Cotton v Keogh and Others – citation = [1996] 3 NZLR 1

Court of Appeal, Wellington
14 May; 4 June 1996
McKay, Blanchard, Doogue JJ

Headnote omitted

Appeal

The appellant appealed against a judgment of the High Court reported at [1995] 3 NZLR 236 discharging a caveat and awarding damages for wrongful entry of the caveat.

Appellant in person.

Robert Chambers QC and Peter Langdon for the first respondents.

The judgment of the Court was delivered by Blanchard J.

BLANCHARD J

: Mr Cotton appeals against the judgment of Barker J, now reported at [1995] 3 NZLR 236, in which the Judge (a) dismissed Mr Cotton's claims against his neighbours, Mr Keogh and his wife Miss Langdon (the first respondents), for a disputed boundary strip; (b) determined that Mr Cotton had wrongfully lodged a caveat against the first respondents' title under the Land Transfer Act 1952; and (c) ordered Mr Cotton to pay certain solicitor and client costs of the first respondents relating to the caveat "as damages under s 146 of the [Land Transfer] Act".

Mr Cotton owns 20 Kingsley Street, Westmere, Auckland on which he has his residence. The first respondents were the owners of 16 and 18 Kingsley Street, a larger property until recently in one certificate of title, on which there were two houses. They occupied 18 Kingsley Street.

In 1939 both parcels of land had been compulsorily brought under the Land Transfer Act pursuant to the Land Transfer (Compulsory Registration of Titles) Act 1924. Limitations as to title were removed but the certificates of title for both properties remained limited as to parcels. That meant that the titles were not guaranteed as to their position, area or boundaries. In 1939 and until recent years a thick privet hedge ran between 18 and 20 Kingsley Street. According to Mr Cotton's evidence it was some 2 m wide. For practical purposes it had been the dividing line between the properties since long before the parties acquired them (Keogh/Langdon in 1978 and Cotton in 1981).

In 1987, in circumstances much debated before the Judge and again before this Court, the rear half of the hedge was cut down and the stumps removed by Mr Cotton who replaced it with a fence. Mr Cotton says that he did so with the agreement of the first respondents and that the new fence was erected on the same line as the middle of the hedge, which Mr Cotton says is the true boundary. The first respondents, however, contend that the fence was not being put on the same line and was inside their property; that they raised objection with Mr Cotton; that, in their absence, his workmen then proceeded to angle the fence rather more towards Kingsley Street (but still commencing on the back boundary from a point a metre inside 18 Kingsley Street) but that the entire length of fencing was erected within their land. The first respondents explained that they did not afterwards ask for the fence to be moved back to what they regarded as the true boundary (the old hedge line) because the fence had already been built and it would have been expensive for Mr Cotton to move. Also, they were anxious to have a child proof fence at all times (they had young children and Mr Cotton had already installed a swimming pool at the rear of his property before the hedge was removed) and they were trying to preserve good neighbourly relations.

In 1991 the rest of the hedge was removed and a further fence erected from the end of the 1987 fence to the road boundary. Once more, it was Mr Cotton who had the work done but the first respondents, though they say they were unhappy about the position of this second portion of the fence, raised no objection; indeed, Mr Keogh contributed some labour. However, the same argument exists about whether the new section of fence is built on or about the middle line of the former hedge.

In 1993 the first respondents decided to proceed with a development of their property intending to erect a third dwelling across the rear of the property (with access on the far side of 16 Kingsley Street). Title to the three dwellings was to be by way of cross-leases. The first step was to obtain an ordinary certificate of title for 16 and 18 Kingsley Street ie without a parcels limitation. This had to be done before cross-leases could be created and composite titles obtained.

There needed to be a survey to define the boundaries. It was carried out by the first respondents' surveyor without Mr Cotton's knowledge and a plan lodged for deposit in the Auckland Land Registry Office. The plan included as part of the first respondents' property a strip on Mr Cotton's side of the fence. This strip, the piece of land in dispute, is 1 m wide at the rear of the properties, narrowing to 0.56 m at the road frontage. It has an area of 35 m2. The fence is depicted on the plan. Also shown was the position of the various buildings adjacent to the common boundary. Mr Cotton's garden shed was shown encroaching 0.67 m into the first respondents' land and there was a similar encroachment of the soffit of a recently built addition to Mr Cotton's house.

