

SUPREME COURT OF QUEENSLAND

CITATION: *Moloney & Anor v Marler & Darvall* [2004] QCA 352

PARTIES: **GREGORY MICHAEL MOLONEY & PETER IVAN FELIX GEROFF as court appointed liquidators and trustees of the unregistered managed investment scheme known as the SENTRY ALLIANCE SCHEME formerly conducted by ATLANTIC 3 - FINANCIAL (AUST) PTY LTD (IN LIQUIDATION) ACN 056 262 723**
(applicants/respondents)
v
MARLER & DARVALL formerly CB DARVALL & DARVALL (a firm)
(respondent/applicant)

FILE NO/S: Appeal No 6471 of 2004
SC No 1713 of 2004

DIVISION: Court of Appeal

PROCEEDING: Miscellaneous Application - Civil

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED EX TEMPORE ON: 28 September 2004

DELIVERED AT: Brisbane

HEARING DATE: 28 September 2004

JUDGES: de Jersey CJ, Williams JA and Mullins J
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **The application filed on 10 September 2004 is dismissed with costs**

CATCHWORDS: APPEAL – PRACTICE & PROCEDURE – QUEENSLAND – application to correct or vary the order made by the Court of Appeal – whether order made reflected the judgments of the court

APPEAL – PRACTICE & PROCEDURE – QUEENSLAND – application for stay pending hearing of the special leave application to High Court – whether an appropriate case to order a stay

COUNSEL: F L Harrison QC, with P J Dunning, for the applicant
D A Savage SC, with R M Derrington, for the respondents

SOLICITORS: Marler & Darvall for the applicant
Gadens Lawyers for the respondents

MULLINS J: The applicants seek to correct what they describe as the mistake or error in the order numbered 1 made by the Court of Appeal on 27 August 2004 or, alternatively, to vary the order.

It had been contended by the applicants before the learned trial Judge that the applicants had a general possessory lien over the Certificates of Title held in connection with the Sentry scheme as a result of their retainer by Atlantic 3-Financial (Aust) Pty Ltd.

The learned trial Judge found that a lien over the certificates did not come into existence because of the specific or special purpose for which the Certificates of Title were deposited with the applicants, as a result of the letters of instruction from the original investors in the Sentry scheme.

The members of this Court affirmed this conclusion of the learned trial Judge. That process and findings are not reflected by the applicants' shorthand submission made on this application to the effect that this Court found the existence of a purpose trust by the applicants in favour of the original investors.

Order numbered 1 made by this Court on 27 August 2004 reflects the outcome of the appeal in accordance with the judgments of the Court. No correction or variation to the order is appropriate.

It is relevant to the application for a stay of the orders of this Court made on 27 August 2004 that the basis for the special leave application to the High Court is that this Court made a finding that the applicants' possession of the Certificates of Title was subject to a purpose trust in favour of the original investors which misstates the findings made by this Court. That must significantly reduce the chances of a successful special leave application.

It is also a case which has changed considerably in presentation between trial, the appeal and this application. Even if the application for special leave were successful and the appeal to the High Court were successful, it is likely that the matter would have to be remitted for further hearing in view of the number of issues and discretionary considerations in respect of relief that remain to be resolved in this matter and that have not been necessary to resolve to date.

In relation to the undertaking as to damages, an undertaking as to damages is offered by the applicants. Any undertaking, however, would be for the benefit of the investors in the Sentry scheme and would have to cover any damages sustained by

them as a result of being held out of their funds, pending the resolution of the special leave application or any appeal.

The extent of those possible damages is not able to be foreseen with any accuracy at this stage. There is also an unsatisfied query raised by the respondents about the worth of the undertaking offered by the applicants.

A consequence of any stay would be that not only would the Sentry scheme remain unadministered, but possibly four other unregistered managed investment schemes being wound up by the respondents would remain unadministered.

Even allowing for the fact that a successful appeal to the High Court could be rendered nugatory without a stay, these matters that I have mentioned do not make it an appropriate case to order a stay. I would dismiss the application filed on 10 September 2004 with costs.

THE CHIEF JUSTICE: I agree.

WILLIAMS JA: I agree.

THE CHIEF JUSTICE: That is the order of the Court.
