

SUPREME COURT OF QUEENSLAND

CITATION: *Australia & New Zealand Banking Group Ltd v Deqmo Pty Ltd & Ors* [2015] QSC 128

PARTIES: **AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED**
ABN 11 005 357 522
(applicant)
v
DEQMO PTY LIMITED
ACN 160 036 877
(first respondent)
FRANCIS PETER BERTOLA
(second respondent)
REGISTRAR OF TITLES, QUEENSLAND
(third respondent)

FILE NO/S: SC No 4075 of 2015

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 24 April 2015

DELIVERED AT: Brisbane

HEARING DATE: 24 April 2015

JUDGE: Philip McMurdo J

ORDER: **Delivered ex tempore on 24 April 2015:**

Order as per draft.

CATCHWORDS: EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INJUNCTIONS FOR A PARTICULAR PURPOSE – TO RESTRAIN EXERCISE OF A LEGAL RIGHT – where the applicants sought an injunction to restrain the first respondent and the Registrar of Titles from lodging any further caveats over the property – where the Registrar offered no opposition to the application – where an order was made against the Registrar notwithstanding the absence of any wrongdoing on the part of the Registrar

REAL PROPERTY – TORRENS TITLE – CAVEATS AGAINST DEALINGS – REMOVAL – where the applicant was the first registered mortgagee of properties - application for removal of caveats lodged by the first respondent

Land Title Act 1994 (Qld), s 66, s 127

Gangemi v Gangemi (2009) WASC 268, applied
Halaga Developments Proprietary Limited v Grime (1986) 5
 NSWLR 740, applied
Milne Feeds Pty Ltd v Bride, unreported, Supreme Court of
 Western Australia, No 1076 of 1996, 7 May 1996, applied

COUNSEL: J McKenna QC, with G Coveney for the applicant
 No appearance for the first, second or third respondents

SOLICITORS: DibbsBarker for the applicant
 No appearance for the first, second or third respondents

HIS HONOUR: Yesterday, the Court heard and determined a contested application for the removal of caveats lodged by registered owners of two pieces of freehold land on which they had conducted a cane farm. The application was made by the present applicant bank in order that the bank might complete contracts which it has made with an arm's length purchaser for the sale of the properties. The contracts, as I was told yesterday and again today, are due for settlement today although the bank does have a right to extend, for a limited time, the date for settlement.

The order made yesterday was that the registered owners' caveats be removed. It was further ordered that the registered owners not lodge any further caveat over these lands save with the leave first obtained from the Court. Immediately upon those orders being made, there was an oral application made by counsel appearing for the owners for such leave. He read into the record the terms of the proposed further caveats which the registered owners wished to lodge. I refused that oral application. It has since emerged that, later that afternoon, further caveats were lodged, not by the registered owners, but by another party over these lands.

The present application, which was filed by leave today, seeks the removal of those caveats as well as an order against the Registrar of Titles to preclude any other caveat, at least one which would prohibit a relevant dealing with land from taking effect. The present caveats are lodged by a company called DEQMO Proprietary Limited, which is named as the first respondent. Each caveat also has the name of a Mr Francis Bertola as the lodger. On one of the caveats, his address is given as a certain place in Western Australia. A company search of the caveator shows him to be its director. The search also shows a telephone number for him.

Lawyers for the applicant have called that number this morning and an account of that conversation is given on the affidavit of Mr SD Guthrie. According to that affidavit, the person who answered the phone accepted that "probably" he was Mr Francis Bertola. When told that there would be this application heard to remove the caveats, this person answered "Gee, that was quick." The person added that the documents could be sent to a certain email address, which he confirmed was the email address of a Mr Rod Culleton. The documents have been sent to that address. There have been some responses from someone by the name of Mrs Georgiou-Culleton. Those responses have been printed and marked as an exhibit. It is sufficient to say about them that they indicate no intention, on the part of that person at least, to contest the present application. Nor has Mr Bertola

expressed any such intention and the telephone conversation set out in Mr Guthrie's affidavit indicates the contrary.

The application is made in circumstances of obvious urgency. There is a power to extend the date for settlement from today but no doubt arrangements for settlement today are well-advanced. There is also the interest of the purchaser to be considered and those on the purchaser's side of the transaction.

The purchaser has, for some time, been in possession of this property. The caveats claim an interest which is expressed as "fee simple". This is to be compared with the grounds of claim within each caveat which has been handwritten – or which have been handwritten as follows: "Caveator claims equitable mortgage/lease".

Passing over the tension between the interest claimed and the grounds for the claim, on the face of these caveats, the grounds for the claim could not support an interest which is superior to that of the applicant, which is a mortgagee under a mortgage registered in September 2010. The caveat does not indicate whether the alleged lease is a lease for three years or less. But given the date of registration of the mortgage, it can not be an existing lease which could prevail against the registered mortgage because of the terms of section 66 of the Land Title Act. Nor could an interest as an equitable mortgagee prevail against the registered interest of the applicant. And, again, there is an apparent tension on the face of these caveats between the claim to be both an equitable mortgagee and a lessee although, perhaps in theory, there might be such a combination of entitlements.

As I mentioned, the purchaser is in possession of the properties which further indicates the weakness of a claim for a lease, at least a lease which would prevail against the applicant.

On the face of the caveats then, they could not support an interest which prevails against the applicant and which could be used to impede the applicant's exercise of its power of sale. The application for the removal of these caveats would not preclude any claim which the caveator might advance against the applicant.

The present question is whether there ought to be the restraint upon the dealings with the land by the applicant as a result of these caveats. In the present circumstances of urgency and having regard to the responses, such as they have been, from the caveator, the director and the party to whom the applicant was referred by him, it is my conclusion that an order ought to be made now for the removal of the caveats.

There is then a further order which is sought which is against the Registrar of titles. Not unreasonably, the applicant apprehends that, absent an order of the kind which it seeks against the Registrar, it is likely that there would be further caveats lodged to prevent, or at least impede, the completion of this sale by the applicant.

The order which is sought is to the effect that any caveat lodged which would affect any relevant dealing would be removed by the Registrar. I was referred to several cases which will establish the jurisdiction to make such an order against the Registrar notwithstanding the absence of any suggested wrongdoing on the Registrar's part, see *Halaga Developments Proprietary Limited v Grime* (1986) 5 NSWLR 740, *Milne Feeds Proprietary Limited v Bride*, a decision of the Supreme Court of Western Australia on 7 May 1996 of Justice Murray, and *Gangemi v Gangemi* (2009) WASC 268.

The Registrar has been informed of this application and offers no opposition to it, but through the principal lawyer for the Department of Natural Resources and Mines, has written to the applicant's solicitor making certain suggestions for the terms of an order if the Court is minded to make any order against the Registrar. The first suggestion relates to the terms of the undertaking as to damages which will be provided for the applicant for this order against the Registrar. It's suggested that this be expanded so as to be expressed to be for the benefit of both Registrar of Titles and the State. In my view, that is unnecessary. The usual undertaking as to damages is able to be enforced by any person. The second suggestion should be, I think, incorporated within the order which I will make.

For these reasons, there will be orders for the removal of these two caveats and against the Registrar in terms of the draft which I have signed and which will be placed with the file.