The first Mr Cotton knew of the plan was when he received a notice from the District Land Registrar advising him that an ordinary certificate of title would be issued in favour of the first respondents in respect of the land shown in the plan unless a caveat in form R in the Second Schedule to the Land Transfer Act was lodged "forbidding the same" on or before 13 October 1993: see s 205(3).

Mr Cotton did cause such a caveat to be lodged. But, unlike an ordinary caveat (in form N) forbidding registration of a dealing (s 137), a caveat in form R is deemed to lapse after three months from lodgement unless the caveator has within that time taken proceedings in a Court of competent jurisdiction to establish title to the estate or interest specified in the caveat and has given written notice thereof to the District Land Registrar or has obtained from the High Court an order or injunction restraining the Registrar from issuing the ordinary certificate of title: ss 144 and 205(6).

Mr Cotton failed to preserve his form R caveat. He now blames his former solicitors who, in reply, maintain that Mr Cotton was aware of the position but was unwilling to meet the cost of bringing proceedings. (The solicitors have been joined as fourth defendants but Barker J was not called upon to determine Mr Cotton's claims against them.) In any event, the form R caveat lapsed on January 1994.

On 8 June 1994, nearly five months after the caveat had lapsed and at a time when they must have had reason to believe that Mr Cotton was not pursuing his objection to their plan, the first respondents entered into an agreement to sell the house on the front of 18 Kingsley Street (the dwelling nearest to Mr Cotton's land and now known as flat 2) to Mr M J Edgar, the second respondent. Settlement was to occur on 22 July 1994 or five working days after notice to the parties of issue of the composite certificate of title for flat 2, whichever was the later. It is as well to say at this point that Mr Cotton accepts that Mr Edgar has acted in perfect good faith at all times. He innocently walked into a dispute between his vendors and their neighbour and has always been willing to abide by the decision of the Court.

The plan was deposited on 23 June 1994. On the same day the Registrar issued an ordinary certificate of title and, again on the same day, it was cancelled and composite titles were issued for the two houses. An ordinary certificate of title also issued for the remaining undivided one-third share in 16 and 18 Kingsley Street, intended to be the basis for a third composite certificate of title once the new building at the rear of the first respondents' property was sufficiently complete. But on 3 August 1994, before settlement with Mr Edgar had taken place, a second caveat was lodged on Mr Cotton's behalf by his then solicitor. This stopped registration of any transfer to Mr Edgar or other dealing. Although the judgment in the High Court says that it was a caveat in form M, it was in fact in form N.

Barker J delivered his judgment in favour of the respondents on 24 May 1995. He ordered the discharge of the second caveat. Mr Cotton did not seek its preservation pending the hearing of this appeal.

Registration of purchaser since High Court judgment

The first respondents through their counsel have placed before this Court, without objection by Mr Cotton, an affidavit updating events since Barker J's decision. Leave was not required: R 36(2) of the Court of Appeal Rules 1955. The affidavit reveals that Mr Cotton's form N caveat was removed from all three titles on 26 May 1995. On the same day Mr Edgar registered his transfer and also a mortgage to his bank. On 10 August a mortgage to the first respondents' bank

was registered against both their remaining titles. Mr Cotton accepts that the banks, like Mr Edgar, have taken their registered interests bona fide and for value.

These registrations having occurred, it has been impossible since 26 May 1995 for Mr Cotton's appeal to succeed so far as it seeks an order for possession and an order recalling the certificates of title and directing a new survey. Although at the time of the High Court trial fully guaranteed titles had already issued to the first respondents, Mr Cotton was relying upon the exception found in s 63(1)(d) of the Land Transfer Act. That permits an action for possession or recovery of land in the case of:

> . . . a person deprived of or claiming any land included in any grant or certificate of title of other land by misdescription of that other land, or of its boundaries, as against the registered proprietor of the other land . . .

but, now crucially, only where that registered proprietor is not "a transferee or deriving from or through a transferee thereof bona fide for value".

