SUPREME COURT OF QUEENSLAND

CITATION:	*UPM Pty Ltd v 19 Brakes Pty Ltd & Ors* [2007] QSC 124
PARTIES:	**UPM PTY LTD (ACN 101 686 195)** (plaintiff) **v.** **19 BRAKES PTY LTD (ACN 094 253 988) AS TRUSTEE OF THE CASABLANCA TRUST** (first defendant) and **BERES ANN HOGAN** (second defendant) and **CHRISTOPHER MARTIN HOGAN** (third defendant) and **TERENCE KEITH MACKAY** (fourth defendant) and **CARMEN LEE MACKAY-HOGAN** (fifth defendant)
FILE NO:	1924 of 2007
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	30 May 2007
DELIVERED AT:	Brisbane
HEARING DATE:	21, 22 May 2007
JUDGE:	Chesterman J
ORDER:	**1. The plaintiff is granted leave to lodge another caveat on the same or substantially the same grounds as caveat no. 71 011 4320 over land registered in the name of the first defendant and situated at 19 Brakes Crescent Miami, Qld, described as Lot 51 S.P. 184644, in the county of Ward and the parish of Gilston, title reference no. 50573402** **2. Until trial or earlier order, the defendants and each of them be restrained from selling or otherwise disposing of or dealing with land at 19 Brakes Crescent** **3. Until trial or earlier order, the defendants and**

each of them be restrained from increasing the indebtedness secured over the land at 19 Brakes Crescent in excess of two million dollars.

4. **The orders with respect to the defendants being restrained from dealing with the land are made upon the plaintiff giving the usual undertakings as to damages and upon Lee Paterson Pilkington giving his personal undertaking to pay any loss which the defendants or any of them, might suffer by reason of the injunctions just made, limited to the extent of ten thousand dollars.**

5. **The plaintiff to deliver its amended statement of claim by 5 June 2007.**

6. **The defendants to deliver their amended defences and counterclaims by 26 June 2007.**

7. **All documents brought to court under subpoena be returned to their rightful owners.**

8. **This matter to be certified to be tried speedily.**

9. **The costs of this application are reserved.**

CATCHWORDS: REAL PRPERTY – CAVEAT. APPLICATION TO RE-LODGE UNDER s129 *LAND TITLES ACT 1994* (QLD)

EQUITABLE REMEDIES – INTERLOCUTORY INJUNCTION – MAREVA INJUNCTIONS - TO RESTRAIN DEALING WITH LAND PENDING DETERMINATION OF RIGHTS the plaintiff is claiming specific performance of a contract to purchase property and the return of money paid to the second, third, fourth and fifth arising out of the termination of a business relationship - where pending trial of the main issues, an interlocutory applicant was made to lodge a caveat over the subject property and an order restraining the defendants form dealing with the property – where the plaintiff has mad e out a prima-facie case for relief at trial – where plaintiff claims *Mareva* orders are necessary on the grounds that the second and third defendants are intending to dispose of their assets and transfer them overseas and leave the jurisdiction – whether evidence supports justifiable fear that judgement would go unsatisfied.

Land Titles Act 1994 (Qld), s 129

COUNSEL: Mr D Cooper with Mr C Francis for the plaintiff
Mr D Clothier for the first, second, third and fifth defendants
Mr F Redmond of the fourth defendant.

SOLICITORS: Steindls for the plaintiff
Tucker & Cowan for the first, second, third and fifth defendants

Kenny & Co for the fourth defendant

[1] The plaintiff is the trustee of the Pilkington Superannuation Fund No. 2. It is controlled by one of its directors, Mr Lee Pilkington. The second defendant, Mrs Hogan, is Mr Pilkington's sister. The fourth and fifth defendants are Mrs Hogan's children. The third defendant is Mrs Hogan's husband. Mrs Hogan was formerly a director of the plaintiff and she and her two children were formerly employees.

