SUPREME COURT OF QUEENSLAND

CITATION:	*Pioneer Investments (Aust) Pty Ltd v Zonebar Pty Ltd & Ors* [2006] QSC 360
PARTIES:	**PIONEER INVESTMENTS (AUST) PTY LTD (ACN 070 004 045)** **(plaintiff)** **v** **ZONEBAR PTY LTD (ACN 079 510 795)** **(first defendant)** **and** **KEVIN RICHARD SHIRLAW AND OSTABRIDGE PTY LTD (ACN 003 611 194) (Receiver and Manager appointed)** **(second defendants)** **and** **LEONARDUS GERARDUS SMITS** **(third defendant)**
FILE NO/S:	BS 6354 of 2006
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane
DELIVERED ON:	7 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	2 November 2006
JUDGE:	Mackenzie J
ORDER:	**1. The applicant Zonebar Pty Ltd's application to remove the caveat is dismissed.** **2. The applicant Mr Smit's application to have the moneys held in trust on behalf of Pioneer and him pursuant to the order of the Chief Justice of 17 October 2006 paid out to him is dismissed.** **3. The costs of and incidental to each application shall be the respondent's costs in the cause, to be paid by the respective applicants.**
CATCHWORDS:	CONVEYANCING – LAND TITLES UNDER THE TORRENS SYSTEM – MORTGAGES, CHARGES AND ENCUMBERANCES – TRANSFER OF MORTGAGE – joint venture agreement to purchase real property securities – where mortgages held pursuant to declaration of trust – where land sold in exercise of power of sale as mortgagee – where

contract specified land was subject to registered mortgage – where purchase price paid reflected the encumbrance on the title – where trustee mistakenly omitted mortgage from memorandum of transfer – where applicant beneficiary lodged caveat – whether caveat should be removed to allow development of the land – whether the balance of convenience favours removal of the caveat – whether there is a serious question to be tried

Land Title Act 1994 (Qld) s 79
Property Law Act 1974 (Qld) s 94, s 86(2)

Australian Broadcasting Corporation v O'Neill (2006) 229 ALR 457, applied

COUNSEL: D Savage SC with P Hackett for the applicant
M Stewart SC with S Monks for the respondent

SOLICITORS: Morgan Conley Solicitors for the applicant
James Conomos Lawyers for the respondent

[1] **MACKENZIE J:** There are applications by the first defendant Zonebar Pty Ltd ("Zonebar") to remove a caveat lodged on 6 June 2006 by Pioneer Investments (Aust) Pty Ltd ("Pioneer") and by the third defendant Mr Smits to have funds held in a trust account paid out to him.

[2] It is uncontroversial that Zonebar is controlled by Mr Smits and is now the registered proprietor of the land in respect of which the caveat has been lodged. It acquired the land from Mr Shirlaw, the first of the second defendants in the action, who was registered mortgagee of a mortgage 704246070 ("the relevant mortgage") and another mortgage, 702987988 ("the related mortgage") who was exercising his powers of sale as mortgagee.

[3] The interest upon which the caveat is based is described as "an equitable estate or interest (as equitable chargee) of an estate in fee simple". This interest is described in the caveat as arising from a combination of:

(a) a right enforceable against the caveatee to have the relevant mortgage restored to the register; and
(b) a written deed of trust dated 11 November 2005 by which Mr Shirlaw held the mortgage and rights under it on trust for parties including the caveator.

[4] The facts upon which these claims are based are, in summary:

(a) that the caveatee purchased the land from Mr Shirlaw exercising his power of sale as mortgagee by a written contract which included a condition that the land would be acquired subject to the mortgages;
(b) that, at settlement of the purchase, the relevant mortgage was mistakenly withdrawn;
(c) that no money was received by Mr Shirlaw in reduction of any of the monies secured by the mortgage;
(d) that the caveatee refuses to register the mortgage; and

(e) that Mr Shirlaw refuses to seek to have the mortgage registered.

[5] The issue of whether there is a serious question to be tried requires a complex series of transactions to be referred to. The starting point is that Ammbar Pty Ltd ("Ammbar") was the registered proprietor of the land. On 10 November 2005, a transaction, the effect of which is in controversy, occurred. The applicant says that Ammbar paid out the first and second mortgages (the second being the relevant mortgage) and directed the mortgagee to transfer them to Mr Shirlaw pursuant to s 94 of the *Property Law Act 1974*.