And there is also s 183(1):

> **183. No liability on bona fide purchaser or mortgagee** -- (1) Nothing in this Act shall be so interpreted as to render subject to action for recovery of damages, or for possession, or to deprivation of the estate or interest in respect of which he is registered as proprietor, any purchaser or mortgagee bona fide for valuable consideration of land under the provisions of this Act on the ground that his vendor or mortgagor may have been registered as proprietor through fraud or error, or under any void or voidable instrument, or may have derived from or through a person registered as proprietor through fraud or error, or under any void or voidable instrument, and this whether the fraud or error consists in wrong description of the boundaries or of the parcels of any land, or otherwise howsoever.

Mr Cotton was unable to point to any way in which he could now impeach the certificates of title. Mr Edgar has become registered bona fide for value as proprietor of a one-third interest in the whole of 16-18 Kingsley Street notwithstanding that his leasehold interest relates only to the front portion of Kingsley Street. It seems that Mr Cotton, who is not a lawyer and appeared for himself in this Court, did not appreciate this point until it was discussed with him at the hearing. It is not possible to adjust the disputed boundary as against the first respondents without doing so as against Mr Edgar. The fee simple cannot be partitioned because of the restrictions imposed by the district plan. Thus, even if an in personam remedy had been available to Mr Cotton, it could not have involved a boundary adjustment. Moreover, the mortgagees' interests are also in the entire property and are also indefeasible.

[His Honour then reviewed the evidence and factual findings concerning the history of the hedge and the fencing and the proper line of the common boundary and proceeded:]

Having reviewed the evidence, we are not persuaded that Barker J was wrong to conclude that it was likely that the hedge was on the boundary depicted on the deposited plan.

Conversion of a limited title

However that may be, Mr Cotton had other hurdles to surmount even if he had proved that the fencing is now where the middle of the hedge used to be. It is necessary first to say something about the process of converting a title limited as to parcels into an ordinary title. Someone surveying land which is limited as to parcels must make a mathematical calculation which relates the dimensions shown on the limited title with the position of road alignments and any survey points which have previously been established in connection with nearby fully guaranteed titles. The surveyor must also take into account other physical features (if any). If this calculation produces a surplus or a deficiency the surveyor must then make an adjustment, usually on a pro rata basis.

In this case the surveying evidence was unanimous that mathematically the survey done for the first respondents was correct. While the first respondents' frontage increased by 0.05 m, Mr Cotton's frontage gained 0.03 m, roughly in proportion. The respective areas of the two properties increased by 8 m2 and 21 m2. The majority of that increase in the first respondents' area resulted from a kink in the southeastern boundary of 16 Kingsley Street arising from the earlier surveys of properties on the other side of that boundary.

In this case the mathematical calculation placed the common boundary where it is now shown on the deposited plan and the certificates of title. But the surveyor must also adjust for any area which mathematically would fall within the title but which is in the occupation of another person in such circumstances and for such a period as to have deprived a registered proprietor under a limited title of ownership of that area. In other words, any area the title to which has been acquired by an adverse possession which is still continued by someone other than the registered proprietor is not to be included in the ordinary certificate of title.

Section 199(1)(d) of the Land Transfer Act ensures that a limited certificate of title does not prevail against the title of any person adversely in occupation of, and rightfully entitled to, land comprised in the certificate of title. And s 199(3) provides:

> (3) Notwithstanding the provisions of section 64 of this Act, the issue of a limited certificate of title for any land shall not stop the running of time under the Limitation Act 1950 in favour of any person in adverse possession of that land at the time of the issue of the certificate, or in favour of any person claiming through or under him.

Section 16(3) of the 1924 Act, which was in force in 1939, was to the same effect.

Under the Limitation Act 1950, s 7(2), an action is not to be brought by a person to recover any land after the expiration of 12 years from the date on which the right of action accrued to that person or to someone through whom that person claims. (Prior to the commencement of the Limitation Act 1950 the position was governed by the Real Property Limitation Act 1833 of the Imperial Parliament. The question of which of those Acts should be taken to govern the situation was discussed by Richmond J in Tong v Car Reconditioners Ltd (1965) 1 NZCPR 587, 589. It was unnecessary to decide that point for it could not affect the outcome of the case. Nor can it do so here.)