[2] The first defendant, 19 Brakes Pty Ltd ('19 Brakes') is the successor in title to Seaworth Pty Ltd. It is controlled by the second and third defendants, Mr and Mrs Hogan, and it owns a valuable home at 19 Brakes Crescent, Miami.

[3] The plaintiff has two claims. The first is that it purchased part of the land at 19 Brakes Crescent from Seaworth Pty Ltd pursuant to a written contract dated 1 April 1997. The land was formerly in two parcels, Lots 1 and 2 on BUP 102611. The contract was for the purchase of Lot 1 for a price of $190,000. Notwithstanding the contract 19 Brakes did not convey the land to the plaintiff and later amalgamated both Lots 1 and 2 to form Lot 51 on SP 184644.

[4] The plaintiff claims specific performance of the contract for the purchase of Lot 1. Should it succeed it will require ancillary orders separating the titles and the conveyance of the reconstituted Lot 1. In the alternative it claims damages or equitable compensation for the loss of the land.

[5] The plaintiff lodged a caveat to protect its interest in the land but it lapsed because the plaintiff was a month late in commencing these proceedings seeking the conveyance of Lot 1. It has applied for leave, pursuant to s 129 of the *Land Titles Act* 1994 to lodge another caveat on the same ground as that which lapsed.

[6] The plaintiff's second claim is for the return of sums aggregating about $800,000, paid to the second, third, fourth and fifth defendants. The payments were made by Mrs Hogan, principally in January 2006, when she and the other defendants terminated their employment in circumstances of extreme personal hostility between Mr Pilkington and Mrs Hogan. The sums claimed are said to be in excess of what they were entitled to by reason of their employment by the plaintiff.

[7] In addition to seeking leave to lodge a further caveat the plaintiff seeks orders, pending trial, restricting the manner in which the defendants may deal with their principal assets. These *Mareva* orders are said to be necessary because of the justifiable concern that Mr and Mrs Hogan are making plans to dispose of their assets and transfer the proceeds overseas where they intend to live and work.

[8] The defendants contest the plaintiff's claims but concede that the plaintiff has made out an arguable case for relief, both with respect to the transfer of Lot 1 and the repayment of moneys. The defendants dispute the assertion that Mr and Mrs Hogan intend to move overseas, taking their assets with them, and complain that the plaintiff offers no valuable undertaking in support of the *Mareva* orders it seeks.

[9] The application was heard over two days. There was substantial cross-examination of Mr Pilkington and Mrs Hogan. The latter was questioned for a day. The point was to demonstrate the strength of the plaintiff's claim so as to diminish the need for a valuable undertaking.

[10] Despite the time taken at the hearing of the application, in the end there was not much debate about the orders which should be made. This is because the defendants, as I mentioned, conceded that there was a triable issue and offered undertakings with respect to dealing with their property at 19 Brakes Crescent, though subject to the provision of a worthwhile undertaking which they claimed had not been offered.

[11] At the conclusion of the hearing I made orders and indicated I would give brief reasons later. The orders made were limited to what should be done with the land at 19 Brakes Crescent pending trial. The particular orders did not seem to create the potential for the defendants to suffer any loss from the restriction in the brief time which it should take to have this action brought on for trial. Accordingly I did not require the plaintiff to give more than its own undertaking, the worth of which was not established, and an undertaking from Mr Pilkington personally to a limit of $10,000.

[12] It is normally undesirable to express any opinion about the results of a trial when dealing with an interlocutory application. It is not usually possible to do so. In this case, however, voluminous material was placed before the court and there was extensive cross-examination of the principal witnesses. It was, I think, possible to discern the shape of the respective cases. To the extent that the plaintiff argues that the strength of its case diminishes the need to prove the need for an undertaking of substantial value it is necessary to essay some estimate of its strength.

