

SUPREME COURT OF QUEENSLAND

CITATION: *AB & Ors v IJ & Ors* [2008] QSC 046

PARTIES: **AB**
First Plaintiff/First Defendant by Counterclaim
and
CD
Second Plaintiff/Second Defendant by Counterclaim
and
EF
Third Plaintiff/Third Defendant by Counterclaim
and
GH
Fourth Plaintiff/Fourth Defendant by Counterclaim

v

IJ
Defendant/Plaintiff by Counterclaim
and
KL
Fifth Defendant by Counterclaim
and
MN
Sixth Defendant by Counterclaim
and
OP
Seventh Defendant by Counterclaim
and
QR
Eighth Defendant by Counterclaim
and
ST
Ninth Defendant by Counterclaim
and
UV
Tenth Defendant by Counterclaim

FILE NO/S: 10963 of 2007

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING
COURT: Supreme Court

DELIVERED ON: 28 February 2008

DELIVERED AT: Brisbane

HEARING DATE: 22 February 2008

JUDGE: White J

- ORDER:
1. Caveat numbered 711064975 insofar as it relates to the "Crump Street property" described as Lots 33 and 34 on Registered Plan 38083, County of Stanley, Parish of Yeerongpilly, Title References 12113248 and 12113180 and "35 Sentinel Court" Cleveland described as Lot 416 on Crown Plan SL12471, County of Stanley, Parish of Cleveland, Title Reference 17255029 be removed.
 2. Caveat numbered 711444699 dated 21 February 2008 and lodged by KL Pty Ltd to prevent dealings with 35 Sentinel Court, Cleveland described as Lot 416 on Crown Plan SL12471, County of Stanley, Parish of Cleveland, Title Reference 17255029 be removed.
 3. Caveat numbered 711300726 be retained subject to the following conditions:-
 - (a) that the Plaintiffs, by 7 March 2008, pay or cause to be paid all outstanding rates and land tax (including accrued interest) on the properties set out in the schedule which is exhibited at page 23 of exhibit EEM3 to the affidavit of Emma Elizabeth Mawson filed on 11 February 2008.
 - (b) that the Plaintiffs maintain or cause to be maintained payment of all continuing rates and land tax (including accrued interest on any late payment) on the properties the subject of paragraph 3(a) hereof until further agreement between the parties or order of the Court.
 - (c) that the Plaintiffs pay the Applicant the sum of \$1,250.00 every Tuesday from and including 12 February 2008, to be paid to the Applicant's solicitors' trust account until further agreement between the parties or order of the Court, the first payment (including arrears) to be made on 4 March 2008.
 - (d) That AB and CD and MN guarantee the reasonable legal fees incurred by the Applicant at the conclusion of the proceedings in respect of defending the claim and prosecuting the counterclaim up to a maximum amount of \$100,000.00, such guarantee to be provided in writing to the applicant's solicitors by 7 March 2008.
 4. The proceeding be placed on the Supervised Case List.
 5. Costs reserved.
 6. The application seeking certain injunctive relief filed by the Plaintiffs on 19 February 2008 be dismissed with costs reserved.
 7. There be liberty to apply on three (3) days notice.

CATCHWORDS: CONVEYANCING – LAND TITLES UNDER THE TORRENS SYSTEM – CAVEATS AGAINST DEALINGS – WHO MAY LODGE – where party lodging caveat is party to a broader agreement but has no interest in the specific parcel of land over which the caveat is lodged

CONVEYANCING – LAND TITLES UNDER THE TORRENS SYSTEM – CAVEATS AGAINST DEALINGS – WHO MAY LODGE – where the party lodging the caveat has an interest arising out of the operation of s55 of the *Property Law Act 1974*

CONVEYANCING – LAND TITLES UNDER THE TORRENS SYSTEM – CAVEATS AGAINST DEALINGS – LAPSE, REMOVAL AND WITHDRAWAL – REMOVAL – where there are serious questions to be tried regarding the character and validity of the transfer of the property – whether the balance of convenience supports the maintenance of the caveat – where assets are vulnerable to dissipation if the caveat is removed – where undertakings are provided to cover the expenses of the party restrained from dealing with property

