IN THE COURT OF APPEAL OF NEW ZEALAND

CA147/06
[NZCA] 2007 283

	BETWEEN	HERBERT EQUITIES LIMITED Appellant
	AND	GEORGE SOCRATES MAMFREDOS First Respondent
	AND	GEORGE SOCRATES MAMFREDOS AS TRUSTEE OF SAMRAYAT FAMILY TRUST Second Respondent
	AND	ANNABELLE JANE MAMFREDOS Third Respondent

Hearing: 10 October 2006

Court: Chambers, Arnold and Goddard JJ

Counsel: R J Katz QC and S W B Foote for Appellant
P F Chambers for Respondents

Judgment: 6 July 2007 at 3 pm

JUDGMENT OF THE COURT

A The appeal is allowed in part. The appellant may lodge a caveat over the land in CT 114751.

B The respondents are jointly and severally liable to pay the appellant costs of $6,000 in this Court, plus usual disbursements. We certify for second counsel.

C Costs in the High Court are to be dealt with by that Court in the light of this judgment.

REASONS OF THE COURT

(Given by Arnold J)

Introduction

[1] This case arises out of an uncompleted loan transaction (or transactions). The appellant, Herbert Equities Limited, wanted to borrow US$100m. The first respondent, Mr Mamfredos, agreed to act as the appellant's loan broker, utilising his family trust, the Samrayat Family Trust (Samrayat), of which he was a trustee (the second respondent). To facilitate the loan application process, Samrayat agreed to advance a US$1m loan fee on the appellant's behalf to the proposed lender. The appellant was to repay this fee to Samrayat in instalments.

[2] The proposed loan(s) did not proceed. The appellant lodged a caveat over land owned by the respondents. This was later withdrawn by consent as part of a settlement between the parties. However, the appellant considered that the respondents did not meet the terms of the settlement and lodged a further caveat numbered 6380920.1 over land owned by the respondents in CT 114751. Mr Mamfredos applied to the Registrar-General of Land for the caveat to lapse. When the Registrar notified the appellant of this, the appellant applied to the High Court for an order that the caveat not lapse, or alternatively for leave to lodge a further caveat over that land, relying on ss 145A and 148 of the Land Transfer Act 1952. Shortly after, it issued proceedings to recover various payments which it had made to Mr Mamfredos/Samrayat.

[3] On 8 December 2005 Williams J issued a judgment in which, having addressed the issues to the extent possible on the material before him, he gave the parties the opportunity to file further evidence: HC AK CIV 2005-404-3679 8 December 2005 (the preliminary decision). Having received and considered the further evidence and submissions, Williams J dismissed the appellant's applications. On the respondents' application, he ordered the appellant to provide security for

costs in the sum of $25,000: HC AK CIV 2005-404-3679 26 June 2006 (the final decision).

[4] On appeal, the appellant seeks restoration of its caveat over the respondents' property or leave to register a second caveat over the property, and also a reduction in the sum ordered for security of costs. In addition, the appellant seeks costs on the appeal and in the High Court.

Background

[5] We deal first with the factual background. As will be seen, much of that is contested. We then outline the relevant property transactions, before addressing the pleadings.

Facts

[6] It appears that the appellant wanted to obtain an offshore loan of US$100m. In November 2002 the appellant's sole director, Mr Herbert, was introduced to Mr Mamfredos and to Mrs Mamfredos, the third respondent, through an advisor, Mr Kerr. Mr Mamfredos agreed that he would attempt to arrange a loan for the appellant, acting, according to Messrs Herbert and Kerr, as a "blind broker". This meant that Mr Mamfredos would arrange the loan without the appellant being aware of the lender's identity until it received the final loan documentation.

[7] Messrs Herbert and Kerr said that Mr Mamfredos advised them that credit and due diligence checks would have to be made in relation to the appellant and Mr Herbert. A loan fee of US$1 million would have to be paid in advance, most of which would be refundable if the loan application did not proceed. This loan fee included a "reservation of money" or commitment fee of US$100,000, which would be retained by the proposed lender if the appellant did not proceed with the loan. In addition, the appellant would have to pay a non-refundable due diligence fee of US$15,000. Mr Mamfredos was to receive a US$1m broker's fee. That was to be paid on drawdown of the loan. This arrangement was confirmed in a letter dated 22 January 2003 from Mr Herbert to Samrayat. The letter appointed Samrayat as the

appellant's broker to arrange the US$100m loan for a brokerage fee of 1%. It also dealt with liability for the loan fee and the commitment fee.

[8] Mr Mamfredos gave a slightly different account. He said that his US$1m broker's fee was to be paid in two instalments – US$500,000 was to be paid "immediately", with the balance due when the loan transaction was completed. As we have said, this is inconsistent with the terms of the letter of 22 January 2003 and with the evidence of Messrs Herbert and Kerr. In any event, no such payment was made to Mr Mamfredos and he does not appear to have taken the issue up at the time.

[9] Mr Herbert said that in late December 2002 Mr Mamfredos told him that the appellant had qualified as the borrower and he as the guarantor.

