

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA537/2021
[2022] NZCA 228**

BETWEEN LSK BUILDERS 2011 LIMITED
 Appellant

AND MARK ELWYN DAVID CHAMBERLAIN
 AND SUZANNE CATHERINE
 CHAMBERLAIN
 Respondents

Hearing: 28 March 2022 (further submissions received on 1 April 2022)

Court: Brown, Clifford and Lang JJ

Counsel: G D Pearson and M E Byczkow for Appellant
 L S B Acland for Respondents

Judgment: 7 June 2022 at 10.30 am

JUDGMENT OF THE COURT

- A The appeal is dismissed.**
- B The appellant must pay the respondents costs for a standard appeal on a band A basis and usual disbursements.**
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REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] The appellant (LSK) is a building company that was engaged by the respondents (the Chamberlains) to build their new home. LSK and the Chamberlains are in dispute concerning the payments due under the relevant residential

building contract (the contract). The contract conferred on LSK the entitlement to register a mortgage over the residential property owned by the Chamberlains (the property), to secure payment of moneys due and owing under the contract. The contract conferred a further entitlement to lodge and maintain a caveat against the title to the property for the protection of LSK's rights in the contract.

[2] Having lodged a caveat against the Chamberlains' title to protect its right to register a mortgage, on 16 January 2019 LSK registered an "all obligations" mortgage security which included a priority amount of \$175,000.

[3] In response to the Chamberlains' application to the Registrar-General of Land for the lapse of the caveat, LSK sought an order under s 143 of the Land Transfer Act 2017 that the caveat not lapse. An affidavit in support of LSK's originating application stated that the caveat was necessary to prevent any dealings with the title to the property, and to ensure LSK's interest in the property was protected until the dispute was resolved. There was no specific reference in the application or supporting affidavit to the priority amount included in the mortgage or its implications.

[4] On 5 August 2021, Associate Judge Johnston dismissed the application.¹ LSK appeals that decision.

The High Court judgment

[5] The key clause in the contract, cl 5.4, entitled "Payment", provides for progress payments and payment following practical completion in fairly orthodox terms. The builder's protections to which this appeal relates are contained in cls 5.4.5 to 5.4.7:

5.4.5 The Owner hereby irrevocably agrees and acknowledges that to secure payment of the monies due and owing to the Builder under this Contract, they shall grant a registered mortgage over the Site, the real property description of which is contained in the First Schedule hereof, in favour of the Builder. The form of the mortgage shall be the current Auckland District Law Society All Obligations Mortgage Memorandum (or in the event the Auckland District Law Society ceases to exist the form used by the lawyers for the Builder from time to time).

¹ *LSK Builders 2011 Ltd v Chamberlain* [2021] NZHC 2018 at [27].

5.4.6 For the purposes of clause 5.4.5, if the Owner refuses or fails for whatever reason to execute the necessary documentation to effect the mortgage security in favour of the Builder, the Owner hereby irrevocably appoints the Builder and, if the Builder is a company, the directors of the company to be the attorney of the Owner at any time to:

- a) execute and sign the mortgage in favour of the Builder; and
- b) procure the registration of the mortgage; and
- c) execute and perform any act or deed, matter or thing in accordance with this clause as fully and effectually as the Owner could do.

5.4.7 The Owner irrevocably authorises the Builder to lodge and maintain a caveat against the title to the Site for the protection of the Builder's rights in this Contract.

[6] The Associate Judge observed that LSK did not purport to invoke any interest in the Chamberlains' land other than that asserted in the caveat instrument,² which contained the following statement:

Estate or Interest claimed

Subject to the Caveator's right to mortgage the property pursuant to clause 5.4.5 to 5.4.7 of the Residential Building Contract dated 27 July 2017 between the registered Proprietors and the Caveator.