Acts Interpretation Act 1954 (QLD), s 32

Property Agents and Motor Dealers Act 2000 (QLD), s 17, s 366D(1)

Property Law Act 1974 (QLD), s 55, Part 19

Re: Burman's Caveat [1994] 1 Qd R 123, applied

Cheree-Ann Property Developments Pty Ltd v East West International Development Pty Ltd [2007] 1 Qd R 132; [2006] QSC 182, cited

Francis v NPD Property Development Pty Ltd [2005] 1 Qd R 240; [2004] QCA 343, cited

Re: Henderson's Caveat (1998) 1 Qd R 632, distinguished

COUNSEL: Mr K Barlow for the Defendant/Applicant

Mr K Howe for the First, Second, Third and Fourth Plaintiffs/Respondents

SOLICITORS: Hopgood Ganim for the Defendant/Applicant

DLA Phillips Fox as agents for Mott & Associates, solicitors for the Plaintiffs/Respondents

- [1] These proceedings concern members of the ABIJ family and companies associated with them. For clarity and without disrespect it is convenient to refer to the parties by their first names as they have done in their pleadings. IJ is the defendant in the proceedings commenced by his sons AB and CD and their wives, EF and GH, respectively, on 30 November 2007. IJ has counterclaimed in these proceedings against AB and CD and their wives as well as YZ, a real estate agent, five companies associated with AB and CD (sixth to tenth defendants by counter-claim) and AB's daughter, UV, as eleventh defendant.

- [2] On 5 October 2007 AB lodged caveat number 711064975 over a number of properties consisting in multiple lots of which IJ is the registered proprietor and conveniently described as:
- “35 Sentinel Court” being vacant residential land at Cleveland;
 - “the Holland Park property” which is vacant land located at 899-905 Logan Road, Holland Park West; and
 - “the Crump Street property” which is vacant land adjacent to the Holland Park property.
- [3] On 21 December 2007 CD and GH registered caveat numbered 711300726 over 35 Sentinel Court.
- [4] Hopgood Ganim, IJ’s solicitors, sought to register a mortgage over 35 Sentinel Court to secure their fees but were prevented from doing so because of AB’s caveat.
- [5] After the filing of this application KL, the sixth defendant by counterclaim, lodged a caveat over 35 Sentinel Court (exhibit 2) on 21 February 2008 asserting an entitlement to 35 Sentinel Court. The grounds of claim are said to be pursuant to a constructive and/or resulting trust as the provider of purchase moneys to IJ as well as contributions towards outgoings. It has no dealing number allocated.
- [6] By this application IJ seeks the removal of AB’s caveat over 35 Sentinel Court and the Crump Street property and CD and GH’s caveat over 35 Sentinel Court. He also seeks the removal of the caveat placed over Sentinel Court by KL.
- [7] Alternatively to an order for the removal of the caveat over 35 Sentinel Court, IJ seeks an order whereby CD and GH sign all necessary documents to allow the registration of a mortgage (to Suncorp) upon the title of 35 Sentinel Court as security for indebtedness or liabilities up to \$600,000. IJ wishes to have at his disposal this sum of money for:
- the payment of outstanding rates and land taxes associated with properties that he owns;
 - his living expenses; and
 - the payment of his legal fees to conduct the within litigation.
- [8] It is conceded by AB that the caveat over the Crump Street property ought to be removed. AB also seeks to amend his grounds of claim to caveat 711064975 (exhibit 3).
- [9] Both the Holland Park land and 35 Sentinel Court are vacant land zoned residential. Holland Park is fully encumbered but 35 Sentinel Court is not encumbered.
- [10] IJ owns as registered proprietor other land either alone or with AB and CD in equal shares. Those properties are encumbered.
- [11] The interest claimed by AB over 35 Sentinel Court is an:
“equitable interest as purchasers [sic] of an estate in fee simple”.

The grounds of claim are pursuant to an agreement dated 26 May 2007 (“the 26 May Agreement”) described as being between IJ and AB wherein IJ agreed to transfer and convey to AB an interest in the subject properties in return for \$600,000 and a payment of \$1,250 per week.