[10] The appellant was unable to pay the US$1m loan fee. Mr Mamfredos agreed to lend the appellant the US$1m if it could pay the US$15,000 due diligence fee. The loan was to be advanced by Samrayat. The appellant and Samrayat executed an agreement to this effect on 5 February 2003 (the February loan agreement). It set out how the appellant was to repay the US$1m loan, specifically:

(a) US$100,000 was to be paid from the proceeds of the sale of a property due for settlement on 21 February 2003;

(b) US$150,000 was to be paid upon confirmation of the US$100m loan;

(c) US$750,000 was to be paid from the US$100m loan when it was drawn down by the appellant.

[11] Mr Mamfredos said that he arranged for the US$1m to be paid to an international lender, as contemplated by the agreement. In the present proceedings the appellant disputes this. But over the period January 2003 to May 2003, the appellant made various payments totalling NZ$500,826 to Samrayat, being the due diligence fee and payments under the February loan agreement, on the assumption that the US$1m payment had been made. These payments were as follows:

(a) NZ$32,000 (ie, US$15,000) on 29 January 2003. This was said to be for the due diligence fee.

(b) NZ$70,000 on 4 March 2003. This was said to be towards repayment of the loan application fee.

(c) NZ$398,826 on 13 May 2003. This was also said to be towards repayment of the loan application fee, and included NZ$6,676 by way of interest for late payment.

[12] The parties disagree on what happened after the February loan agreement was executed. Mr Herbert said that he provided feasibility and appraisal documents to Mr Mamfredos in February 2003. He said that he thought the appellant's inability to meet its commitments under the February loan agreement in a timely way would not prevent the appraisal process from proceeding because Mr Mamfredos or Samrayat would pay the loan fee on the appellant's behalf, but Mr Mamfredos told him that the appraisal would not proceed until the payments were up to date.

[13] For his part, Mr Mamfredos said that the appellant failed to provide the requisite financial information in February 2003 or thereafter, despite his numerous requests. Ultimately, although the loan had been fully negotiated with an international lender, the application was invalidated as a result of the appellant's failures. Mr Mamfredos appeared to give two different accounts of the consequences of that in one of his affidavits. At one point he seemed to say that the proposed lender retained the whole US$1m loan fee because the appellant had withdrawn from the loan, whereas at another point he said that the lender retained the US$100,000 commitment fee as a penalty.

[14] The witnesses agreed that they met in mid-May 2003, but disagreed as to what occurred. Mr Herbert said that Mrs Mamfredos had advised that the loan was still available provided that the appellant paid the amounts due under the 5 February loan agreement. But, Mr Herbert said, a few days later and despite that confirmation, Mr Mamfredos informed him that the loan had been invalidated through late payment, and that the commitment fee for the loan (US$100,000) had

been retained as non-recoverable expenses and costs. The balance of the funds could be held in credit for a future loan application or could be returned to the appellant. Mr Herbert said that he protested this penalty and was then told by Mr Mamfredos that the non-refundable fee would be lower (about US$20,000 – US$30,000). He said that Mr Mamfredos had told him that he had personally borrowed US$100m on 16 May 2003. Mr Mamfredos denied this.

[15] The appellant and Mr Mamfredos then entered into an agreement dated 16 May 2003 under which Mr Mamfredos would lend US$25m to the appellant for five years and would attempt to source an offshore loan for Mr Herbert personally. US$24m was to be paid to the appellant and US$1m retained by Mr Mamfredos to meet the costs associated with Mr Herbert's loan application. Mr Mamfredos was also to acquire shares in the appellant and join its board as a consultant. Messrs Herbert and Kerr said that none of this in fact eventuated.

[16] Mr Mamfredos' account was that the appellant acknowledged its failure to meet its information obligations in relation to the US$100m loan and assured him that appropriate steps would be taken to meet due diligence and feasibility obligations. He said that Messrs Herbert and Kerr brought the agreement relating to the US$25m loan to the meeting and begged him to make that amount available. He said that he reluctantly agreed to do so, to avoid missing out on his brokerage fee.

[17] Subsequently, the parties agreed that the loan application process for the original US$100m would be reactivated, and the application resubmitted for allocation in December 2003 or March 2004. However, they disagreed about how that occurred. Messrs Kerr and Herbert said that at a meeting on 25 May 2003 Mr Mamfredos asked to be released from the 16 May agreement as he was unable to source his funds without travelling overseas and he did not have a passport. Mr Mamfredos denied this and said that he made the request when the parties met on 17 July 2003, where they agreed that the 16 May agreement was at an end and that the original transaction would be completed.

[18] Time passed. The appellant's solicitor, Mr Fletcher, said that Mr Mamfredos advised that, contrary to his earlier indication that it would be available in the

December 2003 or the March 2004 loan allocations, the US$100m loan would not be available until the May 2004 allocations. Both Mr Fletcher and Mr Herbert said that the appellant was required to pay a further commitment fee of US$100,000, although Mr Mamfredos disputed that. Mr Fletcher said that he transferred NZ$160,000 (the equivalent of US$100,000) into Samrayat's bank account on 7 May 2004 on the appellant's behalf. For his part, Mr Mamfredos said that the further US$100,000 was accepted by Samrayat as "payment towards overdue interest and principal" under the February loan agreement.

[19] Mr Mamfredos said that he tendered an amended loan application to a proposed lender on 9 May 2004 and that the proposed lender confirmed a loan offer on 5 June 2004. He said that he advised Mr Herbert by telephone that the loan application had been successful and an offer made, only to be told that the appellant had withdrawn its application. Mr Mamfredos said that he lost confidence in the appellant and Mr Herbert and resigned as their broker.

