Date: 2012 02 29
Docket: S-1-CV-2012000001

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ROBERT PARSONS ENGLE

Applicant

- and -

MARGARET LUCILLE CARSWELL

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an application by Robert Parsons Engle ("Engle") for the removal of a caveat registered on title pursuant to s. 148 of the *Land Titles Act*, R.S.N.W.T. 1988, c. 8 (Supp.) (the "*Act*"). The caveat was registered by Engle's ex-wife, Margaret Lucille Carswell ("Carswell"), against the title of a residence inhabited by the couple while they were married.

Facts

[2] The facts underlying this dispute are lengthy and begin in the 1980's. The litigation that has resulted from the breakdown of the marriage between Engle and Carswell also has a lengthy and complicated history.

[3] For the purposes of this application, the facts can be briefly stated. Engle and Carswell married on June 22, 1987. Prior to the marriage ceremony, both parties signed a Pre-Nuptial Agreement (the "Agreement"). The Agreement dealt with a number of issues including property, Engle's business interests, custody of the children and support.

[4] The parties eventually separated and a divorce judgment was later granted on August 17, 1993. The validity of the Agreement was subsequently challenged by Carswell. In February 1995 after a trial, the Agreement was found to be a "valid, enforceable and subsisting agreement." Carswell appealed the decision to the Court of Appeal which dismissed her appeal in 1997.

[5] In 2006, Engle applied to have the divorce action dismissed for want of prosecution. At that point, all that remained to be resolved in the divorce were the property disputes. After a hearing, the action was dismissed.

[6] One of the properties at issue in the matrimonial dispute was the property which is the subject of this application. The Agreement defines the "Principal Residence" of Engle and Carswell as 5 Albatross Court (the "Principal Residence") in Yellowknife.

[7] After the parties divorced, Engle kept the Principal Residence. On two occasions in 2002 and 2005, citing the Agreement, Engle attempted to pay Carswell an amount that was roughly one-half of the appraised value (in 1992) of the Principal Residence. Carswell refused to accept the money and sign a release.

[8] On July 28, 2011, Carswell registered a caveat against title to the Principal Residence as a beneficial co-owner pursuant to the Agreement.

[9] Around November 27, 2011, Engle entered into a purchase and sale agreement for the sale of the Principal Residence. Engle claims that he only became aware of Carswell's caveat during the closing process for the sale of the Principal Residence. The closing date for the sale of the Principal Residence was scheduled for January 23, 2012. Engle filed this application on January 5, 2012. The closing date has since passed but the potential buyers are living in the Principal Residence under an occupancy agreement pending the resolution of this matter.

[10] It is apparent from the materials filed and a search of the online judgment database that more than I have stated has occurred in the litigation history between the parties. I do not have a complete record before me but it appears that issues relating to the divorce were litigated in at least two jurisdictions, the Northwest Territories and California.

Positions of the Parties

[11] Engle's Originating Notice states that not only does he want a declaration that the caveat is invalid and unlawful but he is also seeking other declarations which include that Carswell can no longer make any claim in relation to the Principal Residence.

[12] At the hearing, counsel for Engle modified his request indicating that Engle simply wanted the caveat removed so that the sale of the Principal Residence could occur. The issues of whether Carswell was entitled to a share of the proceeds of the sale of the Principal Residence or one-half of the appraised value of the Principal Residence could be dealt with on another day.

[13] Engle's argument is that Ms. Carswell has not established a *prima facie* case that she has an interest in the property. The Agreement gives Engle the election to sell or not to sell the property. It further provides for the disposition of the proceeds of the sale or if he chooses not to sell, to obtain an appraisal and pay Carswell one-half of the appraised value of the property and furnishings. According to Engle, the Agreement gave Carswell a contractual right to receive one-half of the value of the Principal Residence and this does not give Carswell an interest in the property.

[14] Carswell's position is that she does not want the sale of the Principal Residence to occur at this time and that there is no urgency to justify removing the caveat. While she cited the Agreement when filing her caveat, she is nonetheless of the view that the Agreement is not valid. She is hoping to have the entire divorce reconsidered at some future date and wants the sale delayed or cancelled pending this re-consideration.

