

# SUPREME COURT OF QUEENSLAND

CITATION: *Suncorp Metway Ltd v Siulangapo Inc* [2017] QSC 16

PARTIES: **SUNCORP METWAY LTD**  
**ACN 660 108 317 22**  
(applicant)

v

**SIULANGAPO INC**  
(respondent)

FILE NO/S: BS875 of 2017

DIVISION: Trial Division

PROCEEDING: Originating Application

DELIVERED ON: 27 February 2017

DELIVERED AT: Brisbane

HEARING DATE: 9 February 2017

JUDGE: Brown J

ORDERS: **The order of the court is that:**

- 1. That caveat number 717706206 lodged by the respondent on the Title of 1 Buccanerra Way, Coomera Waters and more particularly described as Lot 290 on SP150124, Title Reference 50427913, be removed forthwith.**
- 2. That the respondent pay the applicant's costs of this Originating Application to be calculated on a standard basis.**

CATCHWORDS: REAL PROPERTY – TORRENS TITLE – CAVEATS AGAINST DEALINGS – REMOVAL – where the applicant filed an application to remove a caveat – where the applicant is a registered proprietor by virtue of holding a registered mortgage – where the caveat lodged by the respondent claims an equitable interest as purchaser of fee simple pursuant to a contract of sale – where the caveat would prevent the registration of the mortgagee's sale – whether the caveat should be removed

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SERVICE – GENERALLY – where the address listed on the caveat registered by the respondent was a PO Box address – where service of this applicant was sent to the PO Box address – where no response has been received from the respondent – where

searches have been undertaken nationally and internationally to find the respondent business and its contact details, with no success – whether the notice to the caveator has been sufficiently served by sending the service of the application to the PO Box

*Corporations Act 2001 (Cth)*, s 601CX(1)  
*Land Title Act 1994 (Qld)*, s 121(2)(b), s 122(1), s 127 s 131(1), s 184

*Cousins Securities Pty Ltd v CEC Group Ltd* [2007] 2 Qd R 520; [2007] QCA 192, cited  
*National Australia Bank Ltd v Waldron (also known as Sgaretta)* [2015] VSC 141, cited  
*Re Drinkwater* (1929) 46 WN (NSW) 202, cited  
*Ross Cook and Brett Cook Pty ltd v Bli Bli #1* [2009] QSC 300, cited  
*Underwood Investments Pty Ltd v Skyford Pty Ltd* (1990) Tas R 206, considered

COUNSEL: A Newman for the applicant  
 No appearance for the respondent

SOLICITORS: Mills Oakley for the applicant  
 No appearance for the respondent

- [1] **BROWN J:** The applicant filed an application on 30 January 2017 to remove a caveat with dealing number 717706206 lodged on 9 December 2016 (“the caveat”) over Lot 290 on Survey Plan 150124, Title Reference 50427913 (“the relevant lot”).
- [2] The applicant is a registered proprietor of the property by virtue of its holding a registered mortgage which was registered on 6 September 2011.
- [3] The caveat lodged by the respondent claimed an equitable interest as purchaser of an estate in fee simple pursuant to a contract of sale dated 31 October 2015 executed by the registered owner, who was Paul William Mark Maindonald. The caveator is described as “Siulangapo Inc”. According to a contract of sale exhibited to the applicant’s material a contract of sale was entered into by Paul William Maindonald with Siulangapo Pty Ltd dated 31 October 2015 (“Maindonald contract”).<sup>1</sup> That contract was apparently amended so as to extend the settlement date until 3 February 2016.<sup>2</sup>
- [4] The caveat has apparently been subject to a requisition by the Titles Office which was to be responded to by 8 February 2017.<sup>3</sup> A title search on 9 February 2017 still showed the caveat on title. On 6 February 2017, the Titles Office indicated to the applicant’s solicitors that the caveat would prevent the registration of the mortgagee’s sale.<sup>4</sup>

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<sup>1</sup> Affidavit of Taylor CFI 2 ex CJT-4.

<sup>2</sup> Affidavit of Taylor CFI 2 ex CJT5.

<sup>3</sup> Affidavit of Taylor CFI 2 [12]-[16].

<sup>4</sup> Affidavit of Taylor CFI 2 ex CJT14 and 15.