[13] The defendants' resistance to the claim for the transfer of Lot 1 had two bases. Initially Mrs Hogan asserted that the purchase price of $190,000 which was paid to the vendor, Seaworth Pty Ltd, the predecessor in title to 19 Brakes, had been repaid. By implication the contract had been mutually rescinded.

[14] No intelligible documentary evidence to establish the repayment was put before the court. Mrs Hogan referred to a document of uncertain origin and more uncertain meaning. It appeared to be a compilation from other documents which were not identified. There was no evidence by way of cheque, cheque butt, bank statement or receipt establishing the repayment. The payment of the purchase price by the plaintiff, on the other hand, was demonstrated.

[15] Subsequently Mrs Hogan justified the defendants' refusal to transfer Lot 1 by an assertion that the agreement was conditional upon Mr Pilkington procuring one of his companies to sell another property, at 9 Brakes Crescent, to the plaintiff, and that has not happened.

[16] The only documentary support for Mrs Hogan's claim so far put into evidence is a memorandum from an accountant employed by the parties' accounting firm, to their solicitor, on 29 August 1995. He wrote:

> 'As part of our superannuation planning for the group … significant … contributions will be paid … prior to 30 June 1995 … . The next step was for the … Fund to utilise these funds … to purchase both unit 1/19 Brakes Crescent and the ground floor unit of 9 Brakes Crescent, Miami. The units are to be transferred at their current market value …'

[17] It is to be noted that the memorandum does not in terms say that the acquisition by the trustee of one property was conditional upon the acquisition of the other.

[18] More significantly there is a substantial body of evidence suggesting that Mrs Hogan until recently accepted that there was a binding contract by which the first defendant had promised to convey Lot 1 to the plaintiff. There is evidence from Mr Pilkington and employees in the accounting firm that on a number of occasions Mrs Hogan promised to attend to the transfer of the property. Until the plaintiff, as trustee, had legal title to the property the tax returns for the superannuation fund could not be prepared and the accountants could not certify that the fund complied with the relevant Commonwealth legislation thereby entitling the contributors to the fund to a deduction against income tax liability. The accountants who deposed to receiving these assurances from Mrs Hogan were not required for cross-examination.

[19] On 16 July 1997 Mrs Hogan signed the financial statements for the plaintiff, as trustee of the superannuation Fund. She acknowledged that the statements contained a true and correct record of the Fund's assets and liabilities. The balance sheet records as an asset a property valued by the trustee at $190,000. Mrs Hogan accepted that the entry is a reference to Lot 1. The acknowledgment that the plaintiff owned the property sits untidily with her recent assertion that the acquisition did not proceed because a condition of the purchase remained unfulfilled.

[20] There is also evidence that in April 2001 the accountants informed Mrs Hogan that the conveyance of Lot 1 to the plaintiff was 'now becoming urgent.' Mrs Hogan did not respond by any assertion that there would be no transfer because there was no obligation to convey the property.

[21] As the evidence presently stands the plaintiff's claim to Lot 1, or compensation for the failure to convey the land, appears a strong one. It should be noted that with respect to this claim the plaintiff has a right to be indemnified out of the assets of the superannuation fund, of which it is trustee, in respect of liabilities incurred in seeking to protect, or augment, the fund. The right to indemnity would extend to payments made pursuant to an undertaking as to damages.

[22] The plaintiff's money claim is not brought in its capacity as trustee but in its own right.

[23] At relevant times the plaintiff provided services to Bond University. It carried out maintenance and repairs to the University's buildings, grounds and facilities and assisted it with building work. It engaged contractors to carry out the actual work and was paid by the university periodically so that it could, in turn, pay the contractors and suppliers.

[24] Following increasingly acrimonious disputes between Mr Pilkington and Mrs Hogan, on 6 January 2006 she resigned as a director of the plaintiff. Her husband, son and daughter also resigned as employees. On or about 8 January 2006 Mrs Hogan withdrew $244,930.79 from the plaintiff's bank account allegedly on account of long service leave, holiday pay and termination pay entitlements for herself, husband and children. The withdrawals left the account $8,421 in debit. The plaintiff was unable to pay its contractors and Mr Pilkington lent it money to allow it to remain in business.

