

# SUPREME COURT OF QUEENSLAND

CITATION: *Miller & Anor v Loel & Anor* [2016] QSC 135

PARTIES: **PETER JOHN FRANCIS MILLER**  
(first plaintiff)  
**SUSAN MARY MILLER**  
(second plaintiff)  
v  
**JAMES BERESFORD LOEL**  
(first defendant)  
**PAUL BERNARD MAHAN**  
(second defendant)

FILE NO: BS989 of 2016

DIVISION: Trial Division

PROCEEDING: Application for summary judgment

DELIVERED ON: 15 June 2016

DELIVERED AT: Brisbane

HEARING DATE: 9 June 2016

JUDGE: Mullins J

ORDER: **1. The application by the first defendant for summary judgment is dismissed.**

**2. The application by the second defendant for summary judgment is adjourned to a date to be fixed.**

**3. Paragraphs 20, 25, 50(d), 50(e), 50(j), 51(z), 51(aa), 51(bb), 51(dd), 55(d)(vi), and 57 to 68 of the amended statement of claim filed on 2 March 2016 are struck out with no liberty to re-plead those allegations.**

**4. Paragraphs 54 and 69C (including the particulars) together with the claim for relief against the first defendant for damages on an indemnity basis in respect of abuse of process is struck out with no liberty to re-plead those allegations.**

**5. Any further amended statement of claim is to be filed and served by the plaintiffs on or before 1 July 2016.**

**6. The question of the costs of application filed on 23 May 2016 is adjourned to a date to be fixed.**

**7. Liberty to either party to apply on two days' notice in writing to the other party.**

**CATCHWORDS:** REAL PROPERTY – TORRENS TITLE – CAVEATS AGAINST DEALING – COMPENSATION FOR LODGING CAVEAT WITHOUT REASONABLE CAUSE – where a company lodged a caveat over the land registered in the name of a joint venture party where the joint venture parties were in dispute – where litigation in respect of that dispute was determined by the court and the caveat removed – where the plaintiffs claim to have suffered loss as a result of the caveat – where the plaintiffs seek to recover that loss against the solicitor who acted for the caveator and a director of the caveator – whether it is arguable that the solicitor and/or the director is a person who lodged or continued a caveat under s 130 of the *Land Title Act* 1994 (Qld)

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – EMBARRASSING, TENDENCY TO CAUSE PREJUDICE, SCANDALOUS, UNNECESSARY ETC OR CAUSING DELAY IN PROCEEDINGS – where the defendants apply to strike out paragraphs of the plaintiffs’ claim – whether paragraphs of the claim are unnecessary or irrelevant

*Land Title Act* 1994 (Qld), s 130

*Uniform Civil Procedure Rules* 1999 (Qld), r 171, r 293

*Re Brooks’ Caveat* [2014] QSC 76, considered

*Devren Pty Ltd v Old Coach Developments Pty Ltd* [2015] QSC 53, related

*Farvet Pty Ltd v Frost* [1997] 2 Qd R 39, considered

*Gordon v Treadwell Stacey Smith* (1997) ANZ ConvR 68, considered

*White Industries (Qld) Pty Ltd v Flower & Hart (A Firm)* (1998) 29 ACSR 21; [1998] FCA 806, considered

**COUNSEL:** The first plaintiff in person for the plaintiffs  
J M Lavercombe (*Sol*) for the defendants

**SOLICITORS:** Lillas & Loel Lawyers Pty Ltd for the defendants

- [1] The defendants apply for summary judgment pursuant to r 293 of the *UCPR* or, in the alternative, for specified paragraphs of the amended statement of claim filed on 2 March 2016 (the statement of claim) to be struck out pursuant to r 171(1) of the *UCPR*.
- [2] This proceeding is a subsequent instalment of the dispute that was disposed of after trial before Boddice J in *Devren Pty Ltd v Old Coach Developments Pty Ltd* [2015] QSC 53 (the reasons). Lillas & Loel Lawyers Pty Ltd (Lillas & Loel) acted for the plaintiff Devren Pty Ltd in the earlier proceeding. Mr and Mrs Miller were the second and fifth defendants respectively and Mr Miller was the founding director of Old Coach Developments Pty

Ltd (OCD). Mr and Mrs Miller were the trustees of a family trust and were sued in that capacity as the third defendants. Mr and Mrs Miller were the founding directors of the fourth defendant.

