

SUPREME COURT OF QUEENSLAND

CITATION: *McElligott v Commonwealth Bank of Australia* [2012] QCA 61

PARTIES: **LORAIN RONDA McELDIGOTT**
(appellant)
v
COMMONWEALTH BANK OF AUSTRALIA
ACN 123 123 124
(respondent)

FILE NO/S: Appeal No 8456 of 2011
SC No 6441 of 2011

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 20 March 2012

DELIVERED AT: Brisbane

HEARING DATE: 2 March 2012

JUDGES: Margaret McMurdo P and Fraser JA and Applegarth J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Appeal dismissed.**
2. The appellant pay the respondent's costs of and incidental to the appeal to be assessed on the standard basis.

CATCHWORDS: CONVEYANCING – MATTERS ARISING AFTER COMPLETION – OTHER MATTERS – CAVEATS AGAINST DEALINGS – where appellant lodged a registered owner's caveat against land on behalf of a company in liquidation – where the caveat prevented registration of a transfer of the land and mortgage over the land – where the mortgagee applied for removal of the caveat pursuant to s 127 *Land Title Act* 1994 (Qld) – where the caveat was based upon alleged fraudulent conduct – where the alleged fraudulent conduct related to persons other than the transferee and mortgagee – whether the primary judge's discretion under s 127 *Land Title Act* 1994 (Qld) miscarried in ordering that the caveat be removed

PROCEDURE – COURTS AND JUDGES GENERALLY – COURTS – OTHER MATTERS – whether the primary judge

erred in refusing to stay an order for removal of a caveat to permit the appellant to add a party to the proceeding

APPEAL AND NEW TRIAL – APPEAL PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the respondent contends that the appellant advanced the same hopeless position on appeal as at first instance – whether costs should be awarded on the indemnity basis

Land Title Act 1994 (Qld), s 127

Property Law Act 1974 (Qld), s 85(3)

McElligott v Boyce & Ors [2011] QCA 117, cited

McKean v Maloney [1988] 1 Qd R 628, cited

COUNSEL: The appellant appeared on her own behalf
P D Hay for the respondent

SOLICITORS: The appellant appeared on her own behalf
Matthew J Farmer for the respondent

- [1] **MARGARET McMURDO P:** I agree with Applegarth J’s reasons for dismissing the appeal with costs to be assessed on the standard basis.
- [2] **FRASER JA:** I agree with the reasons for judgment of Applegarth J and the orders proposed by his Honour.
- [3] **APPLEGARTH J:** The appellant, Lorain McElligott, is the sole director and shareholder of Westwood Enterprises (Qld) Pty Ltd (“Westwood”). Westwood was wound up by an order made by a judge of the trial division of this Court on 14 October 2009. As a consequence of the winding up of Westwood the appellant lacked the authority to perform or exercise, or to purport to perform or exercise, a function or power as an officer of Westwood.¹ Despite this, on 4 March 2011 in the purported exercise of her power as a director she lodged a caveat over land of which Westwood was then the registered proprietor (“the property”). The caveat named the caveator as Ms McElligott “as sole director” of Westwood and “first appointer and primary beneficiary of the McElligott (sic) Family Trust and contributor”. After requisitions, the caveat was amended by Ms McElligott to describe the caveator as Westwood as trustee for the McElligott Discretionary Trust. She remained named as the lodger of the caveat as sole director of Westwood and in her capacity as first appointer and primary beneficiary of the McElligott Discretionary Trust.
- [4] The interest claimed in the caveat was “an equitable interest in the estate in fee simple”. The grounds of claim alleged “fraudulent action on the part of Bulter (sic) McDermott Lawyers” that resulted in Westwood being wound up on 14 October 2009. The alleged fraudulent action of that firm was to use a statutory demand that did not include a required warning statement, and an assertion by a member of that firm in an affidavit in support of the statutory demand that he believed that there was “no genuine dispute about the existence of (sic) the amount of debt”. The appellant’s allegations of fraudulent action on the part of Butler McDermott

¹ *Corporations Act 2001 (Cth)*, s 471A.

Lawyers in respect of the statutory demand that preceded the winding up of Westwood was the basis for the caveat that she lodged on 4 March 2011. Importantly, the caveat did not assert grounds of claim against other parties, including the then registered mortgagee, the purchaser of the property or the bank which financed the purchase and which is the respondent to this appeal (“the CBA”).