[25] In addition, on earlier occasions, Mrs Hogan caused the plaintiff to make payments to herself, her husband, son and daughter ostensibly to discharge their entitlement to remuneration. The plaintiff claims that the payments were in excess of their actual entitlements. The plaintiff alleges that the second defendant was overpaid $269,075.29; the third defendant $5,189.76; the fourth defendant $425,023.48; and the fifth defendant $73,236.98.

[26] Whether the payments were in excess of actual entitlements is a matter very much in dispute. What is perhaps less capable of dispute is the fact that the fourth defendant received about $250,000 from the plaintiff, paid by his mother, by way of director's fees and dividends. Mr Mackay was neither a director nor shareholder of the plaintiff. His retention of that amount paid to him in respect of an office he did not hold and a capacity he did not possess, may be difficult to maintain, but I say no more about it because there may be an application for summary judgment for those two sums.

[27] The payments were made surreptitiously. They were not the subject of discussion between Mr Pilkington and Mrs Hogan, the two directors of the plaintiff. The amounts paid appear to be in conflict with a resolution of the directors, apparently signed by Mrs Hogan on 13 August 2002. Contemporaneously with her resignation as a director, Mrs Hogan withdrew from the plaintiff all of the moneys and left it unable to discharge its obligations to its creditors.

[28] The minute of the directors' resolution dated 13 August 2002 is very controversial. Mrs Hogan denies signing the minute and denies the existence of any meeting on that day. Indeed she alleges that the document was forged by Mr Pilkington who utilised a sheet of paper bearing the plaintiff's letterhead which she had earlier signed in blank. It emerged in cross-examination that her allegation of forgery had no stronger ground than that a copy of the minute was faxed from her brother's office. It is significant that Mrs Hogan herself implemented many of the resolutions found in the impugned minute of 13 August 2002 in the days and weeks following. Her execution of the resolutions rests uneasily beside her denial that they were made.

[29] The status of the minute of 13 August 2002 must be determined at the trial. To date the evidence in support of its authenticity has some cogency and Mrs Hogan's basis for attacking it seems flimsy. If authentic it would support the plaintiff's claim that the natural defendants were overpaid.

[30] The defendants concede that the plaintiff has an arguable case for the recovery of the moneys.

[31] The plaintiff claims a *Mareva* order is necessary because of evidence that the defendants are dealing with their assets in such a way as to give rise to a justifiable fear that judgment against them will go unsatisfied.

[32] Mrs Hogan has disposed of assets. She was the owner of land at 8 Kopps Road, Oxenford. It is worth about $1.6 million and is unencumbered. She intends to develop it and sell off subdivided lots. She recently transferred the land to her daughter, the fifth defendant for no consideration. Mrs Mackay-Hogan more recently transferred the land to a company, Yarrowridge Pty Ltd, the directors and shareholders of which are Mrs Hogan, her husband and children. No money changed hands pursuant to the transfer though the company acknowledges a debt to

pay Mrs Mackay-Hogan the agreed price, no doubt from the proceeds of the development.

[33] Mrs Hogan intends to borrow against the security of her house at 19 Brakes Crescent to pay for the development, leaving the Oxenford land unencumbered. An increase in the mortgage debt over 19 Brakes Crescent may well defeat the plaintiff's claim to Lot 1, or compensation in lieu thereof.

[34] There is some evidence that Mr and Mrs Hogan intend to move overseas. Mrs Hogan recently advertised her Mercedes motor car for sale and included in the advertisement the fact that she was leaving Australia. Mr and Mrs Hogan have recently advertised their home at 19 Brakes Crescent for immediate rent. The rental being sought is apparent long term: potential tenants are asked to pay a rental bond of $14,000. There is some evidence that Mr and Mrs Hogan have made statements to the effect that they intend to live and work in Asia. Against that Mrs Hogan and her husband deny any such plans and assert their intention to remain in Australia where they have undoubted family ties. The assertion by the second defendant that she intends to reside in her present home must be seen in light of the fact just mentioned, that it has been put on the rental market.

