IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

MISC. 15376/92

BETWEEN : AIR NEW ZEALAND LTD

APPLICANT

A N D : ROSALINA MAELI HIGGINSON

RESPONDENT

Counsel : R. Drake for Applicant
P. Fepulea'i for Respondent

Hearing : 16 February 1993

Judgment : 14 April 1993

JUDGMENT OF SAPOLU, C.J.

The applicant in this case seeks an order for the removal of a caveat placed on its Lelata property pursuant to clause 11 of the Samoa Land Registration Amendment Order 1921. That clause provides as follows:

"11(a) Upon the receipt of any caveat the Registrar shall notify the same to the person against whose estate or interest the caveat has been lodged.

(b) Such person may, if he thinks it, summon the caveator, or the person on whose behalf the caveat has been lodged, to attend before the Supreme Court or a Judge to show cause why such caveat should not be removed.

(c) Such Court or Judge, upon proof that such person has been summoned, may make such order in the premises, either exparte or otherwise, as to such Court or Judge seems meet".

Because of the wording of clause 11(b) the caveator was called upon to give evidence first in order to show cause as to why her caveat should not be removed. In an unreported decision of this Court in Imo v Pereira [1978] the Court said, "Under the New Zealand legislation it was decided in In re Peychers Caveat [1954] NZLR 285 that the onus of proof in such matter as there was on the person moving for the withdrawal of a caveat. However, the wording of clause 11(b) is such that I am of the opinion that in this country the onus in such matters rests on the caveator".

The evidence shows that the caveator who was in Paris, France, wanted to purchase land in the vicinity of Apia and accordingly instructed her solicitor who has filed an affidavit in these proceedings and given oral evidence. On 2 July 1992 the caveator's solicitor wrote to the local general manager of Air New Zealand (the applicant) offering to purchase the applicant's land at Lelata for $50,000. Payment was to be a one-down payment for that amount and the applicant's local general manager was requested to obtain a response from the applicant's head office in Auckland. The evidence reveals that the letter of 2 July 1992 sent to the applicant's local general manager did not show that that letter was copied to the caveator's husband. Apparently that letter was relayed by the applicant's local general manager to the applicant's property manager in Auckland. In his evidence, the property manager says that he submitted the letter of 2 July 1992 from the caveator's solicitor to the applicant's board of directors and the instructions from that board were to obtain a contract for approval and execution from the caveator's solicitor. So by faxed letter dated 13 July 1992, the applicant's property manager advised the caveator's solicitor that the applicant had agreed to the sale of its Lelata land for $60,000 nett on a cash sale basis. In the same letter, the caveator's solicitor was also requested to forward to the applicant's Auckland office a sale and purchase agreement for consideration and execution. The applicant's property manager filed an affidavit in these proceedings and also gave oral evidence. In his evidence, he says that he expected the caveator to send a contract for the applicant's perusal, and if any changes were necessary, the caveator's solicitor would be advised of those changes and a final draft would then be submitted to the applicant for execution. He did not

appear to dispute in his evidence that the price for the applicant's Lelata land was $50,000 even though the price quoted in his faxed letter of 13 July 1992 to the caveator's solicitor is $60,000. In his own affidavit, he says that the applicant agreed to the offer from the caveator for $50,000 for the Lelata land. He also said that the use of the words "on a cash sale basis" in his faxed letter of 13 July 1992 meant that a sale and purchase price contract was required.