- [12] The interest claimed by CD and GH is
“[e]quitable interest as Purchasers of an estate in fee simple”.

The grounds of claim are an equitable interest as purchaser and/or transferee pursuant to the 26 May Agreement wherein IJ agreed to transfer his interest in 35 Sentinel Court to CD and GH. Alternatively they claim their interest pursuant to a constructive and/or resulting trust arising out of the same agreement.

- [13] AB, CD and their respective wives seek specific performance in these proceedings of the 26 May Agreement. The circumstances whereby that agreement was executed by IJ are contentious. It is expressed to be between IJ and AB. It is an agreement concerning the acquisition by IJ, AB and CD in equal shares of IJ's sole interest in the Holland Park property; and the acquisition by CD and GH of IJ's sole interest in 35 Sentinel Court; and includes property situated at 11 Seahaven Court, Cleveland of which the registered owners are AB and his wife, EF, as joint tenants, but where IJ and his former de facto partner, WX, live and have lived since 2001. The agreement provides, *inter alia*, that 11 Seahaven Court is to be transferred from AB and EF as joint tenants to IJ and EF as joint tenants and in respect of which IJ agrees not to encumber the property nor assign, transfer or apply to sever the joint tenancy between himself and EF and consents to a caveat over the title by AB to be removed only by the joint application of IJ and EF: in effect a right of residence.
- [14] On completion, AB and CD agreed to pay IJ the sum of \$600,000 less adjustments in accordance with the standard conditions of the REIQ form of contract of sale. Additionally, AB and CD agreed to pay IJ the sum of \$1,250 per week for the rest of IJ's life. Values were attributed to the properties which were transferred.
- [15] The agreement was not performed. AB and CD maintain that they were ready, willing and able to perform their part of the bargain by attempting to tender cheques for the weekly sum assured by the agreement of \$1,250 together with a payment into court of \$600,000. This payment reflected the terms of an agreement between IJ and his former de facto partner, WX in settlement of her claim against him pursuant to Part 19 of the *Property Law Act 1974* and pursuant to an order of this court to which reference will be made later. IJ repudiated the Agreement no later than 6 August 2007 when his solicitors wrote to AB and CD's solicitors.
- [16] IJ contends that the execution of the 26 May Agreement was procured by undue influence, unconscionable conduct and misrepresentations by AB and CD and/or their agent, YZ and in breach of the provisions of the *Property Agents and Motor Dealers Act 2002* (“PAMDA”). The particulars are that when he signed the agreement IJ was 77 years of age, suffering from depression and anxiety and under the care and supervision of a psychiatrist at whose behest he was taking anti-depressant medication. He also suffered from chronic heart disease as evidenced by his admission to hospital on 6 June 2007 following a syncopal episode while driving a motor vehicle. He subsequently had a pacemaker inserted. At the time IJ contends he was entirely dependent upon the charity of friends for his support having no independent means.
- [17] IJ alleges that YZ represented to him that AB and CD were in default under a loan to a particular financier and if IJ did not agree to guarantee their debt by 4.00pm on 25 May 2007 the financier would take recovery action against them and/or their

associated entities which would result in them losing their businesses. The businesses operated by the ABIJ are as motor vehicle dealers and property developers. IJ alleges that he was told the document effected the guarantee given by IJ.