- [3] The dispute arose out of a joint venture agreement that proposed a subdivision of land at Mango Hill. The outcome of the earlier proceeding was that Devren's claim was dismissed. Boddice J ordered that there be no order as to costs of the earlier proceeding.
- [4] In connection with that dispute Devren had lodged caveat number 714534244 over Lot 23 on SP218844 in the County of Stanley, Parish of Redcliffe which was owned by OCD where the grounds of claim were described as "Pursuant to clause 16.14 of a shareholder agreement dated 2 August 2008 between the caveator and registered owner as deposited with dealing 714618043 a constructive trust was created between the registered owner as trustee and caveator as beneficiary". The lodger was designated in item 1 of the caveat as Lillas & Loel. The solicitor's signature on behalf of the caveator was that of Mr Loel who was the sole director of Lillas & Loel. The caveat was lodged on 27 June 2012.
- [5] It was an issue in the earlier proceeding as to whether Devren had an entitlement to Lot 23, as it sought the transfer from OCD to it of Lot 23 in respect of alleged breaches of contract. It failed in this claim.
- [6] After the reasons were published, Devren refused to remove the caveat, because it intended to appeal the decision of Boddice J. An application was made on behalf of OCD to have the caveat removed which was successful and Devren's application for an injunction preventing OCD from dealing in Lot 23 until the proposed appeal had been determined was unsuccessful. The document to effect the removal of the caveat was lodged on 13 May 2015.

#### **Nature of the current proceeding**

- [7] In the claim that commenced the current proceeding, the plaintiffs seek damages against Mr Loel on an indemnity basis in respect of "abuse of process" and against each of the first and second defendants for the loss of profit in respect of the improper lodgment and continuance of the caveat for the sum of \$1,275,953 and other specified damages.
- [8] It appears from the allegations in paragraphs 52 to 56 of the statement of claim and the submissions made by Mr Miller on the hearing of this application that the claim advanced against Mr Loel on the basis of "abuse of process" is made in reliance on *White Industries (Qld) Pty Ltd v Flower & Hart (A Firm)* (1998) 29 ACSR 21.
- [9] The claim made in respect of the improper lodgment of the caveat is based on s 130 of *Land Title Act 1994 (Qld)* (the Act). The nub of the plaintiffs' complaint against Mr Loel (which is not pleaded clearly in the statement of claim) is that he personally lodged an improper caveat on behalf of Devren, caused the caveat to be maintained, and that Mr Loel personally decided what steps were taken on behalf of Devren in relation to the caveat. The intention of the plaintiffs is to claim against Mr Mahan as the director of Devren who authorised the continuance of the caveat. It is common ground that Mr

Mahan did not become a director of Devren until 27 February 2013 which was some eight months after the caveat was lodged.

- [10] The defendants filed a notice of intention to defend on 26 February 2016. A large number of the allegations in the statement of claim have been the subject of unqualified admissions by the defendants: paragraphs 5, 9-18, 20, 25, 29-44, 50(e), 50(j), 51(r), 51(v), 51(w), 51(y), 51(yy) and 55(d)(i). It is admitted by the defendants that the appointment of Mr Mahan as the sole director and secretary of Devren was arranged by Mr Loel, but it is asserted that Mr Loel did not subsequently play a major role in the management of Devren.
- [11] The defendants deny that Mr Loel lodged the caveat, but say he executed the caveat in his capacity as a director of Lillas & Loel. It is asserted by the defendants that Mr Loel was not aware and ought not to have been aware that there was no basis for lodging the caveat as the grounds for lodging the caveat were set out in the caveat. The defendants plead that it was Lillas & Loel, and not Mr Loel, that was appointed to act on behalf of Devren in the earlier proceeding and that it was therefore Lillas & Loel (and not Mr Loel) who stood to benefit from the pursuit by Devren of the claim in the earlier proceeding.
- [12] The defendants therefore seek summary dismissal of the claim on the basis that they are not the proper defendants and the claim against them has no prospects of success.

#### **The requirements for success in a claim under s 130(1) of the Act**

- [13] Although OCD was the registered owner of Lot 23, the plaintiffs allege that they personally suffered loss or damage as a result of the lodgment of the caveat. There is no challenge by the defendants to the standing of the plaintiffs to pursue a claim for loss or damage. The liability under s 130(1) is imposed on “A person who lodges or continues a caveat without reasonable cause”. The plaintiffs have the benefit of the presumption that applies under s 130(3) of the Act:

“In a proceeding for compensation under subsection (1), it must be presumed that the caveat was lodged or continued without reasonable cause unless the person who lodged or continued it proves that it was lodged or continued with reasonable cause.”