The letter of 13 July was received by the caveator's solicitor on or about 14 July 1992. On 17 July 1992, the caveator's solicitor sent another faxed letter to t he applicant's property manager saying that his client was overseas that he needed to advise his client of the approval for the purchase of the Lelata land and to obtain certain instructions from him. In the same letter, the caveator's solicitor states that when instructions were received from his client, he will then prepare the necessary deed of conveyance and send it to the applicant for perusal and execution. It appears from the evidence by the caveator's solicitor that the matters (not expressed in his letter) on which he needed further instructions from his client was where the money for the price of the land was to be paid from and whether the transaction was to be in the name of the caveator alone or in the names of both the caveator and her husband who is non-Samoan but had acquired Western Samoa citizenship. A company search of the applicant was also to be completed in Auckland. The caveator's solicitor also says that he did not think it was necessary for him to contact the applicant again after his faxed letter of 17 July as he was hoping on a day to day basis to receive a call from the caveator or her husband regarding further instructions. The applicant's property manager says that as he understood the last paragraph of the letter of 17 July 1992 from the caveator's solicitor, the solicitor had not received

instructions from his client. The applicant had also not determined what the deed of conveyance will contain but the applicant expected a sale and purchase contract because of their experience with the torrens system of land registration which is operating in New Zealand.

It appears that on 13 August 1992, the applicant received an alternative offer for its Lelata land from a member of its staff as its local office in Apia after a phone call from that person on 30 July 1992. This alternative offer was not a one-down payment but exceeded the offer from the caveator's solicitor. It was accepted on 13 August 1992 by the applicant and a sale and purchase contract was executed between the applicant and the second offerer. On 7 September 1992 the applicant received a faxed letter of the same date from the caveator's solicitor advising that he had been in touch with his client who was in France and he was at that time processing the documentation for the transfer of the land. The same letter indicated the caveator's preference for payment of the full purchase price of $50,000 to the applicant's office in Apia and requested confirmation from the applicant. In reply to the letter of 7 September 1992 from the caveator's solicitor, the applicant's property manager by faxed letter of 18 September 1992 advised that since the caveator's last letter in July, the applicant had accepted an alternative offer and had exchanged contracts with the second offerer. The caveator's continued interest in the applicant's Lelata land was belated. That was the first time the caveator's solicitor became aware that the applicant had accepted an alternative offer for the purchase of the Lelata land, and by faxed letter of 24 September 1992 advised the applicant that there was a binding sale and purchase contract between the parties as evidenced by letter of 2 July 1992 from the caveator's solicitor and the letter of 13 July 1992 from the applicant. The same

letter of 24 September 1992 required specific performance of the sale and purchase contract and pointed out that the caveator had lodged a caveat against the Lelata land forbidding registration of any instrument or document against that property. A deed of conveyance accompanied the letter of September 1992 for perusal and execution by the applicant. That deed of conveyance in one of its recitals refer to an agreement of sale and purchase for the Lelata land between the applicant and the caveator for the price of $50,000. The applicant did not execute that deed of conveyance. For completeness, it also appears that the applicant was not aware of the identity of the caveator until it received the deed of conveyance. The central issue in this case is whether there was a concluded sale and purchase agreement between the parties to support the lodging of the caveat.

Before dealing with the issues raised in the evidence and submissions by counsel, I will deal first with the question of the procedure to be followed in an application for removal of a caveat. From my experience at the bar and during the short time I have held judicial office up to now, it is clear to me that there is an inconsistency in the procedure which is adopted in dealing with applications for removal of a caveat. One approach, which is the approach adopted by counsel in this case, is to file an application for removal of a caveat together with supporting affidavits. When the application comes up for hearing, oral evidence is also called and examined, cross-examined and re-examined. This oral evidence is called from the deponents in the affidavits. Submissions from counsel then follow after the evidence is completed and the Court then makes a decision. The second approach has been to file an application for removal of a caveat together with supporting affidavit. At the hearing of the application, no oral evidence is called but the Court hears

only submissions from counsel. The Court then makes a decision whether or not to remove a caveat on the basis of the application, affidavits and submissions of counsel. This is known as the summary procedure for removal of a caveat. There has been to my knowledge, no decision by the Court on which of the two approaches or procedures should be adopted.