- [18] The particulars in the defence and counterclaim are that IJ was taken by YZ at the request of AB's solicitor to the offices of Mr Stephen Colville, a solicitor in Cleveland. IJ alleges that he did not read the agreement, was not aware of its contents and was afforded no opportunity to do so or to confer in private with Mr Colville about the agreement. He alleges bullying by YZ about the urgency of his signature and alleges that he was induced thereby to sign the agreement. Mr YZ denies being AB's agent and says he has known IJ for 10 years and with whom he has a common interest in horse racing. He denies making the representations attributed to him.
- [19] IJ alleges that the agreement is unconscionable because the terms are harsh and unfair to him in that his properties were to be transferred to AB and CD at gross undervalue. IJ estimates in his pleading that the properties are worth approximately \$10,000,000 in return for which he was to be paid \$600,000 and \$1,250 per week with a right to reside in 11 Seahaven Court.
- [20] By his counterclaim IJ alleges that from about the mid-1980s AB assumed such control of the motor car sales businesses that IJ was deprived of their profits. In 1976 IJ executed a power of attorney in favour of AB which was only revoked in 2006. IJ alleges that from about 1988 to 2006 AB caused IJ to purchase and sell a number of properties in their joint names, the funds for which were provided by IJ or advanced by financial institutions and secured by mortgages over IJ's property and directed the application of the proceeds of sale to AB's interests solely and for which he has not accounted.
- [21] IJ alleges that AB has forged his signature on certain contracts and security documents.
- [22] AB and CD and their wives join issue with IJ about most of the allegations made in the defence and counterclaim. Rather than being overborne, AB and CD allege that IJ was an astute businessman who kept his finger on the pulse of what was going on and was aware of all the transactions referred to in IJ's pleadings. Contrary to being left impecunious, Mr Ian West, the former accountant for both IJ and AB deposes that IJ was paid significant sums by KL. Mr West has completed a preliminary examination for the years 30 June 1990 to 30 June 1994 which shows that in excess of \$1,000,000 was paid to IJ during that period.
- [23] A number of witnesses to the impugned signatures swear that they know IJ and he executed the documents in their presence.
- [24] On the other hand, Mr Colville, in a letter to IJ dated 4 June 2007, wrote that in his opinion IJ signed the agreement with AB on the evening of 25 May 2007 in his office "under duress". It is accepted that his opinion swears to the issue but it is indicative that if called to give evidence in the proceedings Mr Colville will describe that evening in terms which might lead to a court reaching that conclusion. AB deposes that his solicitor received a fax from Mr Colville on 25 May which contained extensive handwritten amendments inserted by IJ which had the effect of

increasing his interest in the Holland Park property from 10 percent as was proposed in the draft agreement from AB to 33 percent; of increasing his weekly income from \$1,000 as proposed to \$1,250; of removing his obligation to transfer his interest in the Greenslopes property; of indemnifying IJ from any liabilities incurred by reason of the sale of the businesses operated from the Holland Park and the Greenslopes properties; of removing his obligation to pay any stamp duty assessed on the agreement; of indemnifying him in respect of his legal costs on a solicitor and client basis; and of indemnifying him in respect of all other expenses or liabilities including the Office Lane property at Glenmorganvale (which was not included in the agreement). This, it is argued, is not the conduct of a man overborne.

- [25] Two further matters need to be mentioned. AB contends that his father has a chronic gambling habit. WX supports this in an affidavit in her application for an injunction restraining IJ from dealing with his assets in her proceedings for a property adjustment order (BS 1927 of 2005). She states that IJ has been a gambler for many years. AB exhibits records of IJ's Sporting Bet Australia account for the period 3 March 2007 to 2 February 2008 which show losses of \$29,055. This is against a background of IJ's assertion (advanced by his solicitors: IJ has not sworn an affidavit in these proceedings) that he has no source of income and relies on the charity of friends to support himself financially.
- [26] IJ has identified debts of approximately \$470,000 including over \$100,000 to named individuals who are not identified as friends (tentatively suggested to be moneylenders by AB) and over \$200,000 as credit card debts. AB and Mr West each depose to IJ's receipt of some \$340,000 between October 2005 and March 2007 and just under \$1,000,000 between 1991 and 1994 from the motor car businesses and rents from property of which IJ is the registered proprietor. IJ has lived at Seahaven Court without payment of rent or outgoings since 2001.
- [27] The other matter is WX's claim for a property adjustment order. Only some of that material is before the court but it seems that the de facto relationship commenced in 1997 although a relationship between them had commenced in about 1991. In March 2003 WX moved out of the residence at Seahaven Court but at some later time returned to live separately under the one roof with IJ. In March 2005 she sought the property adjustment order.
- [28] On 18 March 2007 WX executed a Settlement Agreement with IJ whereby IJ agreed to:
- provide a new house registered to WX which, together with the land, would be valued at \$500,000;
 - pay her \$500 per week indexed for the rest of her life;
 - pay her private health insurance;
 - provide her with a motor vehicle to the value of \$50,000; and
 - land at Wanora to be transferred from IJ to IJ and WX as joint tenants.
- [29] WX became aware of the 26 May Agreement between AB and IJ and was concerned that IJ's assets were being removed beyond the jurisdiction of a Part 19 *Property Law Act* order. AB and CD and their wives were joined as second respondents to her application and an injunction was granted restraining IJ from dealing with his assets. On 12 June 2007, upon the second respondent's undertaking, *inter alia*, to pay into court the amount agreed to be paid under the