The Associate Judge concluded that LSK's caveat became redundant once its mortgage was registered and that the caveat should therefore lapse.³

[7] The Associate Judge noted that LSK was claiming approximately \$200,000 under the contract and that the Chamberlains disputed that claim.⁴ While not expressly addressing the mortgage's priority amount or its implications, the Associate Judge discussed LSK's concern about increases to its claim due to accumulating interest and escalating costs in this way:

[26] Mr Pearson [counsel for LSK] also raised in submission that LSK's claim is now for a greater amount than it was as at the date of the registration of the mortgage, essentially because of accumulating interest and escalating costs. I do not accept that that alters the position. LSK's arguable interest in the land extends only to the debt due under the contract. Any amount due under the contract could and should be covered by

² At [23(d)].

³ At [23(e)], [24] and [27].

⁴ At [2].

an all obligations security of the sort it was contractually entitled to register. Any claim not due under the contract does not constitute an interest in the land.

Issue on appeal

[8] LSK's notice of appeal contended that the judgment erred in two respects:

- (a) in failing to recognise that the agreement to mortgage was not, or was arguably not, limited to one or any particular mortgage; and
- (b) in failing to recognise that at the time of the application to sustain the caveat LSK had an interest in land, namely an agreement to mortgage to secure unpaid and accruing costs.

[9] The parties agreed on the issue to be determined on the appeal, namely whether the Judge erred in finding that LSK had no caveatable interest in the Chamberlains' land. However, we consider that a more focused issue is:

Upon registration of a mortgage, does a caveat previously lodged to protect the mortgagee's interest become redundant?

Discussion

[10] The submissions of Mr Pearson, counsel for LSK, first invoked the following observation in *Sims v Lowe*:⁵

But it would in our view make a nonsense of the law and of the provisions about caveats if the registration of a subsequent mortgage should of itself do more than postpone the unregistered charge to the registered.

[11] Mr Pearson suggested that this Court was making the point that the entitlement to a caveat does not turn on the terms of any mortgage, registered or unregistered, but on whether a person has an interest in land. However, this Court's observation must be read in the context of the argument advanced in that case, based on a discrepancy between the terms of the unregistered mortgage and the terms of the caveat registered by the mortgagee one year after that mortgage was signed. While the

⁵ *Sims v Lowe* [1988] 1 NZLR 656 (CA) at 660.

mortgage instrument gave an interest as a fourth charge, the caveat, owing to the intervening registration of a subsequent mortgage, claimed an interest as a fifth charge. It was asserted that, as a result, there was no interest capable of supporting the caveat. This Court soundly rejected that argument and held that the registration of a subsequent mortgage did not prevent the lodging of the caveat.⁶ The proposition which Mr Pearson seeks to draw from that decision does not assist LSK, which obtained, as it was entitled to do, registration of a second mortgage behind the existing first mortgage over the property.

[12] Mr Pearson's second point was that the registered mortgage offers LSK only partial protection as a consequence of the inclusion of the priority amount. As he put it:

The reality is that given the loss of the caveat substituted by a mortgage with a priority amount of \$175,000, there is nothing to prevent the respondents discharging their mortgage to the bank, transferring the property to another party subject to the Appellant's mortgage and the Appellant only has \$175,000 secured, despite being owed more.

[13] Mr Pearson submitted that the caveat prevented that course because it stopped any further dealing with the title and hence the registration of the mortgage did not render the caveat redundant. Mr Acland, counsel for the respondents, characterised this strategy as inappropriately utilising a caveat to provide separate security for "additional debt". On Mr Acland's analysis, LSK had a contractual right to register a charge, which it had exercised. It did not have a right to register a second charge and hence there was no interest in land which could justify a caveat.

[14] LSK's perceived difficulty has arisen because of its unilateral inclusion in its mortgage of the \$175,000 priority amount. That figure is a "stated priority limit", a term defined in the Property Law Act 2007 as the maximum amount for which the mortgage has priority in relation to any subsequent mortgage.⁷ Section 92(1) provides:⁸

⁶ At 660.