In my view the second procedure which is the summary procedure is the correct one and should be adopted in an application for removal of a caveat. That means at the hearing of an application for removal of a caveat, the Court decides on the basis of the application and affidavits filed by the parties and any submissions by counsel as to whether or not the caveat should be removed. An expeditious hearing could be given to such an application as the Court normally does with an application for an interim injunction supported by affidavits. There may be exceptional circumstances when the Court will decide to hear oral evidence from a witness, for example, a witness who is leaving Western Samoa to return to his country and it will be difficult to bring that witness back for any subsequent proceedings. At any substantive hearing which follows oral evidence may be called and examined, cross-examined and re-examined.

Clause 11(b) of the Samoa Land Registration Amendment Order 1921 provides that an aplicant for removal of a caveat may summons the caveator or the person on whose behalf the caveat has been lodged to appear before the Court to show cause as to why the caveat should not be removed. Upon proof that the summons has been served, clause 11(c) provides that the Court may then make an order 'exparte or otherwise as seems meet'. In my view the words of clause 11(c) clear envisage that the procedure to be adopted in an application for removal of a caveat should be the summary procedure. There are marked similarities between the provisions of the Samoa Land Registration Amendment Order 1921 relating

to an application for removal of a caveat and the provisions of The New Zealand Land Transfer Act 1952 on the same matter. This is no surprise as the Samoa Land Registration Amendment Order 1921 was a creature of the New Zealand Administration when that country administered Samoa under the League of Nations. So we turn to see what is the proceudre in New Zealand for an application of the kind like the one before this Court and it is sufficient to refer to one authority. This is the case of Merbank Corporation v Carter [1978-1982] NZCPR 279 at 282 where Casey J said, "Section 143 provides that a person specified therein "may apply to the Court for an order that the caveat be removed and upon "proof that notice of the application has been served, it may make such "order in the premises, either exparte or otherwise, as to the Court seems "meet. This clearly envisages a summary application supported by "affidavits, which appears to have been the procedure adopted in most of "the reported cases, judging by the comments made by the Bench in "disposing of them..... As I have already pointed out, this application "has followed what I regard as an exceptional course, in that a great deal "of evidence has been placed before me by means of the affidavits, "cross-examination, re-examination and discovery, and counsel have made "comprehensive legal submissions". It would also be pointless, in my view, to have a substantive hearing if all the oral evidence on the issues to be decided in a subsequent substantive hearing has already been examined and determined in the hearing of a summary application for removal of a caveat. For the substantive hearing will then be a mere repetition of the evidence already heard, examined and determined in the hearing of the summary application. So the summary procedure is the correct procedure to be adopted in an application to remove a caveat under the provisions of the Samoa Land Registration Amendment Order 1921.

Having said all that, I turn to the present proceedings. The present application first came up for mention before this Court on 23 November 1992. After several adjournments on applications by the respective parties, it finally came for trial on 16 February 1993. In addition to affidavits filed by both the applicant and the respondent, oral evidence was also called and examined, cross-examined and re-examined. Counsel also made legal submissions. As already pointed out, this is not the procedure envisaged by clause 11(c) of the Samoa Land Registration Amendment Order 1921. However, after careful consideration, I have decided to deal with the present application on the basis of the affidavits as well as the oral evidence. And I do so for these reasons. In the first place there has been up to now an inconsistency in the procedure adopted in relation to applications for removal of a caveat. That procedural inconsistency has already been adverted to in this judgment. So the procedure followed by counsel in this case is not without precedent. See for instance the decision in Imo v Pereira [1978], an unreported decision of this Court already mentioned in this judgment. Secondly, it is clear that the evidence that was called in these proceedings on the central issue in dispute whether there was a sale and purchase contract between the parties, will be the same evidence on the same central issue if there is a subsequent substantive hearing. There is no point then in leaving the central issue in this case to go to a substantive hearing when the discussion at the substantive hearing will be merely a repetion of the discussion that has already taken place in these proceedings. It will also be unnecessary expense and time consuming for the parties if the central issue is further deferred to a substantive hearing when, as I have said, the evidence on the central issue at the substantive hearing will be merely a repetition of the discussion that has already taken place in these proceedings. Thirdly, I am conscious that the effect of a caveat is "to freeze" the property that is the subject

of the caveat. In other words the property is paralysed. No dealings in the property may be registered so long as the caveat remains on the property.