26 May Agreement being not less than \$500,000, Chesterman J dismissed the proceedings against them.

[30] WX has told IJ's solicitors that she will not continue with her application for a property adjustment order pending the determination of the proceedings between IJ and AB and CD and their wives. She has consented to the order of Chesterman J being set aside which would have the effect of releasing them from their undertakings. AB and CD and their wives have not executed the consent order provided to them by WX's solicitors.

[31] By letter dated 12 February 2008 AB and CD's solicitors proposed that since the application to remove the caveats was principally to enable IJ to meet debts including land tax and rates liabilities on properties owned by him, to provide for living expenses and legal fees to defend the claim and prosecute the counterclaim, the following was offered:

- “1 our clients' [sic] pay or cause to be paid all outstanding rates and land tax (including accrued interest) as set out in the schedule which is exhibited at page 23 of Ms Mewson's affidavit of 8 February 2008 within seven days. [This includes property not the subject of the Agreement].
- 2 our clients' [sic] maintain or cause to be maintained all continuing rates and land tax on the properties the subject of paragraph 1 hereof until further agreement between the parties or order of the Court.
- 3 our client's [sic] pay your client's reasonable living expenses in the sum of \$1,250 each week from 12 February 2008 to be paid to your trust account until further agreement between the parties or order of the Court.
- 4 our clients, AB and CD, and KL personally guarantee the reasonable legal fees incurred by your client at the conclusion of the proceedings in respect of defending the claim and prosecuting the counterclaim up to a maximum amount of \$100,000.
- 5 our clients' caveats (numbered 711064975 and 811300726) remain on the Sentinel Court property.
6. the application be dismissed with costs reserved.”

That offer has now lapsed but is offered in court through counsel.

Approach

[32] It is now well accepted in Queensland and elsewhere that the approach to an application to remove a caveat is similar to an application for an interlocutory injunction, namely, there must be a serious question to be determined about the caveator's interest in the land and, if there is, whether the balance of convenience favours the retention or removal of the caveat, *Re: Burman's Caveat* [1994] 1 Qd R 123 at 128.

- [33] The disputed issues of fact surrounding the entry into the 26 May Agreement are many. I have made reference to some of the strengths and weaknesses of each side's position arising from the pleadings and from evidence in affidavit form filed in this application. There are serious questions to be determined about IJ's claims of undue influence, unconscionability and misrepresentation. Questions remain, however, as to whether the interests claimed by AB and CD and GH can sustain a caveat and whether the PAMDA "defence" would cause the Agreement to be set aside.

The PAMDA issue

- [34] By amendment to his defence and counterclaim of 15 February 2008 IJ alleges that, relevantly, 35 Sentinel Court is a "residential property" as defined in s 17 of the PAMDA and no warning statement containing the information required by s 366D(1) was given to CD and GH as purchasers (or to IJ for his interest in 11 Seahaven Court) and, accordingly, the Agreement is not binding. Mr Barlow for IJ concedes that in light of the decision in *Cheree-Ann Property Developments Pty Ltd v East West International Development Pty Ltd* [2007] 1 Qd R 132 that "single" in the definition of "residential property" in s 17 of the PAMDA displaces the presumption of plurality created by s 32C of the *Acts Interpretation Act 1954* a serious issue about the applicability of the PAMDA needs to be determined but would argue against the correctness of that decision.
- [35] Mr Howe for AB and CD and their wives, contends that the 26 May Agreement could not be characterised as a sale in any accepted sense referring to *Francis v NPD Property Development Pty Ltd* [2005] 1 Qd R 240 particularly per McPherson JA at 249 and following. This Agreement relates to the transfer of property providing for a life interest in other property, an annuity and a lump sum. There are accordingly serious questions about the characterisation of the Agreement and whether it falls within the provisions of the PAMDA.