[20] In the meantime, Mr Herbert had been declared bankrupt on 1 April 2004. Mr Mamfredos said that he did not learn of this for some months, although there is evidence to suggest that he learnt of it later in April.

[21] Mr Herbert said that at a meeting on 5 June 2004 Mr Mamfredos told him that the loan application could not proceed because of his bankruptcy. He said that there was a further meeting on 6 June, at which Mr Mamfredos refused to confirm or deny that he had received any loan offer. Mr Mamfredos denied that these meetings occurred, even though Mr Fletcher said in his evidence that he had attended the second of them.

[22] Finally, on 6 and 8 June 2004 the appellant communicated with Mr Mamfredos confirming that it had withdrawn from the May 2004 loan application and intended to submit a fresh application.

[23] In the result, the appellant has not accessed any loan brokered by Mr Mamfredos or Samrayat. It has paid Mr Mamfredos/Samrayat a total of NZ$660,826, none of which has been returned.

Property transactions

[24] The appellant's caveat 6380920.1 was lodged against the land comprised in CT 114751. It claimed an interest "as a cestui que trust or by virtue of a constructive, implied or resulting trust between the caveator as beneficiary and [Mr] Mamfredos as the registered proprietor".

[25] The position in relation to the land transactions is complicated. Williams J summarised it in the final decision as follows:

> [10] CT NA21C/825 comprising 6.8493ha was owned by a Mr and Mrs Baas. On 7 June 2003 they contracted to sell "five acres to be surveyed off" that title – the equivalent of 2.0235ha – to Mr Mamfredos as trustee of the Samrayat Family Trust for $180,000 to be paid "within 28 days following Council approval and consent". Mr Mamfredos caveated the title by caveat dated 12 September 2003 registered on 25 September 2003 under no. 5740939.1 claiming an interest pursuant to the contract with Mr and Mrs Baas and through "lodgement of a plan of subdivision and requests for new titles to issue for two lots being a land area of 3.4654ha or thereabouts" incorporating the land in CT NA21D/567 and lot 2 of 4.9671ha.
>
> [11] That was the result of an agreed boundary adjustment and a consequent subdivision and plan being prepared. The plan was approved as to survey on 9 December 2003 and deposited on 4 February 2004 as DP 328163. It contained 2 lots, Lot 1 of 3.4671ha and lot 2 of 4.9721ha.
>
> [12] Mr Mamfredos withdrew caveat 5740939.1 on 6 November 2003 but lodged a second caveat the same day under no.5788512.5. It was in the same terms as the previous caveat. He said withdrawals of the caveat were by consent of all those involved and were undertaken to enable the subdivision and subsequent sale to proceed.
>
> [13] It was also necessary because, by that time, Mr and Mrs Baas had agreed to sell the whole of CT NA21C/825 to a Mr and Mrs Edwards but subject to the agreement for sale and purchase between Mr and Mrs Baas and Mr Mamfredos. The transfer from Mr and Mrs Baas to Mr and Mrs Edwards was dated 4 November 2003 and registered two days later.
>
> [14] On 10 December 2003 Mr and Mrs Edwards signed the transfer to Mr Mamfredos of Identifier 114751, CT 21C/825, being part of Lot 1 DP328163. That transfer was produced on 12 December 2003 but was not entered until 4 February 2004, the date of deposit of DP 328163 and followed the execution on 10 December 2003 of an order for new Certificates of Title in the names of Mr Mamfredos and Mr and Mrs Edwards respectively for Lots 1 and 2 on DP 328163 being Certificates of Title or Identifiers 114751 and 114752 respectively.
>
> [15] As expected, therefore, on 4 February 2004 CT NA21C/825 was cancelled and CTs 114751 and 114752 were issued for Lots 1 and 2 on Deposited Plan 328163 respectively.

[16] It was against the former that [the appellant] signed caveat 6380920.1 on 7 April 2005 and lodged it against the title on 13 April.

[17] As far as CT NA21D/587 … is concerned, that title comprising 1.5702ha was transferred by JKL TV Ltd to Mr Mamfredos by transfer dated 25 February 2003 and registered on 11 March 2003. It was cancelled on 4 February 2004 as part of issuing the new CT 114751 after deposit of DP 328163. Therefore it, too, became subject to [the appellant's] caveat 6380920.1 on its lodgement against CT 114751 on 13 April 2005. Those transactions were explained by Mr Mamfredos in the following way:

