Sustaining a caveat on the grounds of an implied or constructive trust

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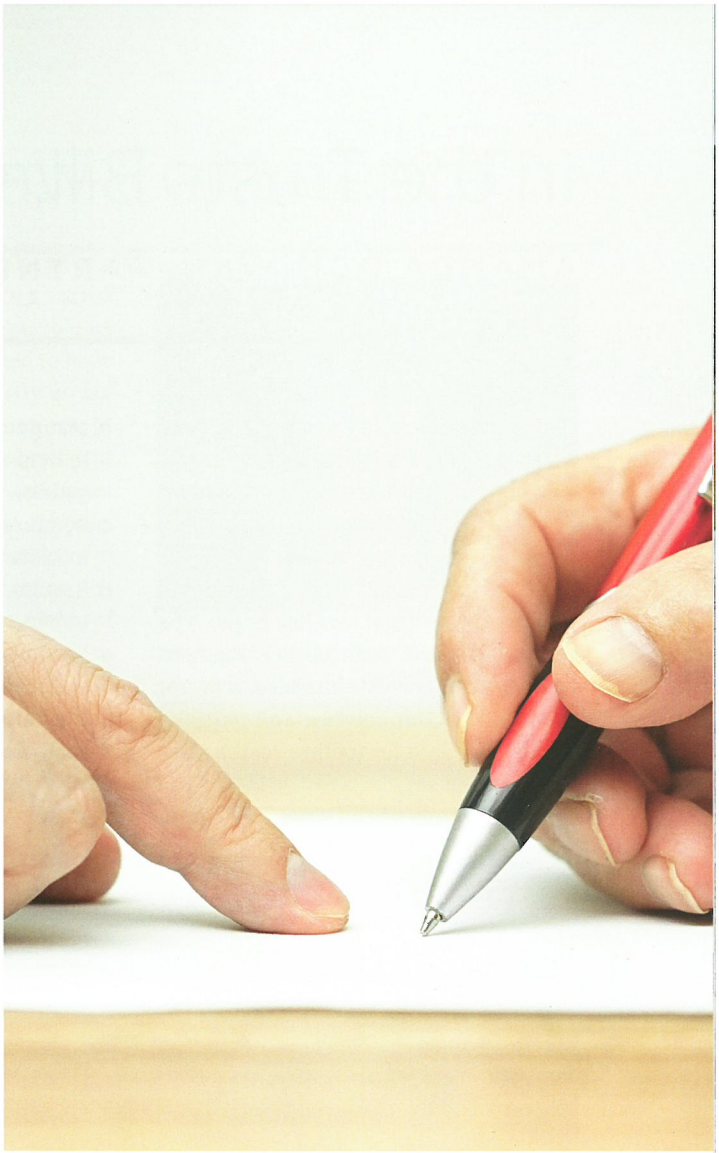

Wakenshaw v Wakenshaw [2017] NZCA 252

A caveat can be registered against a property if a person has sufficient interest in the land. This may include unregistered interests such as those of mortgagees, holders of rights of way, or other easements. In some circumstances beneficiaries of trusts can lodge a caveat against a property. The recent decision of *Wakenshaw v Wakenshaw* dealt with such a situation. In this case a caveat was registered over a property by Janthina (Jan) Wakenshaw claiming that she was a beneficiary under an implied or constructive trust and that her brother in law who owned the property was a trustee.

The Court of Appeal dismissed the application on both Ms Wakenshaw's claims.

Background

Mary Wakenshaw had three children, Donald, Norman and Delwyn. Mary had a house in Auckland but also owned a property at Bethels Beach. The two brothers began developing this property together around 1982. Donald moved there in 1986 and in 1990 Norman and Jan, who were married in 1985, also came to live at Bethels Beach.

There was no agreement as to who contributed to the original purchase price of the property, who undertook the work, or who paid the outgoings during the time they all lived there.

In 2014 Norman died after a long illness. Jan said prior to his death he had arranged to transfer the Bethels Beach title into his and Donald's names as tenants in common. However, this never eventuated.

Several months after Norman's death, Mary made a new will dividing her estate three ways between her children. Her original will left the Bethels property to both Donald and Norman but several weeks after making the new will, Mary gifted the entire property to Donald. Jan was not aware of this at the time. She was sure that Mary would make arrangements so she and the two children were looked after and would not have to move from the property. Jan maintained that Mary said Donald would transfer Norman's share of the property to her.

Eleanor Hall, Mary's solicitor who drafted the new will, differed in her version of events. She had no doubts that Mary had capacity when she made the new will and that she was not pressured by anyone. Mary's wishes were clear – she wanted to transfer the property to Donald because of the love and support he had shown her especially since he had helped look after Norman in his last days.

Ms Hall recalled discussions with Mary about Jan's expectations. Mary had said Jan would understand the new arrangement and at any rate Donald had a good heart and would let her stay on. Moreover, Jan was aware that Mary had helped Norman and her out financially over the years, and they had been able to live on the property rent free.

After Mary died in May 2015 and the property was transferred to him, Donald made a new will gifting the property to Jan's two daughters. He also allowed Jan and the girls to continue living there. Some months later Jan lodged a caveat.

The High Court decision

The High Court dismissed Jan's application for an order sustaining her caveat. Judge Doogue was not satisfied that it was reasonably arguable that an implied trust arose from Norman's alleged contributions to the property price. There were significant factual disputes in the evidence and little detail had been provided. A further issue was that Jan had asserted that Norman was a beneficiary and not herself.

The judge also considered if it was reasonably arguable that an implied trust arose because of the contributions by Norman and Jan to the property applying the principles in *Lankow v Rose*. Again, it was noted that payments were disputed, and that while Norman and Jan had contributed to some costs, they had also occupied the property rent free. Jan appealed the High Court's finding.

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The Court of Appeal

The Court of Appeal found that Jan had no caveatable interest as Norman's next of kin. Jan had asserted that Norman was the beneficiary and that this had passed to her on his death but she had never sought letters of administration for Norman's estate. As Norman died intestate, his next of kin had no caveatable interest in the deceased's land until it had been fully administered.

The court also noted that Jan had no direct caveatable interest in her own right despite claiming her personal contributions gave rise to a constructive trust. The court agreed that the evidence as to her contributions was unsatisfactory. There was no supporting documentation detailing how much was spent on the development. And while it was reasonably arguable that she had made contributions, the real issue at trial would be if those contributions manifestly exceeded the benefits which she had derived.

The court affirmed that where a transferee receives property with notice that it is trust property, the transferee is liable to account for the property. But in this case, neither Ms Hall nor Mary gave Donald notice that the property should be held on constructive trust for Jan.

The court further stated that it was not reasonably arguable that there was a caveatable interest on any prospective claims that Jan or her daughters may have under the Law Reform (Testamentary Promises) Act 1949 or the Family Proceedings Act 1980. The law is clear that a mere right to apply for an order vesting property in an applicant does not of itself give rights to a caveatable interest. Furthermore, a caveat does not of itself assert an interest in the property on behalf of the daughters.

The decision highlights that in circumstances where an applicant claims there is a caveatable interest, it is essential that a reasonably arguable case can be established. It is also a reminder that for a constructive trust to arise, the applicant must clearly show that any contributions to the property in question, manifestly exceed the benefits which have been received.