

# SUPREME COURT OF QUEENSLAND

CITATION: *Amberley Aerospace Park P/L v Heartwood Architectural Timber & Joinery P/L* [2009] QSC 44

PARTIES: **AMBERLEY AEROSPACE PARK PTY LTD (ACN 133 403 371) as trustee for the B & N SOUTHERN FAMILY TRUST**  
(applicant)  
v  
**HEARTWOOD ARCHITECTURAL TIMBER & JOINERY PTY LTD ACN 125 503 504**  
(first respondent)  
**SOUTHERN BN PTY LTD ACN 119 803 422 (in liquidation)**  
(second respondent)

FILE NO: 12535/08

DIVISION: Trial Division

PROCEEDING: Originating application

DELIVERED ON: 6 March 2009

DELIVERED AT: Supreme Court, Brisbane

HEARING DATE: 27 January 2009

JUDGE: Wilson J

ORDER:

CATCHWORDS: REAL PROPERTY – TORRENS TITLE – CAVEATS AGAINST DEALINGS – WHO MAY LODGE AND WHAT INTEREST SUFFICIENT – PARTY TO MORTGAGE OR CHARGE – where first respondent lodged caveat over land claiming an interest as chargee – where registered owner of land is second respondent as trustee – where second respondent was replaced as trustee by applicant – whether there is a serious question to be tried as to whether second respondent gave first respondent a charge over its right of indemnity as trustee – whether caveat should be removed

EQUITY – TRUSTS AND TRUSTEES – POWERS, DUTIES, RIGHTS AND LIABILITIES OF TRUSTEES – INDEMNITY, LIEN AND REIMBURSEMENT – GENERAL PRINCIPLES – where second respondent held properties and carried on business in two distinct capacities – as trustee and in its own right – where second respondent acquired a business from first respondent in its own right – where first respondent provided vendor finance – where

repayment was secured by a mortgage debenture between second respondent as mortgagor and first respondent as mortgagee – where second respondent as beneficial owner charged in favour of first respondent all its right, title and interest in the mortgaged property – where second respondent held land as trustee – nature of second respondent’s right of indemnity out of trust assets – whether second respondent charged its right of indemnity

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PARTIES – OTHER MATTERS – where original trustee of land applied to be joined as second respondent – whether the Court should make an order for joinder

CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP – PROCEEDINGS BY OR AGAINST THE COMPANY – LEAVE TO PROCEED – WHEN LEAVE GRANTED – where company is being wound up on insolvency – whether leave to proceed should be granted *nunc pro tunc* to the applicant

*Corporations Act 2001* (Cth), ss 440D(1), 471B

*Land Title Act 1994* (Qld), s 127, Schedule 2

*Trusts Act 1973* (Qld), s 15

*Balls v Strutt* (1841) 1 Hare 146 at 149; 66 ER 984, cited  
*Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226, cited

*Corozo Pty Ltd v Total Australia Ltd* [1988] 2 Qd R 366, cited

*Corozo Pty Ltd v Total Australia Ltd* [1987] 2 Qd R 11, cited  
*Custom Credit Corporation Limited v Ravi Nominees Pty Ltd* (1992) 8 WAR 42, distinguished

*Jennings v Mather* [1901] 1 QB 108, cited

*Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, cited

*Ogilvie-Grant & anor v East* (1983) 7 ACLR 669, cited

*Re Burman’s Caveat* [1994] 1 QdR 123, cited

*Re Jorss’ Caveat* [1982] Qd R 458, cited

*Re Nymboida River Pty Ltd (In liquidation; ex parte Nimdale Pty Ltd* (unreported; Supreme Court of Qld; Ambrose J; 30 September 1988), cited

*Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99, cited

*Rothmore Farms Pty Ltd v Belgravia Pty Ltd* [1999] FCA 745, cited

*Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319, cited

COUNSEL:

