SUPREME COURT OF QUEENSLAND

CITATION:	*Oversea-Chinese Banking Corporation Ltd v. Becker & Ors* [2003] QSC 301
PARTIES:	**OVERSEA-CHINESE BANKING CORPORATION LIMITED** **ARBN 073 598 035** (applicant) **v.** **GREG JOHN BECKER** (first respondent) and **LYNN DAVIS KINCADE** (second respondent) and **BRIAN GORDON CHATHAM** (third respondent) and **RICCARDO JAMES DRABSCH** (fourth respondent) and **LAURENCE CHRISTOPHER BAYNHAM** (fifth respondent) and **EDWIN CHARLES PORTER** (sixth respondent) and **PAUL THERENCE COLE** (seventh respondent) and **BRONWEN ISLA COLLESS** (eighth respondent)
FILE NO:	6836 of 2003
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	10 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	26 August 2003
JUDGE:	Chesterman J
ORDER:	**1.Order that the plaintiff have leave to lodge further caveats over the land described in paragraphs 1(a), (b), (c), (d), (e), (f) and (g) of the application**

2. No order as to costs

CATCHWORDS: MORTGAGES – CHATTEL SECURITIES - CAVEATS – whether leave to lodge further caveats restricting properties pursuant to s129 of the *Land Title Act* 1994 can be granted

Land Title Act 1994, s129
Trade Practices Act 1974, s82

Clark v. Raymore (Brisbane) Pty Ltd (No. 2) [1982] Qd R 790
re Kelcey; Tyson v. Kelcey [1899] 2 Ch 530

COUNSEL: Mr M.R. Bland for the Application

1st-8th respondents self-represented

SOLICITORS: McCullough Robertson Lawyers for the applicant

1st – 8th respondents self-represented

[1] The plaintiff seeks leave pursuant to s 129 of the *Land Title Act* 1994 to lodge further caveats restricting dealings in eight properties which are owned respectively by the respondents. The description of the properties is set in the application. It is unnecessary to repeat them.

[2] Each of the respondents borrowed money from Capital Finance Corporation Australia (No. 1) Pty Ltd ("Capital") on 30 June 1998. The monies borrowed were applied to acquire what was called a 'participation interest in a collective marketing project for telecommunications products' known as 'Connect the World.' The purpose of the acquisition was to make the respondents eligible for a share of the income tax deductions which could be claimed by the entity, whatever it was, 'Connect the World' in setting up and commencing business. The promoters and the respondents hoped that the borrowed funds and the interest on the loan would be repaid from profits made by the project. Notwithstanding this optimism the respondents remained liable to repay the loan to Capital in accordance with the terms of their respective agreements.

[3] On or about 30 June 1998 all of the respondents except the fourth ("the respondents") offered to enter into a contract with Capital on terms set out in a letter of offer addressed by them to Capital. The letter contains a disclaimer:

> 'Capital … is simply a provider of finance. It makes no representations as to the commercial implications (including taxation) of participation in the "Connect the World" project for which the monies were borrowed. Capital takes no part in the … project.'

The letter advised anyone considering making an offer by signing it to read it carefully and to obtain independent legal and financial advice. It explains that:

> 'Anybody who executes and sends it to Capital, offers to borrow money from Capital.'

In form the letter is an irrevocable offer to borrow the amount specified for the purpose of acquiring 'a participation interest in a collective interest in a collective marketing project for telecommunication related products by Australian authorised funds management as manager as contained in a prospectus …'

[4] Each of the respondents signed a letter of offer to Capital and in due course received from it a facility deed setting out the terms and conditions of their loan agreements. Those deeds were executed on behalf of the respondents pursuant to a power of attorney the terms of which do not matter for present purposes.

[5] Clause 13.4 of the facility deeds provided:

> 'The borrower irrevocably offers to charge in favour of the lender all of its rights, title and interest in any property owned by it whatsoever and hereby authorises the lender to register a caveat over any real property which is subject to this charge. The lender may accept this offer only after an event of default has occurred and can do so by issuing the borrower with a notice of default under this deed.'

[6] A charge given in such terms if supported by consideration or given by deed is valid and affects a general equitable charge over all of the chargor's property existing at the time of the charge. See in *re Kelcey*. *Tyson v. Kelcey* [1899] 2 Ch 530 at 532-534; *Clark v. Raymore (Brisbane) Pty Ltd (No. 2)* [1982] Qd R 790 at 795 per Thomas J. The charge does not apply to after acquired property.

[7] On or about 30 June 1998 Capital advanced loans in varying amounts to each of the respondents. On 23 June 1999 it assigned all of its right, title and interest under the facility deed pursuant to which the loans had been made, and all securities and charges securing monies advanced under those deeds, to the plaintiff. By a letter dated 28 October 1999 Capital gave notice of the assignment to the respondents.

