

SUPREME COURT OF QUEENSLAND

CITATION: *Rockett v Evans* [2008] QSC 227

PARTIES: **LYNETTE JOY ROCKETT**
(plaintiff)
v
TRACY MICHELLE EVANS
(first defendant)
BORRUGURRA PTY LTD (ACN 107 081 569)
(second defendant)

FILE NO/S: 4389/08

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 3 October 2008

DELIVERED AT: Brisbane

HEARING DATE: 17 July 2008

JUDGE: Martin J

ORDER: **That Caveat No. 711450233 by the First Respondent lodged on the title of Unit 301, The Sands, 40 The Esplanade, Surfers Paradise and more particularly described as Lot 46, Building Unit Plan 82, County of Ward, Parish of Gilston be removed forthwith.**

CATCHWORDS: REAL PROPERTY - TORRENS TITLE - CAVEATS AGAINST DEALINGS - WHO MAY LODGE AND WHAT INTEREST SUFFICIENT – application to remove a caveat – where plaintiff bought property from a mortgagee exercising power of sale – where mortgagor attempted to sell the property and exercise a right of redemption - whether the subsequent purchaser has a caveatable interest.

Land Title Act 1994, s 127

Baypoint Pty Ltd v Baker (1994) 6 BPR 13,687
Chia v Rennie (1997) 8 BPR 15,601
Forsyth v Blundell (1973) 129 CLR 477
In re Caveat No 773; ex parte Hodgson (1873) 3 QCSR 158
McKean v Maloney [1988] 1 Qd R 628
R v Registrar of Titles; ex parte Watson [1952] VLR 470
Re Jorss' Caveat [1982] Qd R 458 ,

Re McKean's Caveat [1988] 2 Qd R 524
Rockett v Moneycorp Securities Pty Ltd & Anor [2007] QSC 389
Rudge v Richens (1873) LR 8 CP 358
Tendiris Pty Ltd v Ogle [2004] QSC 355

COUNSEL: AI James for the plaintiff
 PJ Favell for the first and second defendants

SOLICITORS: Ffrench Commercial Lawyers for the plaintiff
 Barry & Nilsson for the first and second defendants

- [1] This is an application pursuant to s 127 of the *Land Title Act* 1994 (“LTA”) seeking an order for the removal of a caveat lodged with respect to Lot 46 Building Unit Plan 82, County of Ward, Parish of Gilston. That lot is unit 301 in “The Sands”, a building at Surfers Paradise. Before the hearing of this matter, the first respondent removed her caveat over unit 216 in the same building and the second respondent removed its caveats over unit 216 and unit 301.
- [2] The registered proprietor of unit 301 and unit 216 is Zorzan-0003 Pty Ltd (“Zorzan”). Pavi Ucchino (“Ucchino”) is the sole shareholder and director of Zorzan.
- [3] It will assist in the understanding of this matter if I set out a brief chronology of relevant events.

September 1987– January 2006	The first respondent (“Evans”) was in a de facto relationship with Ucchino.
23 March 2006	Zorzan executed a second mortgage over both units in favour of Moneycorp Securities Pty Ltd (“Moneycorp”). The first registered mortgage over the properties was held by Wide Bay Australia Ltd.
23 May 2006	Zorzan defaulted under the mortgages to Moneycorp.
29 May 2006	Moneycorp faxed Ucchino a notice of default and advised that it required Zorzan to make good the default in payment within 30 days of 29 May 2006. Moneycorp issued a Notice of Exercise of Power of Sale to Zorzan giving 30 days in which to remedy the default.
June 2006	Evans and Ucchino entered into a deed setting out an agreed property settlement pursuant to the provisions of Part 19 of the <i>Property Law Act</i> 1974. That deed required Ucchino to transfer a number of properties to Evans in return for which Evans was to pay Ucchino a sum of money to be used to discharge any security registered over those properties. Unit 301 was one of those properties.
16 June 2006	Evans entered into a contract with Zorzan to purchase unit 301.
21 June 2006	Evans paid a \$100 deposit to Zorzan on that contract.

5 July 2006	Rockett entered into contracts with Moneycorp (exercising its power of sale as mortgagee in possession) under which Rockett agreed to purchase units 301 and 216.
18 August 2006	Uchino and Zorzan borrowed \$160,000 from Ragan Bros Pty Ltd to pay Moneycorp the amount then owing to it. Moneycorp gave Zorzan a release of mortgage.
22 August 2006	Evans received preliminary approval for her loan application for the purchase of unit 301.
28 August 2006	Rockett lodged caveats against dealings with both units.
15 September 2006	Evans executed a mortgage in favour of Perpetual Trustees Victoria Limited in relation to unit 301.
7 November 2006	Rockett commenced proceedings in this court (BS 9525/06) seeking, among other things, specific performance of her contracts with Moneycorp. (“the Rockett contracts”)
20 December 2007	Wilson J ordered specific performance of the Rockett contracts and dismissed Zorzan’s counterclaim in its entirety. ¹
5 February 2008	Zorzan filed an application to extend time with which it could appeal the decision of Wilson J. That application was dismissed following the failure of Zorzan to comply with an order for security for costs.
25 February 2008	Evans lodged caveats against dealings with both units.