- [5] The caveat had the effect of preventing the registration of a transfer to the party which had purchased the land from the National Australia Bank (“the NAB”) in exercise of its power of sale as mortgagee, C Dixon & Associates Pty Ltd as Trustee for the Dixon Family Trust (“Dixon”). It also prevented registration of a mortgage granted by Dixon to the CBA. By a contract dated 28 January 2011 Dixon had agreed to purchase the property from the NAB for \$669,250. Dixon borrowed the funds required to complete its purchase of the property. The sale was completed on 28 February 2011 when transfer documents were obtained by the CBA to permit Dixon to be registered as the owner of the land and the CBA to be registered as mortgagee. The CBA did not electronically lodge the transfer documents and mortgage until 8 March 2011. By this time, the caveat had been lodged by the appellant.
- [6] The CBA demanded more than once that the caveat be removed, and foreshadowed an application to remove it if this did not occur. An application seeking an order pursuant to s 127 of the *Land Title Act 1994* (Qld) that the caveat be removed was filed on 26 July 2011. On 2 August 2011 the liquidators for Westwood advised the CBA’s solicitors that they neither consented nor opposed its application to remove the caveat and confirmed “at no stage have we authorised Ms McElligott to lodge the caveat on our behalf in our capacity as Liquidators or Receivers.”

The hearing and judgment at first instance

- [7] At the hearing on 25 August 2011 the appellant appeared on her own behalf. The primary judge indicated that he was not prepared, at least at that stage, to grant her leave to appear on behalf of Westwood. Counsel who appeared for the CBA that day noted early in his submissions that no issue was taken with the NAB’s sale of the property, that money had passed to the NAB upon settlement, that transfer documents had been lodged and the caveat was the only thing holding up registration. The primary judge identified in the course of argument that the real issue was whether Westwood, as registered proprietor, had any right to prohibit a transfer by the NAB. Counsel for the CBA noted that it was not said by or on behalf of Westwood that the sale was for an undervalue and no claim was advanced by Westwood that might prevent the transfer.
- [8] In her oral submissions, the appellant emphasised that the purpose of a caveat lodged by a registered owner is to protect against fraud, and she identified the fraud about which she complained as that attributed to Mr Boyce, a principal of Butler McDermott Lawyers. After the appellant made submissions about the purpose of the caveat and the matter of complaint in it, the primary judge asked her whether there was anything else that she wished to add. The appellant then noted that she believed that the property had been sold at an undervalue, and that it did not go to auction. When asked by the primary judge whether there was any evidence of that in the material before him, the appellant responded that there was not. She did, however, later refer to certain documents in her material which related to valuations of the property several years earlier.

- [9] After considering the parties' submissions the primary judge delivered an oral judgment which outlined the background to the matter and the legal principles that governed an application of the kind made by the CBA. His Honour concluded that the NAB as mortgagee had power to sell the land to Dixon and that, subject to the submissions made by Ms McElligott, Westwood had no interest which would entitle it to prevent registration of a transfer consequent upon a sale by the NAB. He concluded that unless Ms McElligott could establish a basis on which Westwood might enforce an interest against the NAB, which would prevent the transfer to Dixon and the subsequent mortgage to the CBA, an order for removal of the caveat should be made.
- [10] The primary judge referred to the allegations of fraud made by Ms McElligott relating to the winding up of Westwood. His Honour noted that there was no allegation that the NAB had fraudulently obtained its mortgage or acted fraudulently in exercising its power of sale. Passages relied upon by Ms McElligott from a Land Title Practice Manual to the effect that a caveat by a registered owner will prevent registration of a transfer by a mortgagee exercising a power of sale "until the caveat is withdrawn or the matter settled by the Court" were said to be not relevant to the question of whether the caveat should be removed, save perhaps for supporting the proposition that the caveat should be removed if the caveator is not entitled to prevent a transfer consequent on a sale by a mortgagee.
- [11] As to the allegation that the NAB sold the land at an undervalue, the primary judge considered the documents that had been exhibited to the appellant's affidavit consisting of a report called "Towards Transparency". The document prepared by the appellant referred to valuations that had been undertaken in late 2004 and 2005. The primary judge noted the difficulties that arose in attributing any great weight to a document that was said to reflect valuations that were undertaken several years before the contract between the NAB and Dixon. They were found to be too remote in time to provide any proper basis for considering whether the NAB sold the land at its market value in January 2011.
- [12] The primary judge found there was no evidence that the NAB did not properly perform its obligations as mortgagee when selling the land and there was no explanation as to how the evidence on which the appellant relied might be said to affect the sale by the NAB to Dixon. The primary judge concluded that, even taking the material at its highest, it did not provide a basis for refusing the application. After considering other submissions the primary judge observed that the appellant was not in a position to challenge the sale to Dixon since control of the affairs of Westwood rested with the liquidators which had not sought to oppose the order for removal of the caveat, or themselves to lodge a caveat to prevent registration of the transfer to Dixon and a mortgage in favour of the CBA.
- [13] An order was made that the caveat be removed. The appellant was ordered to pay the CBA's costs of the proceeding to be assessed on the indemnity basis.
- [14] On 26 August 2011 the CBA re-lodged the form of transfer of the property and the mortgage granted by Dixon to it. As a result, Dixon is now registered as owner and the CBA is registered as mortgagee.

