see how an undertaking would materially add to the defendant's right to be awarded damages, if appropriate, and to recover them.

[17] Finally, I agree with Mr Brodie's submission that there should be a tight timetable imposed on any proceedings in this Court, or by way of arbitration, to resolve the issues between the parties arising on dissolution of the partnership, and in particular to resolve the plaintiff's claim which forms the basis of the caveat. Mr Brodie informed me that he has filed proceedings under the Partnership Act, but has not yet arranged for them to be served. That is expected to occur shortly. Timetabling will be undertaken at the first conference.

Outcome

[18] I make the following orders:

- (a) The plaintiff has an interest in the defendant's share, if any, in the land comprising the properties known as Cranmore, Cridges, Middlewoods, Steeles, Bedfords (Mays), Wilsons and McCauslands by virtue of his interest in such share being partnership property and by virtue of a constructive trust arising out of an equitable estoppel or otherwise in equity.

- (b) Caveat 8628917.1 is sustained, save that the land in Certificates of Title CB13A/1098, CB21K/1034, CB396/99, and CB7A/401 is released from it.
- (c) The costs of this application are reserved.

J G Matthews
Associate Judge

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