LD Bowden for the applicant

PF Mylne for the first respondent

WP Jiear (solicitor) for the second respondent

SOLICITORS: O'Sullivan Lawfirm for the applicant  
 Sajen Legal for the first respondent  
 Quinn & Scattini for the second respondent

- [1] **Wilson J:** On 18 November 2008 Heartwood Architectural Timber & Joinery Pty Ltd (the first respondent) lodged a caveat over three parcels of land in Ipswich claiming an interest "as chargee over an estate in fee simple". The grounds of claim are stated in the caveat as follows -

"Pursuant to Mortgage Debenture dated 24/06/2008 between SOUTHERN BN PTY LTD ACN 119 803 422 and Heartwood Architectural Timber and Joinery Pty Ltd ACN 125 503 504 on 24 June 2008 over all the property of SOUTHERN BN PTY LTD ACN 119 803 422".

- [2] The registered owner of the land is Southern BN Pty Ltd as trustee.
- [3] Southern BN Pty Ltd was the trustee of the B & N Southern Family Trust until 24 November 2008, when administrators were appointed to the company, and it was replaced as trustee by Amberley Aerospace Pty Ltd. Subsequently, on 23 December 2008, it went into liquidation pursuant to a resolution of creditors.
- [4] On 26 November 2008 the new trustee Amberley Aerospace Pty Ltd filed this application for the removal of the caveat. On 17 December 2008 Southern BN Pty Ltd applied to be joined as second respondent. On 23 January 2009 Amberley Aerospace Pty Ltd filed a further application for leave to proceed *nunc pro tunc* pursuant to s 440D(1) or 471B of the *Corporations Act 2001* (Cth).

### **Joinder**

- [5] The application for joinder was unopposed, and I intimated during the hearing of the other applications that the Court would make an order for joinder.

### **Leave to Proceed**

- [6] By section 440D of the *Corporations Act 2001* (Cth), while a company is in administration, a person cannot commence or continue a proceeding against the company or in relation to its property except with the leave of the Court. Similarly, by section 471B, while a company is being wound up in insolvency or by the Court, a person cannot commence or continue a proceeding against the company or in relation to its property except with the leave of the Court. The Legislature's clear intention is to ensure that corporate assets are distributed rateably amongst all creditors so that none gains an advantage over others.<sup>1</sup> The present application is not capable of being dealt with by proof of debt in the winding up. Nor will other

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<sup>1</sup> *Ogilvie-Grant & anor v East* (1983) 7 ACLR 669 at 671.

creditors be disadvantaged by its being determined. Accordingly, leave should be granted *nunc pro tunc*.

### Removal of caveat

- [7] The second respondent held properties and carried on business in two distinct capacities - as trustee of the B & N Southern Family Trust and in its own right. It held the land in Ipswich as trustee. It held land on the Gold Coast and acquired a joinery business on the Sunshine Coast in its own right.
- [8] It acquired the joinery business from the first respondent in June 2008. The first respondent provided vendor finance to the extent of \$100,000.<sup>2</sup> Repayment of the loan was secured by a mortgage debenture between the second respondent as mortgagor and the first respondent as mortgagee. By clause 2.1 -

#### “2.1 Charging provision

To secure the due and punctual payment or repayment of the Secured Moneys, the Mortgagor as beneficial owner charges in favour of the Mortgagee all its Right, title and interest in, to, under or derived from the Mortgaged property.”

- [9] The Ipswich land is now vested in the applicant as the new trustee.<sup>3</sup> It is a “caveatee” within the meaning of the *Land Title Act 1994 (Qld)*,<sup>4</sup> and has standing to apply for the removal of the caveat.<sup>5</sup> In principle the Court will order the removal of the caveat unless the first respondent as caveator satisfies it that there is a serious question to be tried as to its interest in the land and that the balance of convenience favours the continuance of the caveat until trial of proceedings to establish that interest.<sup>6</sup>
- [10] The applicant’s primary submission is that on the plain interpretation of the mortgage debenture the second respondent did not purport to charge trust assets, and further, that it would have been beyond its power to charge trust assets for a non-trust or improper purpose.<sup>7</sup>
- [11] Under clauses 32 and 33 of the B & N Southern Family Trust Deed, the trustee had wide power to grant security over the trust assets. However, that power should be construed as restricted to the purposes of the trust,<sup>8</sup> and the second respondent could

<sup>2</sup> See Loan Agreement ex “C” to affidavit of Brett Southern filed 4 December 2008 (Court Document no. 2).