- [14] The heading to s 130 of the Act is “Compensation for improper caveat”. There are conflicting decisions of this court as to whether that has the effect of incorporating an additional element of improper purpose that must be proved to claim compensation, apart from showing the caveat was lodged or continued without reasonable cause: *Farvet Pty Ltd v Frost* [1997] 2 Qd R 39 and *Re Brooks’ Caveat* [2014] QSC 76. Although the defendants claim summary judgment in their application, the focus of the hearing of the application was on the manner in which the claims were pleaded. There was not full argument on the conflict between these decisions, but in any case the conflict would be better resolved by reference to arguments addressing the merits of a claim, rather than the manner of pleading. Until the conflict is resolved, it may be prudent if the pleading based on s 130(1) of the Act alleged improper purpose, in addition to lodgment or continuance of the caveat without reasonable cause. It may be that, in any case, the grounds relied on

to establish improper purpose overlap with the grounds relied on to show lodgment or continuance of the caveat without reasonable cause: *Brooks* at [18].

### **The claim against Mr Loel**

[15] Mr Loel swore two affidavits which were relied on in connection with the application, one filed by leave on 6 June 2016 and the other filed by leave on 9 June 2016.

[16] Although in paragraph 12(a) of the first affidavit Mr Loel asserted that the caveat was lodged by Lillas & Loel on instructions from Devren, he did not disclose from whom he received those instructions. He stated in paragraph 2 of the second affidavit:

“In or about early to mid-2012 I had a conversation with Mr Hobson who I then understood to be a director of Devren Pty Ltd, regarding the lodgement of a caveat over a property know (*sic*) as Lot 23 which was then owned by Old Coach Developments Pty Ltd.”

Despite referring to a conversation with Mr Hobson, Mr Loel did not state the content of that conversation and, in particular, whether he was instructed by Mr Hobson on behalf of Devren to lodge the caveat.

[17] Mr Loel exhibited email exchanges which he had with Mr McGlade of counsel between 1 and 4 June 2012 in relation to settling the claim and statement of claim for the earlier proceeding and obtaining advice from counsel on whether there was a caveatable interest to support the lodgment of a caveat by Devren over Lot 23 pursuant to clause 16.14 of the shareholders’ agreement. Curiously, neither affidavit of Mr Loel deals with his view of the effect of the compromise agreement dated 4 May 2012 to end formally the joint venture between Devren and the parties associated with Mr Miller, so that neither party would have any future claims against the other, or the payment that was made to the trust account of Lillas & Loel on 9 May 2012 of \$15,000 by the Miller parties pursuant to the compromise agreement.

[18] The fact that Lillas & Loel may have been the solicitors retained by Devren does not preclude the plaintiffs from endeavouring to show that Mr Loel (who was the solicitor undertaking the legal work for Devren when the caveat was lodged) was the moving party or a relevant person for the purpose of s 130(1) of the Act when it came to the lodgment of the caveat over Lot 23. On its terms, the liability for compensation for lodging or continuing a caveat without reasonable cause attaches under s 130(1) to the person who so lodges or continues the caveat which is not limited to the caveator. Based on the decision of the Court of Appeal of New Zealand in *Gordon v Treadwell Stacey Smith* (1997) ANZ ConvR 68, it is arguable that a solicitor who lodges a caveat where it is shown to be done without reasonable cause cannot necessarily hide behind instructions received from the client to lodge the caveat.

[19] The statement of claim is deficient in identifying the material facts and circumstances relied on to prove that Mr Loel was a person to whom liability may attach under s 130(1) of the Act in respect of the caveat over Lot 23, but the affidavits of Mr Loel relied on for summary judgment are themselves deficient on the relevant issue. Even though the plaintiffs would be advised to amend the statement of claim to plead properly the claim

against Mr Loel based on s 130(1) of the Act, it is not appropriate in the light of the content of Mr Loel's affidavits to exercise the discretion to order summary judgment in favour of Mr Loel at this stage against the plaintiffs. The application by Mr Loel for summary judgment should therefore be dismissed. That will not preclude Mr Loel bringing a further application for summary judgment, if so advised after any further amendments are made to the statement of claim.

### **The claim against Mr Mahan**

- [20] Relevant to the claim against Mr Mahan is the allegation in the statement of claim that from 27 February 2013 Mr Mahan was and remained a director of Devren. Presumably, the plaintiffs rely on the fact that he was the sole director and impliedly authorised the lodgment of the caveat by Devren. There is no allegation to that effect, however, in the statement of claim. The statement of claim would need to plead the material facts on which the plaintiffs rely to allege that Mr Mahan was a person who had continued the caveat over Lot 23. The amended statement of claim would also need to plead that Mr Mahan continued the caveat without reasonable cause (and for an improper purpose), even though the plaintiffs may have the benefit of the presumption under s 130(3) of the Act. The statement of claim is therefore deficient in setting out the cause of action that the plaintiffs seek to maintain against Mr Mahan under s 130 of the Act.
- [21] The basis on which Mr Mahan currently seeks summary judgment that he is not the proper defendant and that it should be Devren overlooks the very question that the plaintiffs wish to pursue that Mr Mahan was a person who may be liable for the continuation of the caveat over Lot 23, notwithstanding that Devren was the caveator.
- [22] It became apparent during the hearing of the application, that there are many deficiencies in the statement of claim that need to be addressed. I am therefore inclined to give the plaintiffs an opportunity to re-plead the statement of claim to endeavour to articulate and particularise the claim against Mr Mahan which was articulated in submissions. If the plaintiffs fail to do so, it may then be appropriate to consider giving summary judgment in Mr Mahan's favour. That is why I propose adjourning the application by Mr Mahan for summary judgment, pending the further amendment of the statement of claim.