If in any case there was an occupier in adverse possession when a certificate of title issued under the Act and that person already had a fully matured possessory title so as to be "rightfully entitled to the land", the possessory title prevailed and the limited title was void against that occupier: s 79 of the Land Transfer Act and see Hinde, McMorland and Sim, Introduction to Land Law (2nd ed, 1986) para 2.085. If at that time the adverse possession had not yet matured and the title was subject to a limitation, time could continue to run against the registered proprietor named in that limited title, and after the requisite period of adverse possession a title by adverse possession could mature; but no such title could begin to mature where the possession began only after a limited certificate of title had issued.

Where in this way a possessory title has matured and the possession continues (by the person who acquired that title or a successor) it ought to be taken into account by a surveyor engaged in the work of converting the limited title to an ordinary title. The purpose of the Registrar's notice (under s 207), and the availability of the form R caveat proceeding, is to alert any possessory owners to the danger that, subject to an action permitted by s 63, their title may be lost and to enable them to take steps to ensure that the land occupied by them is excluded from the fully guaranteed title.

Proof of possessory title

The burden of proving a possessory title rests on the person who claims it. What has to be proved is described in a passage from Cooper J in McDonell v Giblin (1904) 23 NZLR 660, 662:

> "In order to dispossess the rightful owner the possession which is claimed to be adverse to his rights must be sufficiently obvious to give to such owner the means of knowledge that some person has entered into possession adversely to his title and with the intention of making a title against him; it must be sufficiently open and manifest that a man reasonably careful of his own interests would, if living in the locality and passing the allotment from time to time, by his observation have reasonably discovered that some person had taken possession of the land."

Barker J rightly decided that Mr Cotton had not so proved. The difficulty Mr Cotton faced was twofold. First, there was the nature of the disputed strip, entirely covered by a hedge. It cannot be easy to go into adverse possession of a hedge with the purpose of depriving the former owner of title to the land on which it is growing. Even if the claimant has regularly cut the outside of the hedge, including the top, and there is no evidence of this here, the possession is unlikely to meet the test enunciated by Cooper J. Nor can it be readily found in the case of a hedge that the existing owner has the intention to give up possession, to allow someone else in: Williams Brothers Direct Supply Ltd v Raftery [1958] 1 QB 159. As Cotton LJ said in Leigh v Jack (1879) 5 Ex D 264, 274:

> "In deciding whether there has been a discontinuance of possession the nature of the property must be looked at. I am of opinion that there can be no discontinuance by absence of use and enjoyment where the land is not capable of use and enjoyment."

In the same case Bramwell LJ remarked at p 273 that:

> ". . . in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it . . .".

What is sufficient will vary according to the facts and circumstances: see Buckinghamshire County Council v Moran [1990] Ch 623.

Secondly, the unchallenged evidence was that in 1939 all of 16-20 Kingsley Street was in the ownership of members of one family. John Greenhalgh had owned Kingsley Street since the 1920s. His sister-in-law Khyla Greenhalgh, owned 16-18 Kingsley Street. They were the persons to whom, respectively, the limited certificates of title issued in February 1939. A brief of evidence of Mrs Windross, daughter of John Greenhalgh, was admitted by consent. She was not cross-examined. She described the "wide" hedge which she remembered crawling through as a child (she was born in 1930). She said that there was a very close family relationship between her father and her aunt; that her aunt used to visit every week to collect rent from tenants of 18 Kingsley Street and to have a cup of tea with her brother and his family; and that her father would never have asserted ownership against her aunt to the middle of the hedge:

> "It would have been completely out of character for my father to have done that. He wouldn't have dreamed of claiming additional land from my aunt which was not lawfully his."

In other words, from Mrs Windross's observation -- admittedly that of a child, but she must have known well the character of her father -- there is most unlikely to have been present in 1939 the requisite intent on her father's part to make a title to the hedge against her aunt.

Damages under s 146

Section 146 reads:

> **146.** **Person entering caveat without due cause liable for damages** -- (1) Any person lodging any caveat without reasonable cause is liable to make to any person who may have sustained damage thereby such compensation as may be just.
>
> (2) Such compensation as aforesaid shall be recoverable in an action at law by the person who has sustained damage from the person who lodged the caveat.

If any compensation was properly awarded to the first respondents for the lodging of the second caveat the parties are agreed that the quantum should be fixed in accordance with the judgment below.

A person "claiming" to be entitled to an interest in land may lodge a caveat in form N. It is not necessary that the claimant actually has the claimed interest.