> 19.1 The purchase of 21D/587 and transfer on 25 February 2003 (that is, one week prior to the first payment of $70,000 by [the appellant]) shows that none of [the appellant's] loan repayments were used or even contemplated for use by me to purchase that portion of 114751.
>
> 19.2 Further, the process in which I was immersed to purchase two portions of two separate titles in order to add to [Samrayat's] existing title and the value of that property as a result required two quick purchases in order to amalgamate that land, so that it was only reasonable that for me to commence down that path in February 2003, the purchases had already been contemplated and the funds were already available to effect those necessary purchases. They simply would not have been made in anticipation of and reliance upon loan repayments from [the appellant].
>
> 19.3 Both purchases were made on behalf of [Samrayat] in my role as trustee, as were the title transfer and creation of a new title, using funds already in the possession of the second defendant, in its account, separate from any monies paid by [the appellant].
>
> …
>
> 22 That is, there was a transfer to me by Mr and Mrs Edwards on 10 December 2003, not as a result of a purchase with settlement that month, but as the result of a purchase by me (for [Samrayat]) from Mr and Mrs Baas in June 2003. … In other words, "Mr Fletcher's" $350,000.00 played absolutely no part in that land purchase and gave him no interest whatsoever upon which to place a caveat as he had done.
>
> 23 … both his [Mr Fletcher's] and [the appellant's] monies played no part in the purchases that form part of the 495 Brookby Road property. In short I believe an accurate assessment is now possible and confirms that [the appellant] cannot demonstrate a

> link between its repayments to [Samrayat] and the acquisition of land in my name.

Pleadings

[26] The appellant issued the present proceedings to recover the NZ$660,826 which it paid in the period January 2003 to May 2004, and (under some causes of action) a further amount by way of professional fees, together with interest and costs.

[27] The appellant's original statement of claim contained four alternative causes of action, namely a claim for breach of contract, a claim for breach of fiduciary duty, a claim under the Fair Trading Act 1986 based on misleading or deceptive conduct and a claim based on breach of trust. In each case the appellant alleged that the respondents used the funds which it paid under the February loan agreement for purposes other than arranging an offshore loan for the appellant.

[28] The original statement of claim did not allege that the funds paid by the appellant were used by one or more of the respondents for the purchase of the property which it caveated. However, the appellant filed an amended statement of claim which added a fifth cause of action in which it is alleged that the respondents fraudulently misappropriated the appellant's funds, including using them for the purchase of the caveated property.

[29] Despite this, no remedy is sought in respect of the property. During the course of argument, Mr Katz QC said that the pleadings would be amended to include a remedy in respect of the property.

[30] In their statement of defence, the respondents deny that the funds were used by any of them for any purpose other than arranging the overseas loan. Mr Mamfredos admits that he owed a fiduciary duty to the appellant, but denies that he breached it. The respondents deny that they have any obligation to account for the money paid by the appellant to Mr Mamfredos/Samrayat.

Decision of High Court

[31] In the preliminary decision Williams J, after setting out the factual background, noted that a critical difference between the parties was whether the US$1m loan from Samrayat to the appellant under the February loan agreement had in fact been advanced. Mr Mamfredos said that it had been deposited in the account of an overseas lender on behalf of the appellant. Mr Herbert contested that.

[32] The Judge said:

> [68] Of the possibilities, if the US$1m advance was actually made, it seems implausible that it would have been paid direct to [the appellant]. Mr Herbert denies it and, in any event, why would the funds be paid by Mr Mamfredos or the Samrayat Trust to [the appellant] only to be returned to Mr Mamfredos for onward transmission to those to whom the loan application and due diligence fees were due? He, after all, was the only person aware of their identities.
>
> [69] But if, as Mr Mamfredos suggests, US$1m loan was paid on [the appellant's] account on its behalf to an overseas bank, it would appear to be a simple matter for the payments to be proved by receipts or other documents from the payees. Yet there is nothing whatever in the evidence by way of proof in that regard.
>
> [70] Following on from that, if, despite Mr Herbert's firm assertions, the US$1m advance was actually paid to [the appellant] or on its behalf, the fact that [the appellant] made payments to Mr Mamfredos or the Samrayat Trust strongly suggests it thought the loan application and due diligence fees had or were to be paid on its behalf by Mr Mamfredos or the Samrayat Trust, and its payments to them were on account of repayment of the loan made for that purpose.
>
> [71] However, what is critical in that scenario is that if [the appellant's] payments to Mr Mamfredos and the Samrayat Trust were towards repayment of a loan, then the [respondents] were free to do as they chose with the money they received, including using it for purchasing land. It was their money. [The appellant] would have no caveatable interest in any land brought with its loan repayments.
>
> [72] The only possibility which might conceivably give [the appellant] a caveatable interest in any land in Mr Mamfredos' name or held by him in trust for the Samrayat Trust, would be if the US$1m advance was never made and the payments made to Mr Mamfredos or the Samrayat Trust were payments by [the appellant] to Mr Mamfredos towards the loan application and due diligence fees but utilized by him in or towards purchase of the land discussed earlier in this judgment.
>
> [73] The [respondents] object to the continuation of the caveat encumbering their land and point to evidence that it is frustrating their wish

> to deal with the property. However, if the situation is as Mr Mamfredos asserts and the loan application and due diligence fees were paid by and through him, with the former now having been forfeited as a penalty for [the appellant's] refusal to accept the loan offer and repayments being on account of the loan, then it is difficult to see why the proof of those matters, which must have been readily available, has not been put in evidence. If Mr Mamfredos' version of events is correct:
>
> - There must be a due diligence report and a receipt for the fee from those who prepared it.
>
> - There must be documents evidencing the receipt of the large loan application and the fee by the person or organisation to which they were sent and paid.
>
> - There must be loan application documents evidencing the lender's willingness to provide such a large loan. Yet the only security document Mr Mamfredos put in evidence was a printed and incomplete form of Auckland District Law Society General Security Agreement and Mortgage dated 21 May 2003 which, though it mentioned a loan of "$US100,000,000.00 or New Zealand dollar equivalent", on its face it covers a loan by him to [the appellant] (under its former name) which he described as a "guarantor security over the US$100,000,000.00 proposed loan monies" not the security documents themselves.
>
> [74] The omissions to produce any documents whatever which might convincingly demonstrate that [the appellant's] claim is unfounded and its caveat should not be sustained are perplexing in the context of this case.

