SUPREME COURT OF QUEENSLAND

CITATION:	*Schouten v Govard Pty Ltd; Govard Pty Ltd v Schouten & Anor* [2003] QSC 259
PARTIES:	**PETER JOSEPH SCHOUTEN and ELIZABETH ANGELA SCHOUTEN** (applicants) **v** **GOVARD PTY LTD** (ACN 093 223 404) (respondent) **Heard with:** **GOVARD PTY LTD** (ACN 093 223 404) (applicant) **v** **PETER JOSEPH SCHOUTEN and ELIZABETH ANGELA SCHOUTEN** (first respondents) **JOHN WILLIAM MORGAN and GERALDINE FRANCES MORGAN** (second respondents)
FILE NO/S:	S6582 of 2002 S6989 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application – Further Order
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	16 April 2003
JUDGE:	Mackenzie J
ORDER:	**1. In originating application S6582 of 2002:** **a. The application is dismissed;** **b. I order that the applicants Peter Joseph Schouten and Elizabeth Angela Schouten pay the respondent's costs of and incidental to the application to be assessed.** **2. In originating application S6989 of 2002:** **a. It is declared that no binding or enforceable contract exists for the sale by the applicant to the first respondent of lot 13 in a development called "The Ridge, Noosa Springs" more**

particularly described as lot 13 on GTP107048, County of March, Parish of Weyba;

b. Further hearing of the application is adjourned to a date to be fixed;

c. Costs as between the applicant and the first respondents are reserved to the judge hearing the adjourned application;

d. **I order that the first respondent pay the second respondent's costs of and incidental to the application to be assessed; provided that the first respondents have liberty to apply to the judge who hears the adjourned application, in relation to final incidence of costs paid by them to the second respondents**

CATCHWORDS: CONVEYANCING – LAND TITLES UNDER THE TORRENS SYSTEM – CAVEATS AGAINST DEALINGS – COMPENSATION FOR LODGING CAVEAT WITHOUT REASONABLE CAUSE – where two parties entered expressions of interest in same block of land being sold by a developer – where both signed contract preparation instruction forms – where dispute as to which paid deposit first in time – where one party lodged caveat over the land – where order for removal of caveat made by consent – whether that party liable to compensate the developer – whether caveat lodged without a reasonable cause – whether a binding and enforceable contract existed between the developer and that party

s 130 *Land Title Act* 1994 (Qld)
s 59 *Property Law Act* 1974 (Qld)

Masters v Cameron (1954) 91 CLR 353

COUNSEL: J Lee for the applicant in S6582/02 and for the first respondent in S6989/02
D J S Jackson QC, with G Beacham, for the respondent in S6582/02 and for the applicant in S6989/02
J M Rosengren for the second respondent in S6989/02

SOLICITORS: Virgil Power & Co Lawyers for the applicant in S6582/02 and the first respondent in S6989/02
Skyes Pearson & Miller Lawyers for the respondent in S6582/02 and the applicant in S6989/02
Maskiells for the second respondents in S6989/02

[1] On the 18th July 2002 Mr and Mrs Schouten filed an originating application (S6582/02) against Govard Pty Ltd (Govard) seeking an "order" that the documents annexed to Mr Schouten's affidavit constituted a memorandum or note within the meaning of s 59 of the *Property Law Act* 1974 (Qld)in relation to a contract for the sale of land relating to property in the Noosa area from the respondent as vendor to the applicants as purchasers.

[2] On 1 August 2002 Govard filed an originating application (S6989/02) joining Mr and Mrs Schouten (the Schoutens) and Mr and Mrs Morgan (the Morgans) seeking the following relief:

i) A declaration that no binding or enforceable contract exists for the sale by Govard of the particular parcel of land to the Schoutens;

ii) Alternatively, a declaration that the Morgans were entitled to a transfer from Govard of the legal estate in the land in priority to the Schoutens;

iii) That the caveat lodged by the Schoutens in respect of the land be removed, and

(iv) A declaration that such caveat was lodged and continued without reasonable cause.

[3] The matter came on for hearing. After a receipt purporting to establish the date upon which the Morgans paid their deposit, of which more will be said soon, the parties asked for an adjournment and, by consent, an order that the caveat be removed was made. Directions were given with regard to the delivery of further written submissions on the issue of whether a contract existed between Govard and the Schoutens.

[4] It was apprehended that one purpose of having that issue determined was the existence of a right to compensation under s 130 of the *Land Title Act* 1994 (Qld) which is as follows:

> 1) A person who lodges or continues a caveat without reasonable cause must compensate anyone else who suffers loss or damage as a result.
>
> 2) In a proceeding for compensation under subsection (1), a court of competent jurisdiction may include in a judgment for compensation a component for exemplary damages.
>
> 3) In a proceeding for compensation under subsection (1), it must be presumed that the caveat was lodged or continued without reasonable cause unless the person who lodged or continued it proves that it was lodged or continued with reasonable cause.

[5] The issue in that regard is whether by lodging the caveat or continuing it as the dispute evolved the Schoutens are liable to compensate Govard. The caveat in question was lodged on 28 June 2002. The first step in the underlying dispute was the completion of expressions of interest and delivery of them by the Schoutens and the Morgans to Govard in relation to purchasing the same parcel of land. Govard's position was that the Morgans' expression of interest and the accompanying preliminary deposit had been delivered first. It was deposed that Govard intended to deal with prospective purchasers in the order in which their expressions of interest were registered, with the second person, if there was more than one expression of interest, being advised of the fact that he, she or it was second in line. Mr Schouten's affidavit filed in S6582/02 on 18 July 2002 confirms he was aware of this, but in the circumstances below, was not immediately told that there was a prior expression of interest.