### **The strike-out application**

- [23] Pursuant to paragraph 2 of the application, the defendants apply pursuant to r 171(1)(a) and (c) of the *UCPR* to strike out certain paragraphs of the statement of claim. Paragraphs 57 to 62 of the statement of claim which are based on ss 180 to 183 of the *Corporations Act 2001* (Cth) are misconceived. If there were any breach by the directors of Devren of their duties as directors, that is for Devren to enforce and not the plaintiffs. Those paragraphs must be struck out and cannot be re-pleaded. Paragraphs 63 to 67 of the statement of claim deal with events that occurred after the caveat was removed and are irrelevant to the claims pleaded against the defendants and should also be struck out.
- [24] The plaintiffs have recited in the statement of claim findings or statements made by Boddice J in the reasons which are unnecessary for the purpose of pleading the causes of action pursued in the statement of claim. On that basis paragraphs 20, 25 and 50(e) should

be struck out as unnecessary. The plaintiffs also included observations made by various judges in connection with the earlier proceeding that are irrelevant to the claim that is pleaded. On that basis paragraphs 50(d), 50(j), 51(z), 51(aa), 51(bb) and 55(dd) should be struck out as unnecessary. The plaintiffs set out in paragraph 55(d)(vi) a summary of arguments that Mr Miller put before Byrne J on an application filed by Devren in the earlier proceeding for additional disclosure. On any view, there is no justification for repeating in three pages of the statement of claim the arguments put forward on that interlocutory application. Paragraph 55(d)(vi) should be struck out as unnecessary.

- [25] It appears that the plaintiffs are relying on *White Industries* to seek, in effect, that their legal costs and expenses incurred in the earlier proceeding should be the subject of an order against Mr Loel personally as the solicitor for Devren on the basis that his conduct in the earlier proceeding amounted to an abuse of process of the court. If the plaintiffs wished to pursue a costs order against Mr Loel personally for the earlier proceeding, that should have been done in the earlier proceeding. The alleged abuse of process does not give rise to a separate cause of action by the plaintiffs against Mr Loel. It was relevant only to the making of costs orders in the earlier proceeding.
- [26] Although paragraph 54 of the statement of claim is not referred to in the application, it is the subject of the defendants' written submissions. Paragraph 54 is a statement that the plaintiffs rely upon certain provisions of and rules made under *Federal Circuit Court of Australia Act 1999* (Cth). That has no relevance whatsoever to the plaintiffs' claims in this proceeding and should be struck out.
- [27] Paragraph 69C deals with the legal costs and expenses that the plaintiffs are seeking to recover from Mr Loel as a result of the alleged abuse of process. That cannot be maintained in this proceeding and should be struck out. The defendants sought to strike out the balance of paragraph 69, but it does plead the manner of calculation of the plaintiffs' claim for compensation under s 130(1) of the Act. I am therefore not inclined to strike the balance of paragraph 69 out at this stage. It follows that the claim for relief against the first defendant for the legal costs on the basis of abuse of process must also be struck out.

## Orders

- [28] The orders which I make are:
1. The application by the first defendant for summary judgment is dismissed.
  2. The application by the second defendant for summary judgment is adjourned to a date to be fixed.
  3. Paragraphs 20, 25, 50(d), 50(e), 50(j), 51(z), 51(aa), 51(bb), 51(dd), 55(d)(vi), and 57 to 68 of the amended statement of claim filed on 2 March 2016 are struck out with no liberty to re-plead these allegations.
  4. Paragraphs 54 and 69C (including the particulars) together with the claim for relief against the first defendant for damages on an indemnity basis in respect of abuse of process is struck out with no liberty to re-plead those allegations.
  5. Any further amended statement of claim is to be filed and served by the plaintiffs on or before 1 July 2016.
  6. The question of the costs of application filed on 23 May 2016 is adjourned to a date to be fixed.

7. Liberty to either party to apply on two days' notice in writing to the other party.