If the Court is now to defer a decision on the central issue to a substantive hearing, the next available date for such a hearing will be in July or August but as I have said the evidence at the substantive hearing will obviously be the same on the central issue as the evidence already heard by the Court.

Now the power of the Court under clause 11(c) of the Samoa Land Registration Amendment Order 1921 to make orders on an application for removal of a caveat is discretionary by reason of the words "such Court may make such order in the premises, either ex parte or otherwise, as to such Court....seems meet". There is no guidance in the 1921 Order as to how tht discretion is to be exercised or as to the scope of the discretion. Those questions were not raised in this case and therefore I prefer not to express any views on those questions.

It is to be pointed out, however, that in New Zealand the Court of Appeal seems to be divided on the approach to be adopted to an application for summary removal of a caveat. In Castle Hill Run Ltd v NZI Finance Ltd [1985] 2 NZLR 104 the New Zealand Court of Appeal comprising of Cooke and Richardson JJ, and Sir Clifford Richmond, held that the approach to be adopted towards an application for summary removal of a caveat is to first consider whether there is a serious question to be tried or an arguable case. If so, then the Court is to weigh balance of convenience considerations. In adopting this two tier approach, the New Zealand Court of Appeal followed the approach adopted by the Privy Council in Eng Mee Yang v Lethumanan [1980] AC 331 which was a case on the caveat provisions of the Malaysian Torrens system. In its decision, the Privy Council in turn adopted the aproach taken by Lord Diplock to applications for interlocutory injunctions in the House of Lords

decision in American Cyanamid v Ethican Ltd [1975] AC 396. In the subsequent case of Holt v Anchorage Management [1987] 1 NZLR 108 a differently constituted New Zealand Court of Appeal comprising of McMullin, Somers and Casey JJ adopted a different approach. It was held in that case that what has to be determined is whether the caveator has an arguable case, or as it is often put, a serious question to be tried, to sustain the validity of the claim. Further balance of convenience considerations will not generally be taken into account in an application for the summary removal or extension of a caveat. Without deciding between these two different approaches, I am of the view that whichever of the two approaches is applied to the present case the result will be the same in view of the affidavit and oral evidence that has been adduced. See also Varney v Anderson [1988] 1 NZLR 478 another New Zealand Court of Appeal decision on a caveat application.

Coming back to the evidence and the central issue whether there was a concluded sale and purchase contract between the parties to sustain the caveat, I think the approach to be adopted where the Court is asked to find a contract of sale of land from a series of letters or correspondence is thatstated in Boulder Consolidated Ltd v Tangaere [1980] 1 NZLR 560, a case on a contract of sale of land, by Cooke J: "There are two possible ways of approaching the question. "The more traditional one is stated by Lord Diplock in Gibson v Manchester City Council [1979] 1 All ER 972, 974; [1979] 1 WLR 294, 297 :

> 'My Lords, there may be certain types of contract, though I think 'they are exceptional, which do not fit easily into the normal 'analysis of a contract as being constituted by offer and 'acceptance; but a contract alleged to have been made by an 'exchange of correspondence between the parties in which the 'successive communications other than the first are in reply to 'one another is not one of these. I can see no reason in the

'instant case for departing from the conventional approach of
'looking at the handful of documents relied on as constituting
'the contract sued on and seeing whether on their true construction
'there is to be found in them a contractual offer by the council to
'sell the house to Mr Gibson and an acceptance to that offer by
'Mr Gibson. I venture to think that it was by departing from this
'conventional approach that the majority of the Court of Appeal was
'led into error'.

