



## Transcript of Proceedings

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WHITE J

No S1884 of 2002

MERIDIEN PTY LTD  
(ACN 079 598 075)

Applicant

and

CALEDONIAN BUILDERS PTY LTD  
(ACN 813 201 647)

First Respondent

and

ROBERTS CONTRACTING (R.U.) PTY LTD  
(ACN 066 855 374)

Second Respondent

BRISBANE

..DATE 01/03/2002

JUDGMENT

HER HONOUR: Meridien Proprietary Limited has brought an application returnable today that two caveats be removed from two properties which it owns pursuant to section 127 of the Land Title Act 1994.

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Today, Mr Egan, on behalf of the first and second respondents, Caledonian Builders Pty Ltd and Roberts Contracting (R.U.) Pty Ltd filed an originating application seeking declarations and rectification of building contracts.

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The fact that that application was made virtually instanter has meant that the orderly progress of the hearing has been somewhat deranged and facts have unfolded, allegations and counter-allegations have been made either by assertion from the Bar table or by affidavits being provided without any notice and finally in the case of the undertakings, to damages by Mr Ward and Mr Roberts, the principals of the two respondents themselves giving oral evidence on oath.

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This has then been a somewhat unsatisfactory way of considering the matter but I think that it may be disposed of fairly shortly.

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On the 20th of February, the respondents lodged caveats over the two parcels of land as I have mentioned. The interest claimed was as equitable mortgagee of an estate in fee simple and the grounds in the case of both caveats were as follows:

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"Pursuant to a contract in writing between the registered owner and the caveators dated 26 October 2000 granting the caveator an equitable mortgagee over the land charging the land as security for the payment by the owner to the caveator of the sum of" and then on each caveat the sums were \$20,218.70 and \$32,403.36 respectively.

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On their faces, the contracts referred to by the caveators were not with Meridien Proprietary Limited but were with another company, Meridien Constructions Proprietary Limited. Without more, that would be sufficient to have the caveats removed.

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The application filed today seeks rectification of those two contracts so that the party described therein as the owner should be rectified to Meridien Proprietary Limited. Both Mr Roberts and Mr Ward depose that at all times it was their understanding and belief that they were contracting with, through their companies, Meridien Proprietary Limited.

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Mr Egan concedes that the rectification of the contract, were it to take place, can only operate in the future and cannot be made retrospective. He points to clause 28 of the contracts as creating the entitlement to lodge the caveat as indeed is expressed in the grounds of the caveat itself, but that entitlement of course, is grounded in the subject contract which on its face is with Meridien Constructions Proprietary Limited and the registered proprietor of the land is Meridien Proprietary Limited.

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There is a further allegation in the material that in effect the principal of Meridien Proprietary Limited and the persons who worked for it led the respondents through their principals into the belief that they were dealing with the actual owner of the land, Meridien Proprietary Limited. Indeed, Mr Ward goes so far as does Mr Roberts to depose that they did not know of Meridien Constructions Proprietary Limited until halfway through last year when there was a request that invoices should be directed to Meridien Constructions Proprietary Limited.

Finally, Mr Egan submits that the material would suggest that Meridien Constructions Proprietary Limited was acting throughout as the agent of Meridien Proprietary Limited.

I do not propose to canvass the contested issues of fact. They are extensive. Accordingly it is not possible to resolve any of those issues today. However, I must be persuaded before allowing the caveat to remain that there is a serious question to be tried as well as dealing with issues of balance and convenience because the continued existence of a caveat must be approached rather like an interlocutory injunction.

To my mind, a telling fact is that the party named as the owner on the subject contracts is Meridien Constructions Proprietary Limited and Mr McCart, the director of Meridien Proprietary Limited deposes in paragraph 5 of his affidavit that all of the building contracts which identified Meridien

Constructions as the contracting party were prepared in the offices of the second respondent and submitted by Mr Roberts to him.

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It is therefore a fact which tips the balance, it seems to me, against all the various other contested facts which would allow the caveats to remain.

The other issue is the balance of convenience. One of the lots has already been sold and that occurred prior to the lodging of the caveat on the 20th of February. The purchasers of that residence are already in occupation. There seems no basis upon which one would argue that an innocent third party, at least on the facts here, should be inconvenienced by the presence of a caveat against the title.

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The other lot, lot 10, is for sale and it might be said to be neither one way nor the other as to whether it would be more or less inconvenient for the caveat to remain, thus deferring the prospect of Meridien Proprietary Limited selling that property. But on the whole one would incline to the view that the balance of convenience would tend in favour of allowing any future sale to go forward.

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And I note that that was the basis upon which Justice Wilson allowed a caveat to be maintained in Maindram Projects Proprietary Limited and Melbourne Construction and Management Company Proprietary Limited, an unreported

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decision - judgment, 10 May 2001, [2001] QCS 136, that is, the caveat was maintained until a contract of sale was entered into.

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Finally there is the question of the undertakings as to damages. While of course one can have every sympathy for people who are positioned, as both Mr Roberts and Mr Ward seem to be, in financially straitened circumstances as a consequence of business reverses, the fact remains that neither their companies nor themselves are in any position to offer undertakings as to damages of any real worth.

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Their companies and themselves are indebted in ways which would give negative figures, even if it be the case that their financial embarrassment might, at the end of the day, be said to be due to these particular contracts. I should also add that the amounts set out in the caveats are not payable until about the 6th of March. They are progress payments under the contracts.

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Accordingly it is apparent from these reasons that I am of the opinion that the caveats ought to be removed from lots 9 and 10 more particularly described in the originating application filed on the 27th of February 2002.

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HER HONOUR: On the question of costs, whilst there are some unsuccessful applications for an interlocutory injunction

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and the removal of caveats which might suggest the appropriate course is to reserve the question of the costs, it seems to me that this case is not one of those.

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Although the hearing has taken a deal of time it has really been quite clear that the best case that the respondents could mount was to commence proceedings against the applicant, but that a caveatable interest on material which they themselves have always held, was not available.

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Accordingly I order that the respondents pay the applicants' costs of and incidental to each application, to be assessed on the standard basis.

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Thank you for your assistance, gentlemen. I hope that you have a refreshing weekend. Thanks, Mr Bailiff.

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