[8] Despite the sanguine hopes of the promoter and the respondents the project did not generate sufficient funds to pay interest due on the loans. On 7 January 2002 the solicitors for the plaintiff sent them letters of demand.

[9] The letters drew attention to the respondents' failure 'to repay the instalments due under the facility deed' and went on to intimate that 'pursuant to clause 16 … all amounts under the deed are immediately due and payable.' However the plaintiff indicated that it would forego its entitlement to recover the full amount provided that arrears, the amounts of which were specified, were paid and if the respondents thereafter paid monthly instalments. None of the respondents accepted the terms of the letter and all of them remain in default.

[10] In February and April 2003 the plaintiff lodged caveats with the Registrar of Titles to forbid dealings with the properties owned respectively by the respondents. No action was commenced by the plaintiff to establish its interest claimed under the caveats which therefore lapsed after three months pursuant to s 126(4) of the *Land Title Act*. The reason given for the plaintiff's failure to commence proceedings is that its Victorian solicitor was unaware of the subsection and did not realise that a caveat lodged in Queensland would lapse after the expiration of three months, unless an action were commenced. None of the respondents gave notice pursuant to s 126(2) requiring the plaintiff to commence its action within fourteen days of lodging the caveat.

[11] Section 129 provides that:

> 'If a caveat lapses or is withdrawn, cancelled or removed for a lot, or is rejected by the Registrar under s 157, the person who was the caveator may lodge another caveat for the lot on the same, or substantially the same, grounds only with the leave of a court of competent jurisdiction.'

[12] The applicant relies upon the letters of demand as constituting 'notices of default' for the purposes of Clause 13.4. I accept this submission. The letter served to advise the respondents that they were in default of their obligations to make payments of interest and demanded the whole of the amount due under the deed but offered to accept a lesser payment if made promptly. The offer was not accepted so that the letter served as a demand for the whole amount. Accordingly it seems right to conclude that the letters constituted an acceptance of the offer referred to in Clause 13.4 so that the respondents' offers to charge their property in favour of the lender were accepted by the letter of 7 January 2002.

[13] The first and third respondents acquired the property over which the applicant lodged caveats and over which it wishes to lodge fresh caveats after the execution of the facility deeds but before the acceptance of the offer on 7 January 2002. The seventh respondent acquired his property after the charge became effective by acceptance of the offer on 7 January 2002. The position of the second respondent is a little complicated. She was an equal joint tenant of property which was acquired in July 1995. On 22 July 2001 she acquired her co-owner's half interest in the property.

[14] In *Kelcey* a charge of 'all my real and personal estate whatsoever and wheresoever and of what nature or kind soever' was held to be a valid charge over existing property only. This case is a little different in that there was a substantial lapse of time between the making of the offer to charge property and its acceptance, giving rise to the possibility that, as happened, there were changes to the property holdings in the interim. There is a question whether Clause 13.4 applies to property existing at the time the deed was executed or to property which the respondents owned when the offer was accepted, giving rise to the charge. I think the latter is the preferable construction, for two reasons. The offer was a continuing one. It would make little sense if it applied only to property existing at the time the offer was first made unless the offeror promised not to dispose of or encumber that property. Otherwise the offer could become nugatory. Secondly, the clause could not operate effectively if it applied to property owned at the time the offer was made rather than when it was accepted. A borrower might own property on the first date, sell it and buy replacement property which he owned when the offer was accepted. It cannot have been intended that the offer was in respect of the first property which had been alienated, but not the second property which would be available to support the charge.

[15] Accordingly the charge is effective in respect of property which any of the respondents held in January 2002 and which they still hold.

[16] I understand from what Mr Bland said that only the seventh respondent's property was acquired after 7 January 2002. The application against him will be dismissed because he has no property subject to the charge. The other respondents owned

their properties at the time the charge came into existence so that it applies to those properties.

[17] Section 129 is new. The previous legislation forbad lodging further caveats on the same or substantially the same grounds as caveats which had lapsed or had been removed. The section confers no guidance for the exercise of the court's power to permit a fresh caveat to replace a lapsed one. There is clearly a broad general discretion to be exercised by reference to whatever considerations are relevant in the particular case.

[18] In accordance with general principle the applicant for leave must show that the order is appropriate in all the circumstances. Obviously the applicant must demonstrate a caveatable interest in the land such as to justify the caveat. If the grounds for lodging the caveat are arguable rather than plain questions of the balance of convenience between caveator and caveatee must be addressed as they are in applications to remove caveats.

[19] The reason why the caveat was allowed to lapse in the first place and any delay and explanation for the delay will ordinarily be relevant factors but, depending on the circumstances, will not be decisive. Any prejudice that a caveatee would suffer by reason of the lodging of a second caveat would be important.