[33] The Judge then noted that Mr Mamfredos had attempted to justify his failure to adduce any documentary evidence to support his claim that he had made the US$1m payment on behalf of the appellant in three ways (at [83]-[87]):

(a) He said that he was a "blind broker" and so it was in the nature of the transaction that the appellant and the lender did not know each other's identity;

(b) He said that the appellant had the onus of proving its case and that no onus lay on him;

(c) He relied on confidentiality agreements entered into between the parties and others involved on their behalf.

[34] Having pointed out that none of these reasons was sufficient, the Judge said:

> [90] For all the reasons discussed, the conclusions appropriate at this stage of this application are:
>
> a) That an inference may be available that funds paid by [the appellant] to Mr Mamfredos towards the loan application fee and the due diligence cost may have been subverted and used by him or it for their own purposes, particularly acquisition or partial acquisition of Identifier 114651 or other land in Mr Mamfredos' name.
>
> b) That if that inference is available, a resulting or constructive trust arise might arguably arise in relation to the land or part of it.
>
> c) Given that Mr Mamfredos is a trustee of the Samrayat Trust and the Trust was the recipient of one of the payments, his knowledge of the purpose to which those payments were actually put must be attributed to the Trust and accordingly it may hold the whole or part of its beneficial interest in the land under a resulting or constructive trust for [the appellant].
>
> d) That given the seriousness of the allegations it would not be right to allow [the appellant's] caveat to lapse or to give leave for the registration of a second caveat without the parties having a further opportunity to confirm or dispel those tentative views.
>
> e) That because [the appellant's] caveat will continue to prevent dealings by Mr Mamfredos and the Samrayat Trust with their land, the opportunity for the parties to adduce additional evidence should be limited.

[35] The Judge then set a timetable for the filing of additional evidence (at [107]).

[36] In the final decision, having set out the position in relation to the properties, the Judge said that the issue was whether the appellant had shown a sufficient linkage between the money which it paid under the February loan agreement and the purchase of the property (at [18]). The Judge then summarised the evidence which Mr Mamfredos had put forward to justify his assertion that he had undertaken the steps which he said he would and, in particular, had made a payment of US$1m to an overseas lending institution on behalf of the appellant. He summarised the evidence as follows (at [20]):

> …
>
> a) An email to Mr Mamfredos dated 24 December 2002 from a London firm commenting on the J P Morgan Chase due diligence report on the plaintiff and the sender's efforts to improve the due diligence

score so as to render it more likely that a loan offer would be made. The letter spoke of Mr Mamfredos' "remittance of US$15,000 was received today" and said the due diligence report would be couriered to an Arab Bank official on Friday, 27 December 2004.

b) A series of emails dated 15 January 2003 between the same correspondents seeking an explanation for the "cost of this investigation" which was said to have risen from US$8000 to "twice the original quote" and saying Mr Mamfredos was "happy to pay US$10,000".

c) An email dated 16 January 2003 to an official at Arab Bank saying that J P Morgan Chase had been instructed to forward a payment which may be referring to the payment mentioned in the earlier documents.

d) An email dated 20 January 2003 apparently on Mr Mamfredos' behalf to officials at Arab Bank, commenting on the points achieved by [the appellant] in the due diligence appraisal and saying that he had told a named person "to use the money I paid for [another] report for the Herbert report" and that "all that remains is for Herbert to pay me back". The Arab Bank official responded by email on 21 January 2003 acknowledging receipt of a "bag of documents" and saying the points achieved in the due diligence report "will be strengthened by your submissions but you may be asked for guarantee".

e) An email dated 28 January 2003 sent by Mr Mamfredos' brother-in-law on behalf of the Samrayat Trust to Mr Mamfredos and saying:

> Dear George
>
> This is just to let you know that the US $1,000,000.00 has been transferred to BNP Paribas (Suisse) SA, Place de Hollande 2, Case postale, CH-1211 Genève 11, Tel.: +41 (0)22 787 71 11, Fax: +41 (0)22 787 80 00 for the Account of Arab Bank (Switzerland) – Zurich, to cover the costs of Mr. Herbert's and [the appellant's] loan appraisal as you have requested. Before leaving Berne I will have the guarantee documentation formalized and sent to you …

f) A letter from Mr Mamfredos's sister dated 12 May 2005 saying her husband died on 26 April 2005. Mr Mamfredos said his brother-in-law's estate is not yet settled but may hold a number of documents relevant to this matter.

[37] The Judge then analysed Mr Mamfredos' obligations in terms of paying for the property, and considered the additional material provided by Mr Mamfredos. Williams J concluded:

> [32] Whilst, in due course and at the substantive hearing, [the appellant's] view of matters between these parties may be borne out, from all the evidence currently available the conclusion must be that [the appellant] has failed to discharge the onus of demonstrating a reasonably arguable case that CT 114751 was purchased through the wrongful use by Mr Mamfredos or the Samrayat Trust of funds paid to them by or on behalf of [the appellant] towards the due diligence and loan application fees.