<sup>3</sup> *Trusts Act 1973 (Qld)*, s 15.

<sup>4</sup> *Land Title Act 1994 (Qld)*, Schedule 2 – Dictionary.

<sup>5</sup> *Land Title Act 1994 (Qld)*, s 127.

<sup>6</sup> *Re Jorss’ Caveat* [1982] Qd R 458; *Re Burman’s Caveat* [1994] 1 QdR 123. On 23 January 2009 Heartwood Architectural Timber and Joinery Pty Ltd commenced a proceeding in this Court to establish its interest in the Ipswich land: no S 818/09.

<sup>7</sup> Outline of submissions on behalf of the applicant, para 28.

<sup>8</sup> *Balls v Strutt* (1841) 1 Hare 146 at 149; 66 ER 984 at 985; *Corozo Pty Ltd v Total Australia Ltd* [1987] 2 Qd R 11 at 20 per Connolly J.

not have given a mortgage debenture over the Ipswich land to secure indebtedness it incurred to the first respondent not as trustee but in its own right. Counsel for the applicant submitted, correctly in my view, that the words “as beneficial owner” in clause 2.1 of the mortgage debenture should be restricted to property beneficially owned by the mortgagor (the second respondent).<sup>9</sup>

- [12] A trustee is personally liable for debts incurred as trustee in the administration of the trust fund. A right of indemnity out of the trust estate arises concurrently with the incurring of such a liability; it may take the form of a right to reimburse itself for expenses reasonably and properly incurred (“a right of recoupment”) or that of a right to pay expenses out of the trust fund (“a right of exoneration”).<sup>10</sup> The trustee has an equitable charge or lien over trust property to enable it to enforce the right of indemnity. The interest which arises by virtue of the charge or lien attaching to the right of indemnity is proprietary in nature.<sup>11</sup> It is beneficially owned by the trustee<sup>12</sup> and is not lost by a change in trustee or the former trustee giving up possession of trust assets.<sup>13</sup> In principle, it is a caveatable interest.<sup>14</sup>
- [13] In *Custom Credit Corporation Ltd v Ravi Nominees Pty Ltd*<sup>15</sup> the respondent was the trustee of the Ravi Family Trust, and the registered proprietor of land which it held in its capacity as trustee. The appellant advanced moneys to a company in which the respondent owned shares and a subsidiary of that company. Several parties, including one of the borrowers, executed a mortgage as part of the loan transaction. The respondent joined in the mortgage as one of several “covenantors”, in effect as a guarantor: it did so expressly “in its own right and in its capacity as trustee”. By another clause of the mortgage –

“11. The Covenantor further covenants and agrees with the Mortgagee that:-

.....

11.3 the Covenantor as beneficial owner while any moneys remain outstanding hereunder charges all the interest which the covenantor may have or hereafter acquire in any freehold or leasehold property by way of security for the payment of the moneys hereby secured”.

The appellant lodged a caveat against the title to the trust land claiming an estate or interest as equitable chargee “by virtue of clause 11.3 of [the mortgage] ... whereby as further security [the respondent] charged all its interest in any of its

<sup>9</sup> See *Corozo Pty Ltd v Total Australia Ltd* [1988] 2 Qd R 366 at 371 (Full Court); [1987] 2 QdR 11 at 19 (per Connolly J at first instance).

<sup>10</sup> See *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319; *Custom Credit Corporation Limited v Ravi Nominees Pty Ltd* (1992) 8 WAR 42 at 52.