- [5] Curiously on 7 February 2017, apparently with no accompanying explanation, the applicant received a form in the following terms:

“TAKE NOTICE that property described as Lot 290 SP 150124 Gold Coast comprising the whole Estate in Fee Simple of the property the subject of mortgage no 714048605 dated 6 September 2011 was on 31<sup>st</sup> day of October 2015, sold by private contract to *Siulangapo Pty Ltd as Trustee, 156 Griffith University QLD 4222* for a price of \$450,000.00 and that such sale was completed on 9<sup>th</sup> day of December, 2016.”

- [6] The document purports to be signed by Mr Maindonald as trustee and is dated 9 December 2017. It states that the sale to *Siulangapo Pty Ltd* on 31 October 2015 was completed on 9 December 2016. The caveat however described the caveatable interest protected as the interest of a purchaser under a contract of sale.

***Land Titles Act 1994 (Qld)***

- [7] The present application is brought pursuant to s 127 of the *Land Titles Act* (“the Act”). It provides that:

“(1) A caveatee may at any time apply to the Supreme Court for an order that a caveat be removed.

(2) The Supreme Court may make the order whether or not the caveator has been served with the application, and may make the order on the terms it considers appropriate.”

**Service**

- [8] The application to set aside the caveat was sent to the address which has been nominated by the caveator (as required by s 121(2)(b) of the Act) as the address where documents can be served on the caveator.<sup>5</sup> The same address for service is provided as the lodger’s address in the caveat save that the lodger’s address refers to Oxenford rather than Griffith University. The address is a PO Box address.
- [9] Pursuant to s 131(1) of the Act, a notice to a caveator under the relevant division is sufficiently served if sent to the address mentioned in s 121(2)(b) of Act.
- [10] An affidavit has been provided by Ms Holly Browne (CFI3) which deposes to the fact that the parcel was sent to that address. Ms Taylor in an affidavit filed by leave annexed the Australia Post tracking information which showed that the Express Post envelope with the relevant tracking number identified by Ms Browne was awaiting collection on 31 January 2017.
- [11] No material was filed on behalf of the caveator nor was there any appearance at the hearing of this application.
- [12] The applicant contends that the only method of effecting service had been utilised. While that may be so, it does not necessarily mean that service of the originating application has been effected. The UCPR provides for how service of an originating

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<sup>5</sup> Affidavit of Taylor CFI2 ex CJT2.

application is to be effected. Section 131(1) of the Act doesn't by its terms extend the rules as to service of an originating application to include service by sending it to the address nominated under s 121(1)(b) of the Act.

- [13] In *Re Drinkwater*,<sup>6</sup> service of a summons to the address nominated by the caveator in a caveat was held to be sufficient service. Sections 72(2) and (3) of the *Real Property Act* 1900 (NSW) provided for, inter alia, "notice relating... to any proceedings in respect of the caveat".<sup>7</sup> In *Underwood Investments Pty Ltd v Skyford Pty Ltd*,<sup>8</sup> Zeeman J declined to follow *Re Drinkwater*<sup>9</sup> in relation to Tasmanian provisions, s 133(2) and (4) of the *Land Titles Act* 1980 (Tas) which was in materially the same terms as the New South Wales provision. Zeeman J determined that an originating application was not a notice relating to any proceedings and that the *Land Titles Act* did not apply to service of an originating application. His Honour found in that case the service of the originating application to remove a caveat had to occur as required by the Court rules.
- [14] Section 131 of the Act presently is in narrower terms than either of the above pieces of legislation and does not make reference to any proceedings or notice relating to proceedings. There is no definition of "notice" provided whereby it includes an originating application. It therefore does not provide for service of an originating application to the address nominated in the caveat.
- [15] The reference to "Inc" after the name Siulangapo suggests that it is a type of corporation. "Inc" is an abbreviation for incorporated and is used in the United States to refer to a company.<sup>10</sup>
- [16] Rule 107 of the *Uniform Civil Procedure Rules* 1999 (Qld) provides that:

**"Personal service - corporations**

A document required to be served personally on a corporation must be served in the way provided for the service of documents under the Corporations Act or another applicable law."

- [17] Section 109X(1) of the *Corporations Act* 2001 (Cth) provides that:

**"Service of documents**

- (1) For the purposes of any law, a document may be served on a company by:
- (a) leaving it at, or posting it to, the company's registered office; or

<sup>6</sup> *Re Drinkwater* (1929) 46 WN (NSW) 202.

<sup>7</sup> Cf Whitlam J in *Rochester Communications Group Pty Ltd v Lader Pty Ltd* (1997) 143 ALR 648 at 673-4 per Whitlam J.

<sup>8</sup> (1990) Tas R 206.