[38] The Judge then dealt with the respondents' application for security for costs. He ordered that the appellant provide $25,000 by way of security.

Discussion

[39] There is no dispute between the parties as to the approach to be adopted in a case such as the present. As Somers and Gallen JJ said in their joint judgment in *Sims v Lowe* [1988] 1 NZLR 656 at 660 (CA):

> The caveator seeks to clog or fetter the proprietary interest of another. As a matter of principle it seems right that he must justify the continued existence of his caveat. He will do that if he can show he has a reasonably arguable case for the interest he claims.

[40] Turning to the facts of this case, there appear to be three key issues:

(a) Is there an arguable case that Samrayat did not in fact advance or procure the advance of US$1m to an overseas lending institution in support of a loan application for US$100m on behalf of the appellant? If Samrayat did not make or procure such a payment, the payments made by the appellant to Samrayat under the February loan agreement (including the NZ$160,000 in May 2004) were arguably held by Samrayat on trust, and could not be used for some purpose other than that for which they were held.

(b) On the assumption that Samrayat did advance or procure the advance of US$1m to the proposed lender, is there an arguable case that all but US$100,000 was (or should have been) returned by the proposed lender when the loan application did not proceed, so that the appellant is entitled to a refund from Samrayat of at least some of the money which it paid?

(c) If there is an arguable case on either point, is there an arguable case that all or some of the money paid by the appellant to Mr Mamfredos/Samrayat was used to purchase the caveated property?

[41] Before we address these issues, there is a preliminary point to be made. Initially the respondents took the view that it was for the appellant to prove its case, so that they had no obligation to place any of the relevant material before the Court. As Williams J said, that involves a misunderstanding of the position. While it is true that the appellant carries the burden of proof, that does not mean, at this interlocutory stage, that the respondents could simply offer no evidence on the question of the US$1m payment. The appellant established that it had made payments under the February loan agreement to Samrayat. It alleged that Samrayat had not carried out its obligations, including the obligation to forward US$1m to the potential lender. The respondents denied that allegation. Because it was a matter within their knowledge, and they had control of the relevant documentary and other material as discovery has yet to occur, they carried an evidentiary onus. If they did not offer material to substantiate their claim that the US$1m had been paid, they were at risk of the Court drawing an inference unfavourable to them. This is particularly so because, as Mr Katz said, Mr Mamfredos acknowledged that he received the appellant's money as a fiduciary.

[42] We should also note that Mr Mamfredos was involved in the events at issue in both his personal capacity and as a trustee of Samrayat. On the material available we cannot determine in which capacity he was acting at particular points in time. That determination will have to await trial.

[43] Turning now to the first and second questions, Mr Mamfredos filed what was his fifth affidavit after the preliminary decision and attached some material in support of his claim that the US$1m was paid to an overseas lending institution. The material provided is incomplete, informal in nature and in some respects opens up as many questions as it answers. Mr Katz argued that it was inadmissible hearsay, or so unreliable that it could be given little weight.

[44] Williams J was alive to the hearsay nature of the material. He considered that the material was admissible for the purposes of the application before him, although entitled to lesser weight than if adduced in a conventional way (at [23]). We agree with that view: see the discussion in *McGechan on Procedure* at [HR249].

[45] The strongest evidence that the payment was made is an unsigned letter, addressed to Mr Mamfredos and received by mail, from Mr Mamfredos' now deceased brother-in-law, Joseph Eskaf, on Samrayat Trust letterhead. (According to Mr Mamfredos, the Samrayat Trust is his "family's trust in Egypt". We refer to it below as "Samrayat Trust", in contradistinction to the second respondent, Samrayat.)

[46] The letter is dated 28 January 2003. It says that US$1m was transferred to a specified account number at BNP Paribas (Suisse) SA "for the Account of Arab Bank … to cover the costs of Mr. Herbert's and [the appellant's] loan appraisal as you have requested." Although the letter goes on to say that guarantee documentation will be formalised and sent to Mr Mamfredos, this was never done. There is a hand-written note on the letter reading "Original sent to Hassam ABC". In his affidavit Mr Mamfredos said that "Hassam" was an officer of the Arab Bank, although the Bank officer referred to elsewhere in the documentation is "Hassan" Murad.

[47] Of itself, this document does not advance matters much. There is no acknowledgement or confirmation from the Arab Bank that it received the funds in the context of a loan application made on behalf of the appellant, or indeed at all. Further, it is not clear why the original of a letter addressed to Mr Mamfredos would be sent to the Arab Bank and Mr Mamfredos would receive an unsigned copy. Finally, we have no information as to who wrote the hand-written note, or when.

[48] The second item is an emailed letter from Mr Mamfredos' sister, Markella Eskaf, to Mr Mamfredos, dated 12 May 2005, advising that her husband, Joseph, had recently died, and that his affairs had not yet been put in order, so that any papers relevant to the loan were not available. The letter says that guarantee documentation was prepared but was never forwarded for execution because she and

her husband expected to see Mr Mamfredos and his wife at some point and the matter did not seem urgent.