Removing a caveat

[4] Section 127 of the *LTA* provides:

“(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.”

[5] A “caveatee” is defined in Schedule 2 of the *LTA* in the following way:

“*caveatee*, for a lot over which a caveat has been lodged, means—

(a) a registered proprietor of the lot; or

(b) someone (other than the caveator) who has an interest in the lot.”

[6] The applicant is “someone ... who has an interest in the lot” as she has an order in her favour² that the contract she has with Moneycorp for the sale of Unit 301 be specifically performed.

¹ *Rockett v Moneycorp Securities Pty Ltd & Anor* [2007] QSC 389.

² The order of Wilson J in the above decision.

Principles to apply

- [7] In an application such as this, the caveator has the onus of showing:
- (a) that there is a serious question to be tried which would justify leaving the caveat undisturbed³,
 - (b) that it is fairly arguable that he or she has a caveatable interest in the land⁴, and
 - (c) that the balance of convenience favours the status quo and the retention of the caveat on the title⁵

Caveator's submissions

- [8] On behalf of Evans it was argued that there were a number of “fairly arguable serious questions to be tried” namely:
- (a) Whether the payment of 18 August was an exercise by the owner of the land of its right to redeem and, as such, removed any right of the mortgagee to convey the property to another even though the property had not been released from the mortgage;
 - (b) “whether in the circumstance of the exercise of the equity of redemption the mortgagee would if it conveyed the property be acting in bad faith”.
- [9] Similar arguments were put before Wilson J in *Rockett v Moneycorp Securities Pty Ltd*. Her Honour had the following to say with respect to those arguments:

- “[49] Counsel for the second defendant submitted –
- (a) that the second defendant had rectified any default under the mortgage by its payment to the first defendant on 18 August 2006;
 - (b) that the second defendant had thereby exercised its right to redeem – that is, to have the properties freed from the mortgage; and
 - (c) that the first defendant could no longer complete the contracts with the plaintiff.
- [50] There are several reasons why I think this submission is wrong in law and must be rejected.
- [51] The second defendant has paid out the debt it owed the first defendant, but the properties have not been released from the mortgage, as the release has not been registered.
- [52] A contract made by a mortgagee in exercise of its power of sale is binding on the mortgagor unless it is made in bad faith. Once a valid contract of sale is entered into by the mortgagee, the mortgagor's right to redeem is extinguished.⁶

³ *Re Jorss' Caveat* [1982] Qd R 458, *Re McKean's Caveat* [1988] 2 Qd R 524

⁴ *In re Caveat No 773; ex parte Hodgson* (1873) 3 QCSR 158 at 159; *Tendiris Pty Ltd v Ogle* [2004] QSC 355

⁵ *Tendiris* at [37]

⁶ *R v Registrar of Titles; ex parte Watson* [1952] VLR 470, 476-477; *Baypoint Pty Ltd v Baker* (1994) 6 BPR 13,687; *Chia v Rennie* (1997) 8 BPR 15,601

The mortgagee has power to transfer the land (subject to any prior registered encumbrance).

[53] Neither the first defendant nor the plaintiff acted in bad faith, and there was no collusion between them.”

[10] It appears to be argued by the caveator that, by accepting the money in payment of the outstanding amount, the mortgagor ceased to have an interest in the land and therefore had nothing to transfer.

[11] That argument is not supported by authority. A similar argument, on a striking out application, was rejected in *Rudge v Richens*.⁷ Dealing substantively with the same general issue, the English Court of Appeal held that the entry by a mortgagee into an unconditional contract for sale of the mortgaged property barred the mortgagor’s right of redemption so long as the contract subsisted.⁸

[12] It is not suggested by the caveator that the exercise by the mortgagee of its power of sale by entering into the contract with Rockett was done so in bad faith. This area of concern was considered by Walsh J in *Forsyth v Blundell*⁹ where at 496-7 he said:

“...I think it is in accordance with authority and that it should be affirmed that there may be conduct which amounts to a reckless sacrificing of the interests of a mortgagor, although it is not shown that there is an actual intention to defraud him or that there is corruption or collusion with the purchaser. It is concerning conduct of that kind that inquiry must be made in this case whether or not it warranted the granting of an injunction.

