

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

**I TE KŌTI MATUA O AOTEAROA
WHAKATŪ ROHE**

**CIV-2018-442-000010
[2018] NZHC 445**

UNDER Sections 145 and 145A Land Transfer Act
1952

BETWEEN DARREN HEEMAN and DEANNA
MARIA HEEMAN
Plaintiffs

AND GLENN RAYMOND HARVEY
Defendant

Hearing: 14 March 2018

Appearances: S J Zindel for Plaintiffs
M Keall for Defendant

Judgment: 15 March 2018

JUDGMENT OF ASSOCIATE JUDGE MATTHEWS

[1] The plaintiffs apply for an order that Caveat 11009733.1 on Identifier NL686587 (Nelson Registry) not lapse. By their caveat the plaintiffs claim an interest in the land in Identifier 686587 by virtue of three agreements dated 19 July 2002, 22 June 2009 and 8 June 2015. Their interest is said to be in a portion of the land in the Identifier of approximately two hectares which they previously owned as tenants in common with the defendant.

[2] The Identifier in question is one of three Identifiers which comprised a property owned by the plaintiffs and the defendant. Ownership rights in all three identifiers have been determined by a final judgment of this Court dated 7 September 2017. The Court ordered the present plaintiffs to transfer two of these identifiers, including Identifier 686587, to the defendant. Transfers have been effected in accordance with

this judgment. Although the judgment is under appeal no application was made for it to be stayed.

[3] The effect of the judgment is that the Court has determined that the present plaintiffs do not have any interest in the land in Identifier 686587. Notwithstanding this the plaintiffs have lodged a caveat to protect what they claim to be an interest in this land, which Mr Zindel their counsel describes thus:

It is claimed to be a present interest which has yet to be upheld, not the contingent interest dependent on the plaintiffs winning their appeal ...

[4] The application was called before me in the Nelson Civil List on 14 March. The case was stood down to 2.15 pm that day for argument. Both counsel had filed written submissions before the List call. At the conclusion of argument I made an order sustaining the caveat until further order of the Court, to allow for preparation and release of this judgment.

[5] The thrust of the argument for the defendant is that the issue of ownership of the land in Identifier 686587 is res judicata. In *Kidd v van Heeren*, Fogarty J described res judicata thus:¹

A res judicata is a decision pronounced by a judicial or other tribunal with jurisdiction over the cause of action and the parties, which disposes once and for all the fundamental matters decided so that, except on appeal, they cannot be relitigated between the persons bound by the judgment.

[6] Mr Zindel argues that because of the reference to an exception where there is an appeal, no res judicata arises. That misconstrues what the learned Judge says. The exception leaves it open to the parties to raise the issue again on appeal but except in that way, the res judicata applies and the issue cannot be relitigated. Thus the question of a right to ownership of part of the land in Identifier 686587 is finally determined between the plaintiffs and the defendant as matters presently stand.

[7] Section 137 of the Land Transfer Act 1952 provides that any person may lodge with the Registrar a caveat against dealings in any land if that person claims to be entitled to or to be beneficially interested in the land or an estate or interest in it by

¹ *Kidd v van Heeren* [2015] NZHC 517.

virtue of any unregistered agreement. A caveat protects a claim to a present interest in land. The plaintiffs claim an interest in Identifier 686587, but their claim has been conclusively decided against them by a judgment of this Court, and res judicata applies in relation to their claim.

[8] The test applied by the Court to sustain a caveat is whether the caveator has established an arguable case that he has the interest claimed. Unless that position is established the caveat will lapse. In the present case the Court has conclusively determined that the plaintiffs do not have the interest claimed. They cannot now successfully assert in this Court that they have an arguable case.

[9] When the judgment of this Court was issued it was open to the plaintiffs to apply for a stay of the judgment pending determination of the appeal. Had that occurred the Court would have considered it in accordance with the principles applying to such an application, and in the course of that exercise would have considered the strength of the appeal. That did not occur, and in fact the judgment was complied with. Then the plaintiffs lodged their caveat. By then the Court had made a decision that the plaintiffs did not have the interest they continue to assert, and that binds the plaintiffs unless and until the Court of Appeal finds otherwise.

[10] For these reasons the application to sustain the caveat is dismissed.

[11] Costs are reserved. Memoranda are to be filed and served by the plaintiffs within five working days of a decision on their application for legal aid, and by the defendant within a further five working days.

J G Matthews
Associate Judge

Solicitors:
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