[49] In his affidavit evidence Mr Mamfredos said that the guarantee documentation referred to in the letter of 28 January 2003 was not forwarded to him "due to [Joseph's] death". Given that his brother-in-law died on 26 April 2005, over two years after the US$1m was said to have been advanced, this is a little surprising. It may, however, be explained by Mr Mamfredos' relationship with the Samrayat Trust. Mr Mamfredos said that he remained responsible for the debt to the Samrayat Trust even in the absence of a guarantee.

[50] Apart from these two items there are various email communications which appear to relate to some form of due diligence process involving J P Morgan Chase and PriceWaterhouseCoopers in relation to the appellant and Mr Herbert. For example, there is an emailed letter from AXOM International Limited (AXOM), dated 24 December 2002, responding to a letter from Mr Mamfredos dated 8 December 2002 that is not in evidence. It acknowledges the receipt of US$15,000 and says that when completed, "the report will be DHL'd directly to Hassan, Arab Bank SW as per your email". There is then an email message on 14 January 2003 from Mr Mamfredos to AXOM querying an invoice for (apparently) something over US$16,000. The subject line reads "Invoice query". The letter of reply from AXOM, dated 15 January 2003, is headed "Your invoice query" and is attached to an email with the subject line "C F Herbert". It is not clear whether this relates to the invoice for the due diligence work or to something else.

[51] There is then an exchange of emails between Mr Mamfredos and Hassan Murad of the Arab Bank with the subject line "C F Herbert Report". In an email dated 21 January 2003 to Mr Mamfredos, Hassan Murad said, "Joseph contacted me about the transfer, he can deposit with PNB and we take a lien." This is consistent with the letter of 23 January 2003 from Joseph Eskaf, apart from the reference to "PNB" rather than "BNP". In the email Hassan Murad went on to say, "The seven points will be strengthened by your submissions but you may be asked for guarantee, if Herbert gives guarantee he will have to back it up with assets, alternatively he will need strong (bankable) feasibility study that we can deposit."

[52] The material which the respondents have put forward is, as we have said, incomplete and informal. The lack of any formal documentation in respect of such significant transactions is surprising to say the least. Mr Mamfredos deposed that he did not retain much in the way of documentation but sent it overseas. There seems no reason, however, that he could not have obtained its return. We also note that the documentary material provided relates to the first loan that Mr Mamfredos said that he arranged. He has provided no documentary material in relation to the second loan which he said that he arranged in May/June 2004.

[53] There is something else that is puzzling. Mr Mamfredos said that in January 2003 the Samrayat Trust advanced the US$1m loan fee on behalf of the appellant to Arab Bank as the proposed lender. Mr Mamfredos said that the loan application was successful, but was invalidated because the appellant did not provide the necessary information to enable it to be completed. As a consequence, he said, the Bank retained some money.

[54] As we have said, there is an ambiguity in Mr Mamfredos' evidence as to how much the Bank retained. At one point he said the amount retained was US$100,000 but at another suggested that it was the full US$1m.

[55] If the former, the Samrayat Trust must (or should) have been reimbursed by the Bank in the amount of US$900,000, for which there should presumably be some record. If there was (or should have been) some such reimbursement, it is obviously arguable that Samrayat must account to the appellant for the appropriate amount. In his affidavit evidence Mr Mamfredos attempted to characterise the money paid to Samrayat by the appellant under the February loan agreement (including the May 2004 payment) as independent of the payment of the US$1m advance loan fee to the proposed lender. On the available evidence, however, that is an untenable view. The appellant was required to provide an advance loan fee of US$1m to the proposed lender. It could not do so from its own resources. Samrayat agreed that it would advance the funds on the appellant's behalf. The appellant agreed that it would repay Samrayat in instalments, the last of which became due on the drawdown of the US$100m loan. This is set out in the February loan agreement. It is artificial

to attempt to separate the two transactions in the way that Mr Mamfredos has suggested.

[56] If the latter is the case (ie, the lender was entitled to retain all of the US$1m), Mr Mamfredos and/or Samrayat must be significantly out of pocket, given that Mr Mamfredos said that he was responsible to the Samrayat Trust for the repayment of the US$1m and the total amount received by Samrayat from the appellant was only NZ$660,826. In his fifth affidavit, Mr Mamfredos said that Samrayat had served the appellant with a statutory demand for the balance owing under the February loan agreement, although that demand is not exhibited, and has not been progressed.

[57] In the result, then, there is a disturbing lack of clarity about what actually occurred in relation to the US$1m. On the available evidence, the likelihood must be that most of it was (or should have been) returned by the Arab Bank to the Samrayat Trust when the loan did not proceed. On the material available, there does not appear to be any proper basis on which the Bank could have retained it.

[58] To summarise, in light of the evidence currently available we proceed on the following basis:

(a) Mr Mamfredos did arrange for a due diligence report to be prepared and for the Samrayat Trust to forward US$1m to the proposed lender, Arab Bank, by way of a loan fee on the appellant's behalf.

(b) As the loan application did not proceed, the proposed lender was entitled to retain the commitment fee (US$100,000) but was obliged to return the remainder of the US$1m to the Samrayat Trust.