[15] Carswell's specific arguments in opposition to the sale of the Principal Residence are that:

1) Her children are fond of the residence and one of her sons was hoping to use the Principal Residence for a future business base;
2) Carswell has personal belongings in the Principal Residence which she has been unable to retrieve;
3) The purchase price is too low and does not reflect the value of additions and renovations made to the Principal Residence; and
4) To allow the sale to proceed, given the litigation history between the parties, would be unfair.

The Applicable Law

[16] Section 148 of the *Act* states:

> (1) An owner or other person claiming land that is subject to a caveat may, by summons, call on a caveator to attend before a judge to show cause why the caveat of the caveator should not be withdrawn.
> (2) The judge may, on proof that the caveator has been summoned and on the evidence that the judge requires, make an order that the judge considers proper.

[17] As stated by the Alberta Court of Appeal in *Holt, Renfrew & Co. Ltd. v. Henry Singer Ltd.*, [1982] A.J. No. 726, 37 A.R. 90 at. para. 86:

> It is fundamental that [the caveator] have an interest in the... lands to sustain the caveat.... The caveat does not create rights, it merely protects rights. Therefore, if [the caveator] had an interest in the lands in question the caveat is valid. If not, it must be discharged because it is not supported by an interest in land.

[18] In order to show cause, the caveator must establish a *prima facie* claim which "must be based upon facts which if they are believed are complete and sufficient to justify the claim": *Acquest / Alberta Mining Inc. v. Barry Developments Inc.*, [1999] A.J. No. 784, 1999 ABQB 51 at para. 65.

[19] In this case, Carswell has based her caveat upon the Agreement, although she does not believe it is valid. As mentioned above, the Agreement has been the subject of litigation. Miller J. held that the Agreement was valid: *Engle v. Carswell*, [1995] N.W.T.J. No 12. This decision was affirmed by the Court of Appeal: *Carswell v. Engle*, [1997] N.W.T.J. No. 95. No appeal was taken from the decision of the Court of Appeal. The result is that I have to accept the Agreement as a valid agreement, notwithstanding Ms. Carswell's contention that it is not valid. The validity of the Agreement has been judicially determined and I do not have jurisdiction to reconsider it; my task is to determine whether Carswell has an interest in land capable of supporting a caveat.

[20] The relevant portions of the Agreement provide that:

> 2.(3) (b) Robert and Margaret agree that in the event that they permanently cease to live together then it is their intention that each

> of them shall share equally in the then value of the Principal Residence and the furnishings then contained therein.
>
> (c) Robert and Margaret further agree that in the event that they cease to live together Robert shall be entitled to exclusive possession of the Principal Residence and furnishings then contained therein and may elect to sell or not sell that property and furnishings as he may decide.
>
> (d) In the event that Robert elects to sell the Principal Residence and the furnishings contained therein in accordance with the preceding paragraph, the proceeds of disposition after deduction of all reasonable expenses shall be divided equally between the parties.
>
> (e) In the event that Robert and Margaret cease to live together and Robert elects not to sell the Principal Residence and the furnishings contained therein as contemplated by the preceding paragraph then Robert shall obtain an appraisal of the current market value of the said property from a qualified real estate appraiser and an appraisal of the current market value of the furnishings from a qualified appraiser.
>
> Thereafter, Robert shall pay to Margaret one half of the total of the said appraised values of the property and the furnishings within ninety (90) days of the receipt of such appraisals. Robert and Margaret agree that the receipt by Margaret of that sum of money shall operate to release any interest which Margaret might have had up to that time in the Principal Residence and the furnishings contained therein whether pursuant to this agreement or otherwise.

[21] On a plain reading of the Agreement, when the parties ceased to live together, Engle was entitled to exclusive possession of the Principal Residence. Further, he could elect to sell or keep the Principal Residence and that decision was solely his to make. While the Agreement does not specify a timeline for when Engle had to make his election, Carswell's entitlement was to one-half of the value of the property regardless of whether it was from the proceeds of the sale of the residence or from an appraisal of the value of the home and contents. The point is that Engle got to choose whether to keep or sell the Principal Residence. Carswell's entitlement was to one-half of the value of the property and not the property itself.

[22] Is an entitlement to one-half of the value of the Principal Residence sufficient to provide an interest in land capable of supporting a caveat? In my view, it is not.