'In New Zealand Shipping Co. Ltd v A.M. Satterthwaite & Co. Ltd [1975]
"AC 154; 167; [1974] 1 NZLR 505, 510, Lord Wibberforce delivering the
"majority judgment of the Privy Council said :

'....English law, having committed itself to a rather technical
'and schematic doctrine of contract, in application takes a
'practical approach, often at the cost of forcing the facts to fit
'uneasily into the marked slots of offer, acceptance and
'consideration'.

"In delivering the judgment of their Lordships in Port Jackson Stevedoring
"Pty Ltd v Salmon & Spraggon (Australia) Pty Ltd (10 July 1988)
"Lord Wilberforce indicates that the significance of Saztterthwaite's case
"lay not so much in the establishment of a new legal principle as in the
"application of accepted principles to a particular commercial context.
"The observation in Satterthwaite's case was of course not directed to
"negotiations for the sale of land, nor to the interpretation of a series
"of letters. But even in this class of case I would respectfully keep it
"mind as a reminder that a mechanical analysis in terms of offer and
"acceptance may be less rewarding than the test whether, viewed as a whole
"and objectively, the correspondence shows a concluded agreement. On
"either approach the point of view of the reasonable man in the shoes of
"the recipient of each letter is of major importance".

In determining whether there was a concluded sale and purchase contract, the most important correspondence are the 1992 letters of 2 July, 13 July and 17 July. If it was just those letters without more, I would have had no difficulty in deciding that no contract of sale of land ever came into existence between the parties. The letter of 2 July 1992 from the caveator quotes $50,000 as the price for the Lelata land but the reply of 13 July 1992 from the applicant states that the applicant agreed to the sale of the land at $60,000. On their face, these two letters of 2 July and 13 July do not show that the parties had reached agreement on the price which is usually the most essential term in a contract of sale of land. However, the evidence by the applicant in these proceedings seems not to contest but to accept that the price agreed to by the applicant in its letter of 13 July 1992 for the sale of its Lelata land was $50,000. So the Court proceeds on that basis.

Apart from the price and perhaps the property which is the subject of the said letters, I have come to the view that 'viewed as a whole and objectively, and bearing in mind the point of view of the reasonable man in the shoes of the recipient of each letter' there was no concluded sale and purchase contract between the parties to sustain the caveat. In the letter of 2 July1992, the caveator was essentially saying to the applicant : I offer to buy your property for $50,000 and settlement will be on a one-down payment for the full amount. To that came the reply of 13 July 1992 from the applicant which in essence says : We agree to the sale for $50,000 on a cash sale basis. Forward the sale and purchase contract for our consideration and execution. For any queries contact the writer. In the first place it appears that there was no agreement as to how the price was to be settled or as to how the transaction was to be carried out. The caveator says payment of the price was a one-down payment

of the full price. The applicant says payment should be on a cash sale basis. These words 'cash sale basis' were explained in evidence to mean that a sale and purchase contract was required and that is confirmed in the last paragraph of the applicant's letter of 13 July. For the caveator what wascontemplated, as it appears from the oral evidence, by a one-down payment of the full amount, was a deed of conveyance as opposed to a sale and purchase contract. More importantly the use in the letter of 13 July of the words 'for our consideration and execution' clearly imply that the applicant not only was asking for a sale and purchase contract but it was also saying that before we execute that contract we want to peruse and consider it first. When we are satisfied from consideration of the contract, we will then execute it. No doubt if it turns out that the applicant is not satisfied with any aspect of the contract, the caveator will be advised accordingly and requested to make the necessary amendments to the contract and resubmit the same to the applicant for execution. If however, it turns out that the caveator does not accept the changes to the contract as advised by the applicant, then probably what will happen is that there will be no sale and purchase contract between the parties. Furthermore, the words 'if you have any queries contact me', clearly does not suggest that the applicant was making a final acceptance of anything intended to be binding on itself.