The grounds of appeal

- [15] The notice of appeal contains six paragraphs under the heading "Grounds". In essence, the first five paragraphs relate to the alleged wrongful winding up of

Westwood as a result of the alleged fraudulent conduct of Butler McDermott Lawyers. These paragraphs contend that:

- the caveat was lodged by the registered owner;
- that such a caveat will prevent registration of an instrument affecting the lot over which the caveat is lodged “until the caveat is withdrawn or the matter settled by the Court”;
- that the matter of the caveat has not been properly heard and determined by a court;
- that an appeal to the High Court to set aside the winding up of Westwood is on foot and is “highly meritorious”; and
- that an action against Butler McDermott Lawyers for fraudulently serving a statutory demand with a warning statement omitted or removed is on foot.

[16] Some of these matters require explanation. On 3 June 2011 this Court, constituted by Muir, Chesterman and White JJA, dismissed an application by Ms McElligott for an extension of time within which to appeal against the order made on 14 October 2009 that Westwood be wound up.² On 14 February 2012 Ms McElligott lodged documents with the High Court in which she applied for special leave to appeal from that judgment. Ms McElligott believes that her late application to the High Court is meritorious, involves an important point of law about statutory demands and will lead, in the event of a successful appeal, to an order that the winding up of Westwood be set aside.

[17] The sixth paragraph of the grounds of appeal relates to a different matter, namely an allegation that the NAB as mortgagee in possession “failed to adequately advertise the sale, failed to obtain evidence of the property’s value and failed to sell the property by auction.”

The appeal

[18] Upon the hearing of the appeal, the appellant again sought to emphasise that a serious question exists to be tried in relation to the statutory demand that preceded the winding up of Westwood and that the appeal to the High Court in relation to the winding up of Westwood is meritorious. She did not adequately engage with the proposition that, even if it be assumed in her favour that after a successful appeal to the High Court the winding up of Westwood was set aside, this would not impeach the exercise by the NAB of its power of sale or provide Westwood with a legal entitlement to prevent the registration of the transfer to Dixon and the mortgage to the CBA. The appellant was unable to explain how success in proceedings against Butler McDermott Lawyers resulting in an order that the winding up be set aside would alter the entitlement of Dixon and the CBA to be registered pursuant to the transfer that was granted by the NAB as a result of exercising its power of sale.

[19] Westwood held its title as registered owner subject to the NAB’s mortgage. Upon the completion of the sale of the land by the NAB to Dixon, and the lodgement of transfer documents, Dixon and the CBA acquired an entitlement to registration which was only prevented by the caveat lodged by the appellant.

² *McElligott v Boyce* [2011] QCA 117.

[20] The primary judge correctly concluded that there was no evidence that the NAB had breached its obligations as mortgagee when selling the land. Even if, contrary to this conclusion, there was some evidence in support of a case against the NAB for breach of its duty under s 85 of the *Property Law Act* 1974 (Qld) for having failed to take reasonable care to ensure that the property was sold at market value, this did not impeach the title of Dixon as purchaser. Section 85(3) provides:

“The title of the purchaser is not impeachable on the ground that the mortgagee or receiver has committed a breach of any duty imposed by this section, but a person damnified by the breach of duty has a remedy in damages against the mortgagee exercising the power of sale.”