[6] Mr Shirlaw lodged a transfer of the relevant mortgage and the related mortgage for registration on 14 November 2005. A dispute arose with the holder of the third and fourth mortgages. By a consent order between Mr Shirlaw, the receivers of Ammbar, and the holder of the third and fourth mortgages, Brisbane Bridging Finance Pty Ltd ("BBF"), Mr Shirlaw had been given leave to sell the land subject to payment of the net proceeds into an interest bearing account in their joint names. On 23 December 2005, Mr Shirlaw acquired the third, fifth, sixth and ninth mortgages as well. On 17 October 2006, by consent order, an arrangement under which the moneys (which were a little more than $500,000) were invested in the names of Pioneer and Mr Smits to abide the outcome of these proceedings, subject to a contingency now irrelevant.

[7] On 22 December 2005, the land was sold by Mr Shirlaw under his powers in the related mortgage, for $3.4m, to Zonebar. Oddly, there are two documents, different in one important respect, which are described in affidavits as the contract. One is at page 27 *et seq* in exhibit JBL1 to the affidavit of Mr Loel filed 1 August 2006. The other, which is exhibit JALR1 to the affidavit of Mr Roberts, appears to be the copy that was stamped and has amendments in respect of the details of the seller's solicitor and as to the description of the land. It also contains a clause that states as follows:

> "(2) the purchase price payable shall be reduced by the amount owed under Bill of Mortgage 704246070 which the property is being sold subject to and Bill of Mortgage 702987988"

[8] However the affidavit of Mr Loel refers in his affidavit to "clauses 1 and 2 of the special conditions" which cannot refer to the contract exhibited to his affidavit since there is no special condition 2. The argument proceeded, in any event, on the basis that clause 2 was part of the operative contract. The fact that only $1.9m of the $3.4m was paid to Mr Shirlaw is consistent with the purchase price payable being reduced by an amount equal to the amount relied on by Pioneer as the sum owing under the relevant mortgage.

[9] On 11 November 2005 Mr Shirlaw had executed a declaration of trust, the effect of which was that he held the relevant mortgage and the related mortgage on trust for himself, Mr Smits and Pioneer as tenants in common in equal shares. It further provided that the mortgagee would exercise any powers with the concurrence of the beneficiaries.

[10] When the transfer from Mr Shirlaw to Zonebar was executed, no provision was made that had the effect of implementing clause 2 of the special conditions or providing alternative equivalent rights. Further, Suncorp, which was financing

Zonebar, required a deed of priority to be executed by Mr Shirlaw to give Suncorp first mortgagee status as a condition of lending the monies to Zonebar to complete the transaction. Mr Shirlaw executed the deed accordingly. The respondent attributes the form of the memorandum of transfer to a mistake on the part of Mr Shirlaw. The applicant alleges that it was due to a mistake of law, the mistake being that it had not been understood that the mortgagee could not sell land in exercise of its power of sale subject to an existing mortgage, relying on s 86(2) of the *Property Law Act 1974* and s 79 of the *Land Title Act 1994*.

[11] The remaining events to be noted are that on 31 July 2006, Mr Shirlaw and Mr Smits executed a deed of assignment of a variety of Mr Shirlaw's rights to Mr Smits, including all right, title and interest in respect of the relevant mortgage. Then on 5 September 2006 Mr Smits completed the notice of completion of sale form pursuant to the *Property Law Act* in which he advises subsequent mortgagees that as at the date of the settlement of the transaction on 23 December 2005, the loan debts owing "secured by mortgage 703494840 exceeded the amount realised from the net sale proceeds". That mortgage is neither the relevant mortgage nor the related mortgage. By that time Mr Smits had acquired the rights under that mortgage.

[12] It was submitted on the applicants' behalf that no money was outstanding on security of the mortgage because it had been repaid by Ammbar. The essence of the applicants' arguments is that, when the transaction referred to in [3] above occurred, Ammbar paid out the mortgage, with the result that no debt remained to be secured by the relevant mortgage. Even if, after transfer of the mortgages to Mr Shirlaw, there was a debt secured by it, it was no more than $1.5m. That sum was exceeded by the $1.9m paid to Mr Shirlaw when the sale by him as mortgagee settled. Therefore, once that had happened, there was no debt owing and any surplus had to be distributed to subsequent mortgagees.

[13] The argument included an element that whatever rights the respondent might have consequential upon the failure to have the relevant mortgage or an equivalent one kept on the register, that was a separate and distinct issue from the one agitated by the applicant in favour of removing the caveat from the registrar. The premise in relation to the payment of Ammbar's debt, which resulted in Ammbar directing the mortgagee to transfer the mortgages to Mr Shirlaw pursuant to s 94(1) of the *Property Law Act* is that in the end, that is the end of the respondent's claim.