<sup>9</sup> (1929) 46 WN (NSW) 202.

<sup>10</sup> For example, the Australian online encyclopaedic dictionary "Inc" is the "Short form of 'incorporated'. Used in the United States to indicate a company." See also Oxford English dictionary online. A foreign corporation carrying on business in Australia is required to be registered: s 601CD *Corporations Act* 2001 (Cth).

- (b) delivering a copy of the document personally to a director of the company who resides in Australia or in an external Territory; or
- (c) if a liquidator of the company has been appointed – leaving it at, or posting it to, the address of the liquidator's office in the most recent notice of that address lodged with ASIC; or
- (d) if an administrator of the company has been appointed – leaving it at, or posting it to, the address of the administrator in the most recent notice of that address lodged with ASIC.”

[18] Section 601CX(1) provides that:

**“Service of documents on registered body**

- (1) A document may be served on a registered body:
  - (a) by leaving it at, or by sending it by post to, the registered office of the body; or
  - (b) in the case of a registered foreign company--by leaving it at, or by sending it by post to, the address of a local agent of the foreign company, being:
    - (i) in a case to which subparagraph (ii) does not apply--an address notice of which has been lodged under subsection 601CG(1); or
    - (ii) if a notice or notices of a change or alteration in that address has or have been lodged under subsection 601CV(1)--the address shown in that last-mentioned notice or the later or latest of those last-mentioned notices.”

[19] The applicant caused searches to be carried out of Siulangapo Inc, the caveator, in both Australia and the United States. Neither search revealed that there was such a registered entity. Further, the applicant caused searches to be carried out of the name “Siulangapo Pty Ltd”, the nominated purchaser under the Maindonald contract, which did not reveal any such registered corporate entity in Australia. Attempts were also made to contact Siulangapo Pty Ltd by telephoning the mobile phone number listed on the contract of sale. That number however was found to be disconnected.<sup>11</sup>

[20] It is difficult to see what other options were available to the applicant to effect service. It may have sought an order for substituted service given it was impracticable to serve the caveator (the respondent) at a registered address. In that event, it would appear that sending the papers to the address nominated in the caveat would have been an obvious means by which the application could be brought to the respondent’s attention.

[21] In the circumstances, while service has not been effected as required under the UCPR, service has sought to have been effected in the only way that was possible. Given the results of the searches carried out of Siulangapo Inc and Siulangapo Pty

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<sup>11</sup> Affidavit of Taylor, sw 9 February 2017, at [3].

Ltd, it was not open to the applicant to serve the originating application in any of the nominated ways to serve an originating application upon a corporation under the UCPR. While I therefore cannot find that service has been effected on the caveator, the above circumstances are relevant to whether the court would still make any order under s 127 of the Act. Section 127(2) of the Act permits the court to make an order removing a caveat even if the caveator has not been served.

### **Should the caveat be removed?**

#### *Serious Question to be tried*

- [22] In determining whether the caveat should be removed the onus is on the caveator to satisfy the court, as in the case of an injunction, that:
- (a) there is a serious question to be tried which involves the caveator showing “a sufficient likelihood of success to justify in the circumstances the preservation of the status quo”; and
  - (b) the balance of convenience favours the maintenance of the status quo and thus the retention of the caveat on the title.<sup>12</sup>
- [23] The applicant contends that there is no serious question to be tried on a number of grounds.
- [24] The first ground is that the caveator is not a person who can lodge a caveat pursuant to s 122(1) of the Act as it cannot claim an interest in the relevant lot as purchaser under the Maindonald contract. While an interest of a purchaser under a contract of sale may be sufficient to support a caveat, this is based on the fact that the caveator, Siulangapo Inc, is a different entity from the party to the Maindonald contract, which is Siulangapo Pty Ltd. I infer there is no other contract of sale of that date given the correlation in the date of the contract of sale and the description of the land between that referred to in the caveat and the Maindonald contract, the latter having been executed.
- [25] On the face of the caveat there does seem to be a deliberate use of “Inc” as opposed to “Pty Ltd” rather than a mere error, as it has been used consistently in the caveat.
- [26] I also note that the notice of completion of sale, which purports to be signed by Mr Maindonald refers to the completion of the contract having occurred with Siulangapo Pty Ltd as trustee and a nominated address of “156 Griffith University Qld 4222”. The address for Siulangapo Inc in the caveat is said to be PO Box 156 Griffith University of Qld 4222. Both addresses differ from that contained in the Maindonald contract.
- [27] Given the fact there is not a correlation between the caveator and the purchaser under the Maindonald contract there appears to be no serious question to be tried that Siulangapo Inc can claim an interest in the relevant lot.<sup>13</sup> It does appear the caveator does not in fact hold a caveatable interest. If that was so there would be no

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<sup>12</sup> *Cousins Securities Pty Ltd v CEC Group Ltd* [2007] 2 Qd R 520 at [38].