(c) The appellant paid a total of NZ$660,826 to Mr Mamfredos/Samrayat. NZ$32,000 of that was to meet the US$15,000 due diligence fee and was non-refundable. NZ$6,676 was paid by way of interest for late payment of the initial instalments under the February loan agreement. On the face of it, that too would

> not be refundable. NZ$160,000 represented the US$100,000 commitment fee, which the proposed lender was, on the current evidence, entitled to retain, so that also would not be refundable. That leaves NZ$463,150. Subject to any issue of a final interest payment, there does not seem to be any reason why the appellant is not entitled to a refund of that sum from Samrayat, given that the February loan agreement related to the US$1m loan fee, most of which should have been returned to the Samrayat Trust by the proposed lender.

[59] We turn now to the third question, namely whether there is an arguable case that all or some of the money paid by the appellant in terms of the February loan agreement or subsequently was used to fund the purchase of the property.

[60] It is important at this point to identify what land CT 114751 covers. It includes land that Samrayat purchased from JKL TV Ltd and from Mr and Mrs Baas. As to the former land, as outlined in the extract from the final decision set out at [25] above, that was transferred to Samrayat on 25 February 2003. At that stage, Samrayat had received only NZ$32,000 from the appellant. That was reimbursement for the US$15,000 fee which, the evidence indicates, Mr Mamfredos paid to AXOM for the due diligence report. Shortly after, on 4 March 2003, the appellant paid a further sum of NZ$70,000 to Samrayat. If it is assumed for the sake of argument that both these sums were wrongfully applied to the purchase, that would be a total of NZ$102,000 from a purchase price which the Judge estimated to be in the range of NZ$350,000–400,000 (at [27] of the final decision).

[61] However, it is difficult to make that assumption. The available evidence supports Mr Mamfredos' account that he did arrange a due diligence report and did pay a US$15,000 fee for it. It is not clear when the JKL TV Ltd purchase was settled, but it is likely to have occurred before the NZ$70,000 was paid. In any event, it is difficult to see how Mr Mamfredos could have entered into an agreement for sale and purchase of the JTK TV Ltd land in reliance on receiving this payment given the relevant timings.

[62] As to the remaining land, Mr Mamfredos entered into an agreement for sale and purchase of five acres from Mr and Mrs Baas on 7 June 2003, for a price of NZ$180,000. This land was then combined with the JKL TV Ltd land and some other land by way of a boundary adjustment, to comprise the land covered by CT 114751. It is not clear when these other transactions were settled, precisely how much was involved, or how Samrayat funded them. But in view of the timing of the appellant's payments to Samrayat, and of the time taken to complete the title reorganisation, it is at least arguable that the appellant's money was used to fund the purchases of the Baas land and the boundary adjustment land.

[63] There are many unsatisfactory features to this case, most resulting from the respondents' failure to provide information peculiarly within their knowledge which would have enabled the Court to reach a firmer view as to whether the appellant has an arguable case. The respondents provided only the barest of information, and that only after Williams J said that he required more information. They omitted to provide the type of documentary evidence that should have existed if things happened as they said in relation to what were, on any view, major transactions. We consider that the respondents' approach was misguided.

[64] As we have said, on the available evidence we consider it more likely than not that the proposed lender retained, or was entitled to retain, only US$100,000 of the US$1m loan fee when the loan did not proceed, and that the appellant was therefore entitled to a refund from Samrayat of approximately NZ$463,150 (subject, as we have said, to any further liability for interest). Given that we have been provided with no independent evidence of how Samrayat funded the purchase of land covered by CT 114751, we consider that we are entitled to proceed on the basis that Samrayat may have used the appellant's funds as the appellant alleges.

[65] In summary, we accept that there is documentary material which indicates that Mr Mamfredos took steps towards arranging the first proposed loan. We consider it unlikely, in the light of that evidence and of the relevant timings, that any of the appellant's money was used to fund the purchase of the JKL TV Ltd land. It could, however, have been used to fund the purchase of the remaining land. Given that Mr Mamfredos accepted that he owed fiduciary obligations to the appellant, it is

at least arguable that the appellant is entitled to trace its funds. Accordingly, although we are reluctant to disagree with Williams J on a matter of this type, we consider that the appellant has established an arguable case sufficient to support a caveat.

[66] We were advised by counsel that the appellant's original caveat lapsed following the final decision, so that the appellant does not currently have a caveat lodged over the relevant land, but that the respondents have given an undertaking that they will not deal with the land until 7 days after the delivery of this Court's judgment. Accordingly, the result will be that the appellant will have leave to lodge a second caveat over the land (s 148 of the Land Transfer Act). Obviously, this means that the proceedings should be advanced without delay.

[67] This leaves the question of security for costs. As this Court has said previously, it will interfere with a Judge's decision on security only if the appellant is able to show that the Judge has acted on a wrong principle, taken irrelevant matters into account, overlooked relevant matters or is "plainly wrong": *Gibson v Fisher* [2007] NZCA 57 at [15]. We see no basis on which we could properly interfere with Williams J's decision on security.

Decision

[68] The appeal succeeds in part. The appellant has leave to lodge a further caveat over the land in CT 114751. The respondents are to pay the appellant costs of $6,000 plus usual disbursements. We certify for second counsel. The respondents are jointly and severally liable for these costs. Costs in the High Court are to be dealt with by that Court in the light of this judgment.

Solicitors:
David A Wood, Timaru for the Appellant.
Brian Ellis, Auckland for the Respondents.