SUPREME COURT OF QUEENSLAND

CITATION:	*Bank of Queensland Limited v Khoury & Anor* [2010] QSC 114
PARTIES:	**BANK OF QUEENSLAND LIMITED ACN 009 656 740 (applicant)** **v** **MONTY KHOURY (AS TRUSTEE FOR THE AJMK UNIT TRUST) (first respondent)** **QUEENSLAND DIRECT FINANCE PTY LTD ACN 112 372 111 (second respondent)**
FILE NO:	BS3501 of 2010
DIVISION:	Trial
PROCEEDING:	Originating application
DELIVERED ON:	15 April 2010 (*ex tempore* reasons given)
DELIVERED AT:	Brisbane
HEARING DATE:	15 April 2010
JUDGE:	Mullins J
ORDER:	**As per amended draft order initialled and placed with the file**
CATCHWORDS:	REAL PROPERTY – TORRENS TITLE – CAVEATS AGAINST DEALINGS – WHO MAY LODGE AND WHAT INTEREST SUFFICIENT – PARTY WHO HAD LODGED EARLIER CAVEAT – where applicant bank as holder of a mortgage in registrable form from the first respondent seeks leave pursuant to s 129 *Land Title Act* 1994 (Qld) to lodge a caveat against the first respondent's land – where an earlier caveat lodged by the applicant lapsed after the applicant failed to commence proceedings against the first respondent to establish the applicant's interest in the land – where applicant seeks to lodge a second caveat on the same grounds as the lapsed caveat – whether court should exercise discretion to grant leave to lodge a second caveat on the same grounds as the lapsed caveat *Oversea-Chinese Banking Corporation Ltd v Becker* [2004] 1 Qd R 409, followed
COUNSEL:	GJ Handran for the applicant No appearance for the first respondent

W Cochrane for the second respondent

SOLICITORS: HWL Ebsworth Lawyers for the applicant
Anderssen Lawyers for the second respondent

HER HONOUR: This is an application by the applicant to lodge a caveat on the same grounds as the caveat that had been previously lodged by the applicant on the first respondent's land that was mortgaged by the first respondent to the applicant on 19 December 2006.

The property was one in respect of which a duplicate certificate of title had issued. It appears that, after the first respondent signed the mortgage, the applicant did not take steps to register the mortgage. The loan that the first respondent received under the mortgage was $390,000.

In November 2007 the second respondent lent $300,000 to the first respondent. The second respondent also obtained a mortgage in registerable form over the same land in July 2008 from the first respondent. The second respondent lodged a caveat over the land on 30 July 2008. That caveat has been supported by a proceeding and therefore has not lapsed.

The solicitors for the second respondent became aware from some information provided to them in September 2008 that the duplicate deed may be held by the applicant. Requests were made by the solicitors for the second respondent to the applicant to produce the certificate of title to enable the registration of the mortgage that had been granted by the first respondent to the second respondent.

As a result the applicant then lodged caveat 712856764 on the basis that it held a registerable mortgage that had been granted by the first respondent on 19 December 2006, but that

the mortgage was not registered. The applicant claimed an interest as an equitable mortgagee.

According to an officer of the applicant, she has conducted a search of the records of the applicant and has been unable to locate the duplicate certificate of title.

The caveat that was lodged by the applicant lapsed on 11 February 2010. The second respondent then made a request to the applicant to withdraw that caveat. There is no explanation from the applicant as to why it did not take a proceeding to maintain caveat 712856764 on the title. The inference that I draw on the material is that there was oversight on the part of the applicant in looking after its own interests.

The applicant's current solicitors were engaged by 18 March 2010 and started taking steps in order to endeavour to register the applicant's mortgage. They were unsuccessful in procuring the first respondent to provide the duplicate certificate of title.

It appears that a solicitor, Mr Deed of Cranston McEachern, has acted for the first respondent in relation to a dispute between the first respondent and the second respondent. Mr Deed conveyed to the applicant that he had no instructions to accept service of the first respondent's behalf. Mr Deed did attend Court to observe the hearing that took place today.

In connection with its application the applicant seeks to rely on the provision of its mortgage that enables it to serve Court process on the last address that it has for the borrower. Information that is not verified suggests that the first respondent resides overseas. Certainly every address to which the applicant has forwarded communications for the first respondent has elicited no response.

In the circumstances of this matter and having regard to the dispute as to registration which has arisen between the applicant and the second respondent, I consider it appropriate to make an order in reliance on rule 119, subrule 1 of the UCPR, as submitted by Mr Handran of counsel on behalf of the applicant, although if there is a doubt about the power of the Court to rely on that provision in this particular case in the circumstances of this dispute, I would have been prepared to proceed under rule 27, subrule 3.

The second respondent opposed the granting of the leave to lodge a second caveat. It is a matter of the Court exercising a broad discretion, but the authorities to which I was taken by both Mr Cochrane of counsel for the second respondent and Mr Handran give some indication of the usual factors that may be taken into account by the Court in considering the exercise of discretion.

It certainly is not to the applicant's credit that it allowed the caveat to lapse and there is no explanation before the Court that explains the applicant's failure to look after its own interests in respect of the mortgage over the subject

land. On the other hand, the applicant did obtain a mortgage in registerable form from the first respondent in support of the obligation to repay a substantial loan that was made by the applicant to the respondent.

The second respondent may not have been aware of the applicant's mortgage at the time that it advanced funds to the first respondent and the second respondent has preserved its position as far as notifying others of its interest in the property by lodging its own caveat.

Any issue of priorities between the applicant and the second respondent does not need to be resolved on this application. It is relevant, however, that whatever the position of priorities was between the applicant and the second respondent at the time that the caveat lapsed is not prejudiced by the lodging of a caveat by the applicant on the same grounds.

Nothing that has happened between the lapsing of the caveat and the present time is suggested by the second respondent as prejudicing its position as far as its interest in the subject property is concerned. It may be that if the leave for lodging a second caveat were not granted the position of the second respondent could even be improved further, but that is not the relevant factor. What I have to focus on in this proceeding is events that have occurred between the lapsing of the caveat on the 11th of February 2010 and the date of today's hearing or perhaps the date the application was filed on 6 April 2010.

It is relevant that the position of the applicant could be considerably prejudiced by third parties obtaining a priority over its unregistered mortgage as a result of there being no notice on the title of the existence of that security.

I therefore had regard to the approach taken in Overseas-Chinese Banking Corporation Limited v Becker [2004] 1 Qd R 409 and have decided that, taking into account all the relevant factors, the balance of convenience favours preserving the status quo as it was immediately before the applicant's caveat lapsed and I therefore will give the leave to lodge a second caveat on the same grounds as caveat 712856764.

I was surprised at the submission of Mr Handran of counsel in his written submissions that costs should be ordered on the indemnity basis. Just because the applicant has been successful in its application it does not follow that it is entitled to an order for costs. In fact, this application has been brought because of its failure to look after its own interests. It should, therefore, bear its own costs.

Mr Cochrane of counsel sought an order for costs on behalf of the second respondent, but in view of my conclusion that the second respondent took the risk of opposing this application and has been unsuccessful, I have decided that it should also bear its own costs.

I therefore make an order in terms of the amended draft initialled by me and placed with the file.