I do not doubt that as between himself and his mortgagee who has conducted himself in that way in entering into a contract of sale, a mortgagor is entitled to invoke the aid of the Court to prevent the completion of the contract. As between those parties, the proprietary right of the mortgagor will be protected against such a wrongful alienation by the mortgagee. But the critical question is whether the purchaser under the contract acquires a right which entitles him to have the contract completed and therefore precludes the grant of any injunction to restrain its completion. In dealing with that problem I leave aside for the present the statutory provisions which are said to have a bearing upon it.

It has been submitted that a person who has entered into a contract as purchaser cannot be affected in any case by impropriety on the part of the mortgagee, not involving collusion with the purchaser. It has been put as an alternative argument that, if a purchaser may be affected by notice of the facts which constitute the impropriety (not involving collusion), he can be affected only if he has such notice at the time when he enters into the contract. **In my opinion, if the mortgagee does not exercise the power of sale "in good faith" (in the sense explained above) and the purchaser has knowledge of**

⁷ (1873) LR 8 CP 358

⁸ *Property & Bloodstock Ltd v Emerton* [1968] Ch 94

⁹ (1973) 129 CLR 477

the facts which show the lack of good faith, the purchaser cannot obtain a right superior to the right of the mortgagor. Even when a contract made in such circumstances is carried to completion, in many cases the transaction may be set aside, or, alternatively, the conveyance or transfer treated as operating only as a transfer of the mortgage and of the debt secured by it, and not as a transfer of the mortgagor's interest: see *Latec Investments Ltd. v. Hotel Terrigal Pty. Ltd.* (In Liquidation) [1965] HCA 17; (1965) 113 CLR 265, at pp 274-275 . **But if the person who agrees to purchase has no notice of any impropriety at the date of contract and continues to have no notice at the time when it is completed, he will obtain a title which cannot be challenged by the mortgagor.** (It is here assumed that all statutory and contractual conditions essential to the exercise of the power of sale have been fulfilled.)”

- [13] That reasoning was followed by McPherson J in *McKean v Maloney*¹⁰ where his Honour adopted the statement of Walsh J in *Forsyth v Blundell* made at 499: **“If a contract of sale had been made which was not affected by any impropriety, it would not have been open to the mortgagor to claim that until the contract had been completed his right to redeem the mortgage continued notwithstanding the contract and was superior to the right of the purchaser.** Although he retained his title to the land this was subject to the power of sale as defined in the Ordinance and as incorporated into the mortgage instruments. **In my opinion, a contract of sale properly made in the course of the exercise of that power is binding upon the mortgagor, not because the mortgagee contracts as agent for the mortgagor, but because by entering into a mortgage to which the Ordinance applies the mortgagor makes his own rights subject to its provisions, including those which confer and regulate the power of sale, and, therefore, subject to any action which is properly taken in good faith by the mortgagee.”**
- [14] In this case there is no assertion of bad faith on the part of the mortgagee and none arises on the material. Once the mortgagee entered into a valid contract for sale the mortgagor's right to redeem was extinguished.¹¹
- [15] It follows then that as the contract by the mortgagee to sell the property is binding, before completion, upon the mortgagor then the mortgagor was in no position to enter into a contract for sale of the same property. The fact that the mortgagor paid to the mortgagee the outstanding amount can not constitute an exercise of the equity to redeem where the mortgagee has entered into a valid contract for sale of the property before that payment is made. Thus, Evans has no caveatable interest.
- [16] That conclusion is sufficient to eliminate one of the necessary grounds required of a mortgagee to resist this application.

¹⁰ [1988] 1 Qd R 628

¹¹ *R v Registrar of Titles, ex parte Watson* [1952] VLR 470, 476-477; *Baypoint Pty Ltd v Baker* (1994) 6 BPR 13,687

Balance of convenience

- [17] Even if Evans did have a caveatable interest then she has failed to demonstrate that the balance of convenience supports the retention of the caveat. In particular, her failure to make any attempt to become involved in the proceedings between Rockett and Moneycorp combined with the substantial delay (about 18 months) in lodging her caveat and her failure to commence proceedings within three months to support her own caveat demonstrate an absence of will. To allow the caveat to remain would inevitably lead to Rockett having to re-litigate the issues upon which she has already been successful in the case before Wilson J.

Conclusion

- [18] I make the following order:

That Caveat No. 711450233 by the First Respondent lodged on the title of Unit 301, The Sands, 40 The Esplanade, Surfers Paradise and more particularly described as Lot 46, Building Unit Plan 82, County of Ward, Parish of Gilston be removed forthwith.

- [19] I will hear the parties on costs.