[14] However Mr Shirlaw deposes that the payment to the mortgagee was from funds remitted by him, in exchange for transfer of mortgages to him. He also deposes that in addition to the $1.1m approximately so paid, he made a further advance of about $500,000 on 11 November 2005. He deposes that, at the time of sale, the mortgage held by him on trust for himself, Mr Smits, and Pioneer secured $1.5m.

[15] On the applicant's side of the argument, the affidavit of Mr Conley exhibits correspondence concerning the amount of the debt. There is a reference to payment of the balance of the loan entitling "your client" (in context Ammbar) to either a discharge or otherwise to exercise its rights pursuant to the *Property Law Act*. The correspondence shows that the amount advised as the outstanding debt was paid by two bank cheques. There is a passage in the affidavit, dated 21 November 2006, in which it is deposed, on information from the mortgagee's solicitor, that the solicitor

"regarded the payment…as being made by Ammbar…". However even assuming that evidence, which is a hearsay account of another person's opinion as to the effect of a transaction, is admissible in proceedings of this kind, it is not compelling evidence of the actual character of the transaction.

[16] On the alternative premise that the mortgage had not been repaid by Ammbar, it was also submitted that the mortgages were redeemable for the amounts advanced to the mortgagor; the mortgagee was not, whatever the purchase price, entitled to retain more than that sum. Any surplus had to be, and had been, accounted for to the holders of mortgages with lower priorities. As Mr Shirlaw had become registered proprietor of the subsequent mortgage as a result of the transaction on 23 December 2005 (see [14] above) he was entitled to any surplus. Mr Smits subsequently acquired those mortgages in that mortgage on 31 July 2006 (see [11] above).

[17] The appropriate test is taken to be that described in *Australian Broadcasting Corporation v O'Neill* (2006) 229 ALR 457. The respondent submits that there is considerable evidence in support of the proposition that Pioneer has a sufficient likelihood of success to justify not removing the caveat, subject to the issue of balance of convenience. It is uncontradicted that only $1.9m of the $3.4m purchase price was paid for the land. There is evidence that the amount secured by the mortgage was $1.5m. There is documentary evidence, in the form of the declaration of trust, the contract of sale and the deed of priority, which supports Pioneer's case as to the intended effect of the transaction and that it was not implemented.

[18] Various forms of relief are sought. They include, firstly, a declaration that the transfer to Zonebar was executed by Mr Shirlaw in the mistaken belief that it would give effect to the term of the contract of sale that the land would be transferred to Zonebar subject to the relevant mortgage, a declaration that the land is subject to an equitable charge on terms and conditions of the relevant mortgage, and specific performance of the contract including execution of a mortgage in the form of the relevant mortgage. These claims principally concern Zonebar; Mr Smits would be involved to the extent that an obligation would be placed on him to execute relevant documents on behalf of Zonebar.

[19] In the alternative, an order was sought that Mr Smits pay one-third of the amount of the debt to Pioneer, an order that Mr Shirlaw pay damages for breach of trust, and an order that Mr Smits pay damages to Pioneer for breach of fiduciary duty, a declaration that the second defendant holds the first $1.5m of any net proceeds of the sale of the land on trust for himself, Mr Smits and Pioneer and an order and declaration that the $500,000 held in the interest bearing account pursuant to the order of 28 November 2005 (now held pursuant to the order of 17 October 2006) be paid to Mr Shirlaw to be held on the same trust.

[20] The case is one where a contract was entered into to sell the land with an express statement that the relevant mortgage was a title encumbrance and an express condition that it was being sold subject to it. Mr Smits executed the contract on behalf of Zonebar. The contract expressly stated that the purchase price of $3.4m was being reduced by the amount owed under the relevant mortgage, subject to which the property was being sold. The respondent submitted that the proper understanding of the transaction was that the rebated $1.5m represented the amount

secured at the time of the contract under the relevant mortgage. The proper interpretation was that the latter sum had not been repaid at settlement of the sale. The provision in the contract relating to retention of the mortgage was intended to continue to secure it.

[21] Whether it was possible or not to achieve preservation of the relevant mortgage directly, it is difficult to understand why the respondent might have been prepared to give up secured status of its own accord, and why, if it was not possible to achieve the apparent object of the contract directly, the events subsequent to executing the contract do not provide the respondent with a case complying with the test in *O'Neill* In my view there is a serious question to be tried.