Thus if the letters of 2 July and 13 July are placed side by side together with the related affidavit and oral evidence, then apart from the price and the property, there was no consesus ad idem between the parties on the other matters relating to this transaction. And I am of the view that the letters of 2 July and 13 July do not constitute any binding contract of sale of land.

As for the letter of 17 July 1992, the evidence by the applicant was that their impression of this letter was that the caveator's solicitor had not obtained any instructions from his client about the proposed sale. This letter is rather vague and ambiguous as it provides that the caveator's solicitor was to obtain certain instructions from the caveator but it does not specify what those instructions were. A person, in the position of the applicant, reading that letter may well, that the caveator's solicitor had not received full instructions from his client and there was doubt whether the proposed transaction will in fact proceed to completion. The mention in the same letter of a deed of conveyance is not consistent with a sale and purchase contract mentioned in the applicant's letter of 13 July. Then it is said in the same letter that the deed of conveyance will be forwarded for perusal and execution.

Overall, there was still no comcluded sale and purchase contract capable of specific performance after the letter of 17 July. It is clear to my mind, that the applicant's position and intention was that it was not to be bound by any sale and purchase contract until such contract had been prepared by the caveator to his solicitor and then sent to the applicant for the consideration by the applicant and if the applicant is satisfied with the contract then it will execute the contract. In other words, it appears to me that the applicant does not consider itself bound by any contract until it has executed the contract which it will only do after consideration of the contract and being satisfied with it. That contract never came into existece as the caveator contemplated a one-down payment and a preparation of a deed of conveyance. There was therefore never any concluded contract between the parties as they were never ad idem.

Counsel for the caveator made a general and brief submission that there was acquiescene on the part of the applicant to the position as expressed in the faxed letter of 17 July from the caveator's solicitor.

As I understand this submission, it is saying that the absence of any response from the applicant to the letter of 17 July implies that the applicant was assenting to the contents of that letter and the position expressed therein. After careful consideration of this submission, I think it cannot succeed.

The doctrine of 'acquiescene' is generally explained in Halsbury's Laws of England 4th ed. vol. 16 para. 1473 where it says :

"The term 'acquiescence' is used where a person refrains from seeking "redress when there is brought to his notice a violation of his rights of "which he did not know at the time, and in that sense acquiescence is an "element in laches... The term is, however, properly used where a person "having a right, and seeing another person about to commit or in the course "of committing an act infringing upon that right, stands by in such a "manner as really to induce the person committing the act, and who might "otherrise have abstained from it, to believe that he assents to its being "committed; a person so standing by cannot afterwards be heard to complain "of the act. In that sense the doctrine of acquiescence may be defined as "quiescence under such circumstances that assent may be reasonably inferred "from it, and is no more than an instance of the law of estopple by words "or conduct...." In para. 1510 of the same edition and volume of Halsbury's Laws of England it is stated :

"The doctrine of acquiescence, which is founded on the jurisdiction of the "courts of equity to relieve against fraud, operates by way of estopple "to prevent a person who refrains from interfering while a violation of "his legal rights is in progress from taking advantage of his conduct to "the disadvantage of the other. Acquiescence differs from estopple in that "for acquiescence it is not necessary that the person should have made any "representation by words or conduct that he did not enforce his rights".

Applying these statements of the law to the evidence, I am of the view that there could not have been any acquiescence on the part of the applicant to the letter of 17 July from the caveator's solicitor.

In all then, the application in this case succeeds and caveat No. 445X lodged in respect of the applicant's land at Lelata is ordered to be removed. In the circumstances of this case, costs are awarded to the applicant which I fix at $350.00.

Finally, it must be re-emphasised that as from this judgment, the summary procedure must be adopted in an application for removal of a caveat.

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CHIEF JUSTICE