<sup>13</sup> Nor is there any suggestion that it satisfies any of the other subsections of s 122 to justify it lodging a caveat.

serious question to be tried. This is further supported by the fact that there is no evidence “Siulangapo Inc” exists at all.<sup>14</sup>

- [28] However the applicant has submitted even if one was to assume that the caveator was the purchaser under the Maindonald contract, it should succeed given that the applicant holds a superior interest due to its prior registered mortgage, such that there is no serious question to be tried nor is the maintenance of the caveat supported on the balance of convenience.
- [29] The Maindonald contract of sale was entered into after proceedings had been commenced by the applicant against Mr Maindonald following his defaulting under a regulated loan contract with the applicant dated 9 August 2011. That loan was secured by way of a first registered mortgage dated 6 September 2011. The contract of sale was entered into after default proceedings were issued but prior to a default judgment being obtained. Default judgment was entered for recovery of possession and judgment in the sum of \$685,604.59 including interest in the amount of \$8922.88 as at the date of the default judgment and \$2,843.15 in costs.<sup>15</sup> Mr Maindonald’s solicitors were aware of the default judgment application prior to judgment being obtained.<sup>16</sup>
- [30] The applicant obtained an enforcement warrant on 12 May 2016 which was executed on 3 July 2016.<sup>17</sup> “Noah’s Trust” (for whom Mr Maindonald is trustee) sought to stay the warrant for possession and have it set aside in the District and Supreme Court. Both applications were dismissed.<sup>18</sup> The Supreme Court application was dismissed on 8 December 2016.
- [31] The Maindonald contract of sale was subject to the applicant’s mortgage, it being noted as a title encumbrance. However, even if that were not so, as a matter of priority of interest, the applicant’s interest ranks ahead of any unregistered equitable interest that may inhere in the purchaser under a contract of sale entered into after a registered mortgage, such as that purported to be held by Siulangapo Pty Ltd: s 184(1) and (2) of the *Land Title Act*.
- [32] In this regard, the comments of Zammit J in *National Australia Bank Ltd v Waldron* [2015] VSC 141 at [49]-[52] are apt.

“49. As discussed, accepting that Mrs Sgarretta purchased the property under an enforceable contract and that she has an equitable interest in the land which can be supported by the caveat, the Contract of Sale did not proceed. Even if it is accepted that the Contract of Sale remains on foot, which is somewhat questionable, given a period of six years has elapsed, any subsequent equitable caveatable interest which Mrs Sgarretta may have in the property is not one which will take priority over the bank’s registered legal interest. The fundamental principle set out in *Law Mortgagees Queensland Pty Ltd*, that the bank’s interest as registered mortgagee arose

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<sup>14</sup> Nor “Siulangapo Pty Ltd” the nominated purchaser.

<sup>15</sup> Affidavit of Taylor CFI 2 ex CJT1.

<sup>16</sup> Affidavit of Taylor CFI 2 ex CJT12 pp 99, 106.

<sup>17</sup> Affidavit of Taylor CFI 2 ex CJT12 pp 90, 263.

<sup>18</sup> Affidavit of Taylor CFI 2 ex CJT12 pp 91, 299; Affidavit of Taylor CFI 4, CJT13.

before the creation of any equitable interests remains relevant to the present proceeding.

50. It was submitted on behalf of Mrs Sgarretta that the caveat lodged by Mrs Sgarretta predates the plaintiff's enforcement of its right in obtaining judgment for possession of the property and taking possession. It seems to me that this argument is misconceived. The bank's registered interest, which enjoys the benefit of indefeasibility, in the absence of fraud, was established at the time it registered the mortgage on the property. The fact that enforcement proceedings were subsequently commenced is not relevant to the date at which the bank's registered interest was created.
51. In addition, even though Mrs Sgarretta submits that she is willing and able to complete the Contract of Sale with Mr Sgarretta, there is no evidence before this Court that it can or will be discharged. Ultimately, it may well be that Mrs Sgarretta can complete the Contract of Sale however, this will give her a right under the Contract of Sale with Mr Sgarretta. It does not provide a basis to give her an interest that has priority over the bank's registered interest."