⁷ Section 93.

⁸ This is an exception to the general rule in s 89(1) of the Property Law Act 2007 that the priority of a mortgage over property in relation to any subsequent mortgage over the property does not extend to advances made under the prior mortgage after the subsequent mortgage comes into operation.

92 Priority extends to further advances up to stated priority limit

- (1) If a mortgage over property secures further advances by way of financial accommodation up to a stated priority limit, the priority of the mortgage, in relation to any subsequent mortgage over the property, extends to every such further advance, up to the stated priority limit.

[15] Because some implications of the Property Law Act might not have been anticipated, we invited counsel to file further submissions, should they wish to do so, concerning the implications of LSK's priority amount for this appeal. Both parties took up the invitation.

[16] The submissions for LSK correctly recognised that the \$175,000 ceiling would apply both to advances made prior to the registration of a third mortgage and to further advances subsequent to the third mortgage becoming operative. Mr Pearson submitted, therefore, that LSK's mortgage would have no priority over a subsequent mortgage in respect of all outstanding amounts in excess of the \$175,000 priority limit, irrespective of the timing of the advances relative to the subsequent mortgage. Mr Pearson was particularly critical of the Associate Judge's observation that any amount due under the contract could and should be covered by the all obligations mortgage.⁹ He contended that, because the priority limit in LSK's mortgage was insufficient to cover accumulating interest and escalating costs in respect of the contractual debt, the retention of the caveat was essential.

[17] Mr Pearson explained that the selected priority amount reflected the money that LSK considered was due and owing at the time of registration. He recognised that one way in which LSK could have sought to secure priority was by nominating a priority amount greater than the claimed level of indebtedness at the time the mortgage was registered. However he suggested, somewhat faintly, that there might be difficulty with that course, observing that at least one authority has had to consider allegations that a priority sum included unilaterally on the mortgagee's behalf was "a fabricated priority amount".

⁹ *LSK Builders 2011 Ltd v Chamberlain*, above n 1, at [26].

[18] A submission to that effect was made by counsel in *Thorn v United Steel Ltd*.¹⁰ However that argument does not appear to have been pursued and there was no ruling on the issue.¹¹ It is certainly not authority for the proposition that a builder in LSK's position is precluded from nominating a genuine priority amount sufficient to anticipate accruing indebtedness. If LSK's apprehension was sound, it would follow that any builder with a contractual right to register a mortgage to secure payment of a disputed amount would likely wish to maintain a caveat in every case. For, repayment considerations aside (which would not likely be relevant in the building contract debt scenario), there would be no advantage for a builder/mortgagee in stating a priority amount that was no greater than the level of indebtedness at registration.

[19] Turning to what we identify as the central issue in this appeal, where the right under a building contract to register a mortgage has been exercised, we do not accept that the contractual right to maintain a caveat "for the protection of the Builder's rights in this Contract" remains extant. That is so even if the objective of the caveat is to avoid the consequences of a stated priority limit (or a specified principal amount) which, for whatever reason, is less than the amount due and owing to a builder under the building contract. We agree with Mr Acland's analysis on this point.¹²

[20] Whatever the consequences may be of the inclusion in the mortgage instrument of a stated priority limit which is considered, on reflection, to be insufficient, the contractual right to maintain a caveat is spent once the contractual right which the caveat protects, namely the right to register a mortgage, has been exercised. We are satisfied that there was no error in the Associate Judge's conclusion on the ultimate issue of whether in the circumstances the caveat could be sustained.

Result

[21] The appeal is dismissed.

¹⁰ *Thorn v United Steel Ltd* [2017] NZHC 1865, (2017) 18 NZCPR 711.

¹¹ See at [93]–[95].

¹² Discussed at [13] above.

[22] The appellant must pay the respondents costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:

Isherwood Le Gros Law Ltd, Nelson for Appellant

Rout Milner Fitchett, Nelson for Respondents