[23] In *Canada Trustco Mortgage Co. v. Wycott*, [2002] A.J. No. 509, 2002 ABQB 399, Johnstone J. held at para. 26 that "an agreement to pay a certain amount out of the proceeds derived from the sale of lands or an assignment of sale proceeds, absent an express charging provision, does not create an interest in land." See also *Iverson Heating Ltd. v. Canadian Imperial Bank of Commerce*, [1983] A.J. No. 905 at para. 3.

[24] The Agreement does not contain an express charging provision that Carswell was to gain an interest in land. The Agreement states that the Principal Residence was registered in the name of Engle and that Carswell would be entitled to share equally in the value of the Principal Residence if the parties ceased to live together. Control over the disposition of the Principal Residence was left exclusively to Engle.

[25] As a result, the Agreement gave Carswell a share of the proceeds of the Principal Residence and not an interest in land.

[26] Carswell also claims that her children do not want the Principal Residence to be sold for personal and business reasons. There is no direct evidence that her children are opposed to the sale of the residence. The assertion in Carswell's affidavit regarding the children's views is hearsay. It would not be surprising that the children might look fondly upon their childhood home. However, the Agreement gives Engle the right to dispose of the property as he sees fit. He is not required, as a matter of law, to seek the approval of the children of the marriage with respect to the sale of the Principal Residence.

[27] Carswell also argues that she has personal belongings in the Principal Residence. Having personal belongings in the residence is not sufficient to grant an interest in land. Moreover, this issue was dealt with in the Court of Appeal decision wherein the Court determined that Carswell did not have any entitlement to claim personal property in the Principal Residence: *Carswell v. Engle, supra* at para. 16. As such, this issue has already been decided against Carswell.

[28] Carswell also claims that the purchase price in the purchase agreement is too low given the additions and renovations that she and Engle undertook in the 1980's. While the purchase price may not be what either Carswell or Engle hoped to get for the property, there is an offer that Engle has apparently accepted. As stated, the Agreement allows Engle to sell the property in his sole discretion. The appraiser in 1992 was of the view that the house and contents were worth $385, 000. The value

of the home has, not surprisingly, increased since 1992. The current offer to purchase the home was for $685, 000. It is not clear what the final purchase price is for the sale of the Principal Residence. Carswell has not presented any evidence that the purchase price is unduly low. Absent such evidence, I can only conclude that the house sold at fair market value.

[29] Carswell also claims that it would be unfair, given the course of litigation in this divorce, to allow the sale to proceed. As I have stated, it is apparent that the litigation between the parties has been lengthy and complicated and spanned different jurisdictions. Some of the rulings have not been in Carswell's favour and I have no doubt that she feels the end result is unfair. But I am left with an Agreement which has been found to be valid and which permits Engle to sell the Principal Residence. The Agreement does not give Carswell any say in what happens to the Principal Residence; her entitlement was to one-half of the value and nothing more. The issue of fairness is better dealt with in the determination of whether Carswell is still entitled to one-half of the value of the Principal Residence.

[30] For the reasons stated, I have come to the conclusion that Carswell does not have an interest in the Principal Residence. At most, she is entitled to one-half of the value of the Principal Residence. The issue of whether Carswell is still entitled to one-half of the value of the residence is one that was not fully argued before me and remains to be determined.

[31] In the circumstances, there will be an Order directing:

1) The Registrar of Land Titles to remove the Caveat number 174, 114 from the certificate of title number 16810, described as Lot 14, Block 123, Plan 634 in the City of Yellowknife in the Northwest Territories;
2) That the proceeds of any sale of the Principal Residence are to be paid into court pending determination of whether the Respondent is entitled to any of the proceeds of the sale.
3) The determination of whether the Respondent is entitled to any of the proceeds of the sale is adjourned *sine die* and can be brought back to Court on 14 days notice by either party.

[32] If the parties want to speak to costs, they should contact the Registry within 14 days of the filing of this Memorandum. Otherwise, each party will bear their own costs.

S.H. Smallwood
J.S.C.

Dated at Yellowknife, NT, this
29th day of February 2012

Counsel for the Applicant: James Thorlakson
The Respondent represented herself

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