Balance of convenience

[22] There were two main threads to the submission by the applicant in support of removing the caveat. The first is that because of the nature of the relief sought, the respondent is overprotected if it succeeds. It has access to funds held in the investment account pursuant to the order of 17 October 2006 to abide the outcome of the proceedings between Pioneer and Mr Smits. It also has the caveat over the land of which Zonebar is registered proprietor. The second thread is that Zonebar's plans to develop the land are prejudiced by the retention of the caveat on the register because Suncorp, the financier, had written on 4 August 2006 raising difficulties about future funding if the caveat remained on the register. In the critical part of the letter for present purposes, it was suggested that the caveat be withdrawn, as it prevented all further dealings on the title instead of being confined to the protection of the one-third mortgage interest claimed by Pioneer. It continues:

> "You will appreciate that Suncorp cannot consider any other funding applications from Zonebar for any other projects until Pioneer's application is resolved to the reasonable satisfaction of Suncorp."

[23] The respondent counters the second thread of the appellant's argument by submitting that it has made an offer to progressively release the caveat as lots in the subdivision are sold, subject to conditions, so that the transactions may settle. The detail of the proposal is contained in a letter of 13 October 2006 by Mr Conomos, Pioneer's solicitor. The mechanism proposed, leaving aside matters of detail, was that there would be an undertaking from Zonebar that moneys from sales would be paid for commission, paid to Suncorp in discharge of its mortgage up to the sum set out in the Deed of Priority dated 23 December 2005, paid for any adjustments necessary to complete the sale, and paid for solicitors' fees on the sale. There was also a proposal that upon payment in full of Suncorp's entitlements a further sum, up to a maximum of $500,000 plus interest be paid into court pending trial or earlier order, allowing for the $500,000 held in the investment account. I was told orally in submissions that a proposal in the letter of 13 October 2006 had not been responded to despite being renewed, along with other suggestions in a letter of 19 October 2006 following an inconclusive proceeding before Philippides J on 18 October 2006.

[24] Leaving aside the issue of payment of a further sum into court, the conditions proposed seem reasonably relevant to protection of the interest of Pioneer in ensuring that it does not suffer a detriment if, for example, the Suncorp debt blew out for any reason, to the extent that recoverability of any moneys due to Pioneer

through Zonebar would be jeopardised. Further, there is nothing in the material that indicates whether the proposal was ever put to Suncorp. In that connection, the letter from Suncorp of 4 August 2006 is expressed in terms that suggest that Suncorp was amenable to considering other means of resolving the issue inherent in Pioneer's proceedings provided Suncorp was reasonably satisfied with the proposal.

[25] The order contemplated in the proceedings before Philippides J, although controversial in some respects and therefore not made by her, referred to a sum of about $661,000 which, according to the explanation given to me during oral submissions, was agreed as representing a sum which, if paid to an interest bearing account then, would, if judgment were to be given for Pioneer, itself and with interest earned in the interim, produce the sum approximately equal to $500,000 together with interest payable pursuant to a mortgage on the terms of the relevant mortgage. It is inherent in that equation and the draft order that $500,000 held in a trust account pursuant to the order of 17 October 2006 would not wholly cover the potential liability of Zonebar or Mr Smits to Pioneer. It is convenient to express the proposition in that way because it is integral to the applicants' argument on the first thread of their submissions that retention of both the sum held in the account pursuant to the order of 17 October 2006 and the caveat led to overprotection of Pioneer's position.

[26] The relief sought in the first three paragraphs of the prayer seek relief against Zonebar, the ultimate consequence of which would be perfection of a mortgage equivalent to the relevant mortgage. The caveat seeks to preserve the status quo until that issue is resolved, subject to the possibility of a regime of the kind proposed by the respondent or some modification of it to prevent orderly settlement of sales being hindered.

[27] One of the consequences inherent in the scheme in the draft order placed before Philippides J but not made, would have been to increase the amount of money available to meet any judgment against Mr Smits from the $500,000 held pursuant to the order of 17 October 2006 to an amount which contained a sum to cover accruing interest over the relevant period. There is no evidence that the proposition concerning progressive release of the caveat is unacceptable to Suncorp; the incidental issues to implement it would essentially be for the parties to work out. As the matter stands, I am not persuaded that the balance of convenience favours the removal of the caveat.

Orders

1. The applicant Zonebar Pty Ltd's application to remove the caveat is dismissed.
2. The applicant Mr Smits' application to have the moneys held in trust on behalf of Pioneer and him pursuant to the order of the Chief Justice of 17 October 2006 paid out to him is dismissed.
3. The costs of and incidental to each application shall be the respondent's costs in the cause, to be paid by the respective applicants.