This Court has very recently stated the condition which must exist:

> "The question is therefore whether the [caveator's] solicitors did have an honest belief based on reasonable grounds that the [caveator] had a caveatable interest when they lodged the caveat": Couchman v Taylor (Court of Appeal, Wellington, CA 172/95, 29 April 1996) at p 7.

In the present case the position was unusual for it appears that Mr Cotton's former solicitors took it upon themselves to lodge the second caveat without having any express instruction from their client to do so. They wrote to Mr Cotton on August 1994 saying:

> "We should emphasise that we undertake no responsibility at all for the validity of the present caveat or that it is sustainable. We also record that we have registered the caveat on our own initiative to try and get you back into the same position you would have been in if you had filed proceedings in the High Court to sustain the initial form R caveat."

Plainly, Mr Cotton adopted or ratified what the solicitors had done; he took advantage of it and took steps to stop the form N caveat lapsing under s 145. Plainly also, the solicitors had real doubts about whether there existed any reasonable ground for lodging it. Barker J thought that there was not. It was a second caveat for which the prior authorisation of the High Court was needed under s 148:

> **148.** **No second caveat may be entered** -- When any caveat in either of the forms hereinbefore provided has lapsed, it shall not be lawful for the Registrar to receive any second caveat affecting the same land, estate, or interest by the same person, or in the same right and for the same cause, except by order of the High Court.

The forms of caveat referred to are forms M and N. Section 205(6) states that the provisions of the Act in respect of caveats in form M are, with necessary modifications, to apply to caveats in form R. Thus s 148 applied. The second caveat affected the same land and was by the same person. It was also, Barker J, held, "for the same cause", namely "to stop the disputed strip being included in the title for the first defendants' land".

As the Judge recognised, the theoretical basis for the caveat had changed because in the time which had run since the form R caveat had lapsed the ordinary certificate of title and composite certificates of title had successively issued. Mr Cotton's form R caveat did not directly assert a possessory title. Rather, it claimed that there was a "pre-existing boundary" by which it seems to have been meant that the first respondents had agreed that the disputed area belonged in his ownership or that he had a possessory title. The form N caveat was expressed to be "by virtue of a constructive trust". Presumably what was meant was that because an ordinary title now existed the previous claim was to be enforced by means of such a trust. The Judge was correct to think that for the purposes of s 148 this was "in the same right and for the same cause". The prohibition in s 148 cannot be avoided by framing the second claim in a different manner when it in fact relates to the same alleged right and is lodged for the same purpose.

To lodge a caveat in contravention of s 148 is prima facie to do so without reasonable cause, but it is also necessary to look at whether the Court would, if asked, have given permission for a second caveat. In the present case, however, no such permission is likely to have been forthcoming. As already mentioned, the solicitor who lodged the caveat had his doubts about it. So did Mr Cotton's new solicitor who wrote to the former solicitor saying that he inclined to the view that the allegation of "a constructive trust situation may not be sustainable". Barker J commented that this was "a case about adverse occupation; it has nothing to do with the law of trusts . . .". We agree with the Judge that on the facts of this case there was nothing which could support an argument for a constructive trust.

Permission to lodge a second caveat would not have been given had any application been made under s 148. Copies of the limited titles and the deposited plan would necessarily have been exhibited, along with a calculation of the consequences for Mr Cotton's property. The appropriateness of the mathematical calculations and adjustments would have been apparent.

Furthermore, a Court considering an application under s 148 would surely have inquired into the nature of the occupancy claimed by Mr Cotton to have existed since 1939 and would have discovered that the 1 m strip in issue had been entirely covered by a thick hedge.

A Court does not lightly consent to the lodgement of a second caveat. It is in the nature of an indulgence and the applicant's claim is scrutinised carefully. It is unlikely that the Court would have been impressed by Mr Cotton's claim to a caveatable interest arising from adverse possession and authorised him to lodge a second caveat. His form N caveat must be regarded as having been lodged without reasonable cause.

For these reasons the first respondents were entitled to compensation under s 146 as awarded by the Judge.

The appeal is dismissed with costs of $4500 to the first respondents together with reasonable travel and accommodation expenses of one counsel.Appeal dismissed.

Solicitor for the appellant: George Bogiatto (Auckland).

Solicitors for the first respondents: Langdon & Co (Takapuna).