<sup>11</sup> *Chief Commissioner of Stamp Duties(NSW) v Buckle* (1998) 192 CLR 226.

<sup>12</sup> *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 369-370; *Custom Credit Corporation Limited v Ravi Nominees Pty Ltd* (1992) 8 WAR 42 at 53.

<sup>13</sup> *Jennings v Mather* [1901] 1 QB 108 at 111; *Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99 at 109; *Rothmore Farms Pty Ltd v Belgravia Pty Ltd* [1999] FCA 745 at para 36 – 42.

<sup>14</sup> *Custom Credit Corporation Limited v Ravi Nominees Pty Ltd* (1992) 8 WAR 42 at 53; *Re Nymboida River Pty Ltd (In liquidation); ex parte Nimdale Pty Ltd* (unreported; Supreme Court of Qld; Ambrose J; 30 September 1988).

<sup>15</sup> (1992) 8 WAR 42.

freehold properties with repayment of the monies owing to [the appellant] under [the mortgage]”.<sup>16</sup> At first instance the Court ordered the removal of the caveat.

- [14] The Full Court allowed an appeal. Owen J (with whom Malcolm CJ and Walsh J agreed) analysed the nature of a trustee’s right of indemnity and the equitable lien or charge to which it gives rise. His Honour held that in principle a trustee which is not under any form of insolvency administration may charge or assign its right of indemnity in respect of a particular liability to the person to whom the trustee owes that liability.<sup>17</sup> In that case there was a serious question to be tried as to whether the respondent trustee, in granting the charge over the right of indemnity, had created a fetter on the exercise of its duties and powers amounting to a breach of trust. It was therefore held that the caveat should remain until trial.
- [15] A trustee’s right of indemnity does not arise until it incurs a liability in its capacity as trustee. In the present case, there are registered mortgages over the trust land in favour of New Capital Finance No 1 Pty Ltd and Gavin James Barnes. Over \$1.65 million is owing to the first mortgagee alone. Even assuming that those liabilities were properly incurred on behalf of the trust, and that the second respondent has a right of indemnity in respect of them, the present case is distinguishable from *Custom Credit Corporation Limited v Ravi Nominees Pty Ltd*. Here the first respondent mortgagee did not advance any moneys to the trust and the second respondent in its capacity as trustee did not incur any liability to the first respondent mortgagee. This is not a case of a trustee assigning or charging its right of indemnity in respect of a particular liability to the person to whom the trustee has incurred that liability. This is a case of the second respondent having allegedly charged its right of indemnity to someone to whom it has incurred a liability not in its capacity as trustee.
- [16] The Ipswich land was a trust asset. The second respondent could not charge a trust asset with a non-trust liability. Clause 2.1 of the mortgage debenture was ineffectual to charge that trust asset with a liability the second respondent had incurred to the first respondent other than in the performance of the trust. And I am not persuaded that there is a serious question to be tried as to whether the second respondent gave the first respondent a charge over its right of indemnity as trustee.
- [17] Accordingly, the caveat should be removed.

### **Other matters**

- [18] The second respondent is in liquidation. Whether a charge on the right of indemnity, if prima facie valid, would be voidable as a preference was not argued.

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<sup>16</sup> *Custom Credit Corporation Limited v Ravi Nominees Pty Ltd* (1992) 8 WAR 42 at 45 – 46.

<sup>17</sup> *Custom Credit Corporation Limited v Ravi Nominees Pty Ltd* (1992) 8 WAR 42 at 56 – 59; J D Heydon and M J Leeming, *Jacobs’ Law of Trusts in Australia*, LexisNexis Butterworths Australia, 2006, para 2104; H A J Ford and W A Lee, *Principles of the Law of Trusts*, Lawbook Co, 1995, para 14.290, 14.6050.

- [19] There is a second caveat over the Ipswich land. It was lodged by the administrators of the second respondent on 18 December 2008. There is no application to remove that caveat.

**Order**

- [20] I will hear counsel on the form of the order, and on costs.