[35] In the circumstances a *Mareva* order of some kind is justified. It should be no more than is necessary to protect the plaintiff's claims and should leave the defendants as free as possible use of their own property. The plaintiff values its claims, with some allowance for interest and costs, at $1.5 million. The land at 19 Brakes Crescent is worth between $3.5 million and $4 million. It presently is mortgaged for about $1.6 million. A restraint on the defendants preventing them from increasing the level of debt secured against 19 Brakes Crescent above $2 million will preserve an equity of at least $1.5 million against which the plaintiff can execute should it succeed at trial.

[36] The making of such an order was not resisted by the defendants. It leaves them free to deal with the land at Kopps Road as they please.

[37] Nor did the defendants advance any ground of substance in opposition to the application for leave to lodge a further caveat. The plaintiff was only a month late in commencing these proceedings claiming an interest in the land subject to the caveat. Mr Pilkington explained the delay. He said that he wished to deliver a comprehensive and complete statement of claim rather than one which was inadequate and would require supplementation. The plaintiff's claim is complicated and required a detailed pleading. The delay is, I think, explained and justifiable. The defendants point to no prejudice that would suffer by the reimposition of a caveat. The delay being short and explained and there being no prejudice to the defendants, it is appropriate to give the plaintiff the requisite leave.

[38] Mr Clothier, who appeared for the first, second, third and fifth defendants, a little petulantly, insisted upon the need for a worthwhile undertaking from the plaintiff, or from Mr Pilkington personally, as the price for the restriction. He pointed out, correctly, that there is no evidence of the worth of the plaintiff's undertaking. When pressed to indicate what loss the defendants might suffer by reason of not being able to encumber 19 Brakes Crescent to an amount in excess of $2 million for the few months between now and trial, Mr Clothier could not do so. He referred vaguely to the *quantum* of the costs of the action, should the defendants succeed, and the loss

that the defendants might suffer by being prevented from developing the Kopps Road land. The restriction I have made will not affect the latter and an undertaking is not required in respect of costs but in respect of any loss which a defendant may suffer by reason of the limitation on borrowing against the property.

[39] Because there seems no likelihood of such a loss, and because the plaintiff's claim appears, at the least, strongly arguable, I thought it appropriate to impose the restriction upon only the plaintiff's unproven undertaking and Mr Pilkington's own undertaking limited to $10,000.

[40] The orders I made were that:

> Upon the plaintiff giving the usual undertaking as to damages and upon Lee Paterson Pilkington undertaking to pay to the defendants, or any of them, an amount not exceeding $10,000 which the court decides should be paid for damages, the defendants or some of them may sustain because of the order; until trial or further earlier order the defendants and each of them be restrained by themselves, servants or agents from selling or otherwise disposing of or dealing with land at 19 Brakes Crescent, Miami being Lot 51 on SP 184644 in the County of Ward, Parish of Gilston, title reference no. 50573402; and until trial or further earlier order the defendants and each of them be restrained from increasing the level of indebtedness secured over the said land in excess of the amount of $2 million.
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> The plaintiff have leave to lodge another caveat on the same or substantially the same grounds as Caveat No. 710114320 over the land registered in the name of the first defendant situated at 19 Brakes Crescent, Miami being the land described as Lot 51 on SP 184644 in the County of Ward, Parish of Gilston, title reference no. 50573402.
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> The plaintiff deliver its amended statement of claim by 5 June 2007 and the defendants deliver any amended defences and/or counter-claims by 26 June 2007.
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> The costs of the application be reserved.

[41] This action should be got ready for trial as quickly as possible. I certify that it is one which should be tried speedily.