The “title” of the purchaser referred to in s 85(3) is not confined to legal title or a title that is registered.³ Accordingly, the matters raised in paragraph 6 of the appellant’s grounds of appeal are of no avail in the circumstances.

[21] The primary judge correctly identified the issues for determination, made findings of fact which are not challenged in the appeal and correctly applied principles governing applications to remove caveats to the facts in evidence before him. The exercise of the discretion conferred by s 127 of the *Land Title Act* 1994 (Qld) did not miscarry.

[22] Upon the hearing of the appeal counsel for the CBA advanced an additional ground upon which the appeal should be dismissed. This arose because Dixon has become the registered owner and the CBA registered as mortgagee. The CBA submitted that there was no utility in the circumstances in setting aside the order for the removal of the caveat. An order setting aside the order for the removal of the caveat would not serve to defeat, or even address, the registration obtained by Dixon and the CBA. Dixon completed the sale prior to the lodging of the caveat and in this appeal the appellant does not impeach its title or the entitlement of the CBA to be registered as mortgagee.

[23] I would dismiss the appeal for two reasons. First, the application to the primary judge was correctly decided after a proper consideration of the evidence and governing principles, and no error on his part has been demonstrated. Secondly, an order setting aside the order for removal of the caveat has no utility in the present circumstances.

The refusal of a stay

[24] The appellant’s notice of appeal did not appeal against the separate and subsequent decision of the primary judge to not grant a stay of the order that his Honour made. Although this aspect was not raised as a ground of appeal, the final paragraph of the appellant’s submissions in reply contended that the primary judge erred in not granting a stay to allow her to present evidence “of the impropriety of NAB regarding the sale of the property ...”.

[25] On 25 August 2011 after the primary judge ordered the removal of the caveat the appellant orally applied for a stay, and indicated that she wished to advance a case against the NAB, based upon valuation evidence that she did not yet have. She acknowledged that she had not prepared a case against the NAB and it was not

³ *McKean v Maloney* [1988] 1 Qd R 628 at 635-636.

raised in submissions. Counsel for the CBA relied upon the provisions of s 85(3) of the *Property Law Act 1974 (Qld)* and contended that there was no evidence suggesting that Dixon was anything other than a bona fide purchaser for value without notice of any defect in the exercise by the NAB of its power of sale. After hearing argument the primary judge concluded that any evidence, which had yet to be obtained from a valuer to the effect that the value of the land was greater than the sale price, might assist in seeking to establish a breach by the NAB of its duty as mortgagee. However, such a breach did not impeach the title of the purchaser and there were not sufficient grounds to make an order for a stay of the order for the removal of the caveat.

- [26] The appellant has not demonstrated that the learned primary judge erred in reaching this conclusion and in declining to order a stay.

Costs

- [27] There is no separate appeal in relation to the costs order made by the primary judge, nor would such an appeal in respect of an order for costs be competent without leave. The order sought by the appellant included an order setting aside the costs order made against her. No basis has been established to interfere with the order made by the primary judge in relation to costs.
- [28] The CBA sought costs on an indemnity basis in the event that the appeal was dismissed. The principal basis for that application was that the appellant perpetuated what was submitted to be the same hopeless position advanced before the primary judge and sought on the appeal to advance matters which were irrelevant to the CBA's entitlement to apply for removal of the caveat.
- [29] The appellant persisted with arguments that should not have been pressed in the light of the decision under appeal. However, I do not consider that her conduct warrants an order for costs on an indemnity basis.

Conclusion

- [30] The primary judge was correct to order the removal of the caveat lodged by the appellant purportedly on behalf of Westwood. Whatever may be the merits of the claims stated in that caveat in respect of the conduct of Westwood's former solicitors and whatever may be the strength or weakness of the appellant's much-delayed application to the High Court in respect of the winding up of Westwood (being matters about which I express no opinion), the caveat that she lodged was based upon the alleged fraudulent action of the solicitors who obtained an order for the winding up of Westwood. It raised no allegation that the NAB lacked the power to exercise its power of sale as registered mortgagee of Westwood's property. The appellant placed no satisfactory evidence before the primary judge that the NAB had breached its duty as mortgagee in exercising its power of sale, let alone evidence that would impeach the title of Dixon as purchaser and the entitlement of the CBA to be registered as mortgagee.
- [31] The appeal should be dismissed. The appellant should pay the respondent's costs of and incidental to the appeal to be assessed on the standard basis.