AB's interest in Sentinel Court

- [36] Of greater difficulty for AB is his interest in Sentinel Court. Clearly the Agreement consists of dependent terms and conditions and they must all be fulfilled for the Agreement to be accomplished. AB has no actual interest in Sentinel Court. The transfer is to CD and GH. His interest only arises by virtue of the whole Agreement. Mr Howe referred to observations, particularly by Davies JA, in *Re: Henderson's Caveat* (1998) 1 Qd R 632 at 641-2. That was a rather different situation where the caveator had an alleged interest in part of a larger parcel of land, the boundaries of which were yet to be identified. In such a circumstance it was correct, with respect, to conclude that equitable relief would be available either by way of injunction or a limited decree for specific performance to ensure that the registered proprietor dealt with the parcel of land in a manner consistent with subdivisional approval being obtained for the excision of the claimed portion of land. Here AB's interest is qualitatively and significantly less in respect of Sentinel Court and it would require a creative extension to the concept of "an interest in land" to uphold the caveat on that basis. The proposed amendment to the caveat does not improve his claim. I conclude that there is no serious question to be tried in respect to AB's caveat over Sentinel Court.

CD and GH's interest in Sentinel Court

- [37] There is conceded to be a serious question as to CD and GH's interest. They would appear to fall, *prima facie*, within the terms of s 55 of the *Property Law Act 1974* in as much as they are beneficiaries of an agreement and, by their signature at the foot of the 26 May Agreement, have signified their assent to it. There are other acts of assent, for example, these proceedings against IJ.

KL's interest

- [38] The interest which KL Pty Ltd asserts is under a constructive trust insofar as it alleges that it advanced the moneys which IJ utilised to purchase Sentinel Court. KL is AB's company. This was argued to be inconsistent with the whole basis upon which the 26 May Agreement was entered into by AB and inconsistent with the interests advanced under it of CD and GH. Since KL operates entirely at AB's direction it was open to him not to advance KL's claim when negotiating the Agreement. Indeed there may be a basis for arguing that KL is precluded from now setting up that claim. There are few figures available to support KL's claim apart from a long period of payments to IJ but ostensibly as wages and rent. In its current state the evidence is weak.
- [39] In conclusion, there are serious questions to be determined to support CD and GH's interest in Sentinel Court but not AB's, nor am I persuaded that there is sufficient evidence to support KL's caveat.

Balance of convenience

- [40] As has been set out above there are well held concerns about IJ's capacity to deal prudently with any funds that come into his hands. It is argued that if AB and CD and GH are successful in these proceedings to carry the Agreement into effect, then they will have, in a practical sense, lost no more to IJ than they would be required to pay under the Agreement. That does not seem to me to be a sufficient answer. IJ's other properties are said to be fully encumbered. The funds that he seeks will by no means satisfy his debts, his lawyer's fees and provide for living expenses even if they were to be put to those uses exclusively. But the concern is that he will "fritter away" all or some of any moneys advanced and the financier, (at present Suncorp has indicated a readiness to advance \$600,000 on the security of a first mortgage), will resort to its security defeating CD and GH's interests. The proposal emanating from AB and CD goes some way to addressing IJ's concerns about access to funds. I propose to allow CD and GH's caveat to remain conditioned upon them giving undertakings in terms of the offer in the letter of 12 February 2008 from DLA Phillips Fox to Hopgood Ganim.

Injunctive relief

- [41] If the caveators were unsuccessful in retaining the caveats, they sought by cross-application that an injunction issue to restrain IJ from dealing with any of his assets. I am persuaded that since CD and GH's caveat will remain the interests of the other parties are sufficiently protected, and dismiss the cross-application for injunction.

Orders

1. Caveat numbered 711064975 insofar as it relates to the "Crump Street property" described as Lots 33 and 34 on Registered Plan 38083, County of

Stanley, Parish of Yeerongpilly, Title References 12113248 and 12113180 and "35 Sentinel Court" Cleveland described as Lot 416 on Crown Plan SL12471, County of Stanley, Parish of Cleveland, Title Reference 17255029 be removed.

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