[20] In a case such as the present where the plaintiff's interest in the land is clearly established and could be defeated in the absence of a caveat I apprehend that the application should be granted notwithstanding delay, and even in the absence of some reasonable explanation for allowing the caveat to lapse in the first place, unless the grant of leave would be unfair, in the sense of causing prejudice, to the caveatee. In such a case the competing interests of the parties would have to be assessed.

[21] The prejudice to be taken into account would be that suffered by the respondents by reason of the fresh caveats. It would not be the prejudice caused by the restraint on dealing with property imposed by the caveat because that is a detriment contemplated by the *Land Title Act* and it was a prejudice which the respondent suffered when the first caveats were lodged. The inquiry is into any prejudice suffered during the period between lapse of the first caveat and the application to lodge the second caveat.

[22] The respondents do not show any relevant prejudice. Only four of them, the second, fifth, seventh and eighth respondents appeared. The fourth respondent filed an affidavit but did not appear. The second, fifth, seventh and eighth respondents' case was put on their behalf with Ms Kincade with great force and simplicity. The complaint is that the finance broker who sold the investment scheme to them represented that their obligations under the deeds of loan would be met from proceeds of the project and that they would not have gone ahead if they had realised that they were exposed to a risk of having to make the repayments personally. Moreover the Australian Tax Office has disallowed their claims for deductions on the basis that the investment was made 'for the dominant purpose of obtaining a tax benefit and because the expenditure was not incurred in gaining assessable income.'

[23] The documents annexed to Ms Kincade's affidavit appear to bear out her assertions. The prospectus promised that the promoter could 'arrange finance for you with your new business standing as the only security required.'

The letter of 28 October 1999 from Capital which gave notice of the assignment also indicated confidence that the borrowers' obligations would be met from the project's income or from third parties. It did, however, advise that in the interim, the borrowers should pay monthly instalments of interest, and it required arrears to 15 November 1999 to be paid.

[24] Their complaint that they were misled by the promoter does not alter the reality that they borrowed money from Capital, not the promoter, and charged their property with the repayment.

[25] There is one consideration which might impact upon the applicant's right to enforce its charge over the respondents' property. It is that a class action has been commenced in the Federal Court on behalf of all persons who applied to acquire a participation interest in the Connect the World project. The plaintiff has been joined as a respondent in that action which is yet to be heard. The relief sought against the plaintiff is damages pursuant to s 82 of the *Trade Practices Act* and/or an order that the loan agreement and facility deeds made between the respondents and Capital should be set aside.

[26] The respondents who appeared at the hearing did not know that they were applicants in the Federal Court class action. Nevertheless if it should proceed and be determined in their favour the charges would become ineffective.

[27] The existence of the action may well provide a ground for resisting any action taken by the plaintiff to enforce its charges until judgment is given. It is not, it seems to me, a sufficient reason for not allowing fresh caveats to be lodged. Their only purpose is to protect the plaintiff's proprietary interest which it has and will have unless and until the Federal Court makes orders in favour of the respondents. That right could be lost in the meantime without the protection of the caveats.

[28] The case against the fourth respondent had to be considered separately only because the dates of his participation in the project differ from the other respondents. The fourth respondent offered to borrow from Capital by document dated 9 August 1996. By Clause 8.3 of the offer to borrow the fourth respondent promised:

> 'As further security for the due and punctual payment of the secured money and subject to the occurrence and [*sic*] event of default, the borrower as beneficial owner charges in favour of the lender all his right, title and interest in and to all property (including all freehold and leasehold interests in any land) assets and undertakings which he may now or at any time after hold or acquire in addition to the mortgaged property. The borrower appoints the lender his attorney to execute all such documents as may be necessary to effect the said charge. The borrower agrees that the provisions of this document relating to the powers of the lender upon default … will apply to the charge granted under this clause provided that these powers will only apply upon the occurrence of an event of default.'

[29] Capital assigned its rights under the offer to borrow to the plaintiff on 9 August 1996. Notice of the assignment was given to the fourth respondent by letter of 20 November 1996. The fourth respondent, too, has defaulted in making

payments due under the loan and a letter of demand was sent to him on 3 November 2000. He remains in default.

[30] A caveat lodged with the Registrar forbidding dealings in the fourth respondent's property lapsed on 22 July 2003, for the same reason as the other caveats lapsed.

[31] The fourth respondent is otherwise in no different position to the other respondents.

[32] Accordingly I order that the plaintiff have leave to lodge further caveats over the land described in paragraphs 1(a), (b), (c), (d), (e), (f) and (g) of the application. I make no order as to costs. The application was made necessary only by the plaintiff's solicitor's oversight.