[6] According to a salesman Mr Saunders, an expression of interest from the Morgans, but not the preliminary deposit, was received on the 20th April 2002. In addition to the basic details concerning the parties, the price and the lot number the expression of interest form contained the following:

> "I/We hereby agree to enter into a formal contract to be prepared by the Seller's Solicitors on terms and conditions satisfactory to the parties and/or their solicitors including the terms and conditions above."

[7] On 29 April 2002 a further expression of interest accompanied by the preliminary deposit was sent to Govard by the Morgans. A standard letter was sent acknowledging receipt of it. That letter contained the following:

> "Thank you for your Expression of Interest on the above allotment in *The Ridge* – the exciting new land release at Noosa Springs. Your details have been recorded as shown on the attached document. Govard Pty Ltd ("Govard") will hold this allotment for you until such time as formal sales contracts can be prepared with your Preliminary Deposit being held in our solicitor's trust account.
>
> Presently Govard expects completion of the engineering works to occur in the coming weeks, with titles and other legal formalities concluded soon thereafter."

[8] According to Mr Saunders, on 3 May 2002 he was out of the office for part of the day. On Monday 6 May 2002 he was told that an expression of interest had been made in the name of Schouten Developments Pty Ltd or nominee, together with the preliminary deposit cheque, on the previous Friday. Saunders deposed that he tried to contact Mr Schouten but was unsuccessful until 10 May 2002. There is a dispute about the date and content of the conversation. In particular, Mr Saunders denied that he told Mr Schouten that the Morgans had not paid their deposit. According to Mr Saunders a letter confirming receipt of the expression of interest similar to that sent to the Morgans on 30 April 2002 had been sent to the Schoutens on the 8 May 2002, without his knowledge, although the copy exhibited to Mr Schouten's affidavit has the appearance of Mr Saunders' signature on it.

[9] On 21 May 2002 a contract preparation instruction form was sent to the Schoutens. There is nothing of relevance for present purposes in the contents of the document itself. However, it was accompanied by a letter which said, in part:

> "I refer to your Expression of Interest lodge (sic) with Govard Pty Ltd for the above allotment. As per our agreement, Govard has reserved this allotment to you. However, I am now pleased to advise that we are now in a position to prepare formal Sales Contracts."

[10] The form was returned on 28 May 2002. A draft contract of sale and associated documents were sent to the Schoutens' solicitors on the same day. The Morgans' contract preparation instruction form was returned on 5 June 2002, with the contract documents being sent on the same day to them. Each of the draft contracts sent to the parties contained clause 37.1 which is as follows:

> "37. Provision of Contract not an Offer

> 37.1 The provision of this Contract to the Purchaser for execution by the Purchaser is not an offer to sell from the Vendor to the Purchaser. This Contract is binding on the Vendor only on execution by the Vendor and communication of the fact of execution to the Purchaser."

[11] Both the Schoutens and the Morgans signed and returned the contracts. In the event the contract with the Morgans was executed by Govard but that with the Schoutens was not. The answer to the question whether there was a contract between the Schouten's and Govard is to be derived from the terms of the expression of interest, in particular the passage quoted in paragraph [6]. The document did not bring a contract into existence. In so far as the categories in *Masters v Cameron* (1954) 91 CLR 353 are concerned the terms of the document do not in any view fall into a category where a concluded contract was made. While there is reference to reserving the particular land for the party, the contents of the initial document sent in my view clearly enough indicate that there was no intention to enter into final contractual arrangements at the time of the completion of the expression of interest and delivering it to Govard. The letter accompanying the contract preparation form, in referring to "our agreement", may be thought to be referring to the agreement to negotiate a contract satisfactory to the parties. The provision in cl 37.1 is consistent with that being the case, although subsequent to the document already referred to.

[12] The fact that there was not a contract entered into may not inevitably conclude the issue of whether the caveat was lodged or continued without reasonable cause. There is a significant area of difference between Mr Saunders' and Mr Schouten's versions of how the latter came to know of the complication caused by the Morgan's expression of interest and of what was said subsequently. Resolution of who was first in time was not addressed by definitive documentary evidence until an affidavit, read by leave at the hearing and sworn the previous day was produced with a receipt and copy of the Morgans' cheque dated 29 April 2002 annexed. There was also the fact that the steps taken to advance preparation of a contract proceeded without reference, at least in writing, to the fact that the Schoutens were considered to be second in line. At what point, if at all, there was no reasonable cause to lodge or continue the caveat may depend on factual issues.

[13] Under s 130(3) the onus lies on the person who lodged the caveat to rebut the presumption that it was lodged without reasonable cause. For the kind of reasons above that issue cannot finally be resolved in these proceedings. The case is one that seems to call for sensible commercial resolution. However, if Govard wishes to pursue compensation and if the Schoutens wish to lead evidence with a view to establishing that the caveat was not lodged without reasonable cause they should each be afforded that opportunity. If any directions are considered desirable in this regard and the parties can agree on them, I would be prepared to make an order in the terms agreed.

[14] With regards to relief:

1. In originating application S6582 of 2002:
    a. The application is dismissed;
    b. I order that the applicants Peter Joseph Schouten and Elizabeth Angela Schouten pay the respondent's costs of and incidental to the application to be assessed.

2. In originating application S6989 of 2002:
   a. It is declared that no binding or enforceable contract exists for the sale by the applicant to the first respondent of lot 13 in a development called "The Ridge, Noosa Springs" more particularly described as lot 13 on GTP107048, County of March, Parish of Weyba;
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   d. I order that the first respondent pay the second respondent's costs of and incidental to the application to be assessed; provided that the first respondents have liberty to apply to the judge who hears the adjourned application, in relation to final incidence of costs paid by them to the second respondents