- [33] While Zammit J found that there was no serious question to be tried given the priority of interest held by the bank, other cases have considered a superior interest to that claimed in a caveat in the context of balance of convenience.
- [34] There is nothing to suggest in the present case that the applicant does not enjoy the benefits of indefeasibility. Nor does the evidence suggest that this is a case where specific performance of the Maindonald contract would be granted.
- [35] Given that the interest of the applicant under the registered mortgage takes priority over any interest that could be said to be held by the caveator, specific performance would be futile. I do not consider that there is a serious question to be tried.

### *Balance of Convenience*

- [36] Nor do I find that the balance of convenience favours the maintenance of the caveat. As set out above, the applicant has a superior interest in the land, the subject of the caveat.<sup>19</sup> The applicant has also entered into a contract of sale, which was entered into on 10 December 2016 with KL Romeo, for which settlement was to incur on 24 January 2017.<sup>20</sup> The sale price is \$640,000. That time has been extended until 10 March 2017 under cl 14.1(b) of the Special Conditions. The mortgagee is entitled to recover the amount outstanding to it which is the subject of a default judgment out of the proceeds of sale of the property and should not be prevented from a legitimate exercise of its right by exercising its power of sale by the existence of the caveat.<sup>21</sup>

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<sup>19</sup> *Ross Cook and Brett Cook Pty Ltd v Bli Bli #1* [2009] QSC 300 at [21].

<sup>20</sup> Although where a party has a registered mortgage creating a superior interest to that of the caveator it may not be necessary to show that the registered mortgagee contemplates any dealing: *Re Stewart Fitzsimmons Project Pty Limited's Caveats* [1976] Qd R 187 at 189.

<sup>21</sup> *Ross Cook and Brett Cook Pty Ltd v Bli Bli #1* [2009] QSC 300 at [21].

- [37] The factor of delay also to some degree favours the applicant's case for removal. The caveat was only lodged on 9 December 2016 notwithstanding the contract of sale was purportedly entered into on 31 October 2015. There has been significant delay in lodging the caveat. The applicant has taken significant steps to enforce its interest is secured by the mortgage since that time. It is also relevant that the evidence indicates that neither the caveator nor the purchaser exist.
- [38] Any interest which the caveator might hold is subordinate to the claim of the applicant and it is difficult to see that the removal of the caveat will in any way derogate from the caveator's claim. The Maindonald contract specifically noted that the land was subject to "title encumbrances", namely the applicant's mortgage.
- [39] If the Maindonald contract has been completed,<sup>22</sup> no attempt has been made to pay the applicant. The amount of the contract of sale entered into by the applicant, although exceeding significantly the purchase price of the Maindonald contract, is less than the amount the subject of the applicant's default judgment.
- [40] The onus remains on the caveator to justify the continuation of the caveat.<sup>23</sup> It has not sought to do so. Given the position with respect to service discussed above, I have proceeded on the basis of the evidence before me to consider whether or not there was justification in the caveat continuing or whether it should be removed. The evidence does not support the continuation of the caveat.
- [41] The applicant has identified further matters in terms of the balance of convenience which favour the removal of the caveat. In particular, it has referred to evidence that would suggest that the contract of sale has been confected to try and frustrate the exercise of the applicant's rights as mortgagee. I do not need to determine whether that is the case given my findings set out above.<sup>24</sup>
- [42] In all of the circumstances set out above, it is appropriate to order the removal of the caveat notwithstanding that the originating application has not been served as required by the UCPR, given that I have examined the position both on the basis Siulangapo Inc did not hold an interest that could support a caveat, as well as the position assuming that it was the purchaser under the Maindonald contract and I am satisfied on either scenario the contract should be removed.
- [43] Accordingly, I order:
1. That caveat number 717706206 lodged by the respondent on the Title of 1 Buccanerra Way, Coomera Waters and more particularly described as Lot 290 on SP150124, Title Reference 50427913, be removed forthwith.
  2. That the respondent pay the applicant's costs of this originating application to be calculated on a standard basis.

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<sup>22</sup> Given the lack of providence of the "notice of completion of sale" sent without explanation on 7 February 2017 it is not a document to which any weight can be attached.

<sup>23</sup> *Cousins Securities Pty Ltd v CEC Group Limited* (2007) 2 Qd R 520 at 533.

<sup>24</sup> While the applicant did rely on hearsay evidence the above decision was reached having regard to facts that were established by the affidavit evidence presented by the applicant.