

# SUPREME COURT OF QUEENSLAND

CITATION: *Ross Cook and Brett Cook Pty Ltd v Bli Bli #1 & Anor* [2009] QSC 300

PARTIES: **ROSS COOK AND BRETT COOK PTY LTD ACN 119 223 317 as trustee for THE ROSS COOK AND BRETT COOK UNIT TRUST**  
(applicant)  
v  
**BLI BLI #1 PTY LTD ACN 113 906 291**  
(respondent)

FILE NO/S: BS3956 of 2009

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 22 September 2009

DELIVERED AT: Brisbane

HEARING DATE: 25 May 2009

JUDGE: Martin J

ORDER: **That caveat number 710611610 over Lot 4, Bli Bli Rd, Nambour (title reference 108035103) be removed upon the applicant providing an undertaking to maintain in trust an amount equal to one third of the proceeds of sale of Lot 4.**

CATCHWORDS: TORRENS SYSTEM – CAVEAT – APPLICATION FOR REMOVAL – where respondent alleges joint venture agreement for purpose of developing land - where land subject to an option to purchase – where option to purchase expired – where applicant company purchased land for development – where respondent lodged caveat over land – where earlier application for removal of caveat dismissed – where applicant alleges change of circumstances – whether balance of convenience justifies removal of caveat.

*Land Title Act 1994, s 127, s184*

*Australian Property & Management Pty Ltd v Devifi Pty Ltd*  
[1997] 7 BPR 15,235

*Bli Bli #1 Pty Ltd & Anor v Kimlin Investments Pty Ltd & Ors* [2008] QSC 289  
*Buchanan and Anor v Crown and Gleeson Business Finance Pty Ltd* [2006] NSWSC 1465  
*Queensland Estates Pty Ltd v Co-Ownership Land Development Pty Ltd* (1969) Qd R 150  
*Re Burman's Caveat* (1993) 1 QD R 123

COUNSEL: D.R. Cooper SC and Charles Wilson for the applicant  
R.M. Derrington SC for the respondent

SOLICITORS: Attwood Marshall Lawyers for the applicant  
Tucker & Cowan for the respondent

- [1] The applicant in this case seeks an order pursuant to s 127 of the *Land Title Act 1994* that caveat number 710611610 be removed. This is the second application brought by the applicant for removal of the caveat.
- [2] The issue to be decided is whether, since the first application was dismissed, there has been a change of circumstance so material that the balance of convenience now weighs in favour of the caveat's removal.
- [3] For the reasons I set out below, I have concluded that, upon the applicants offering an appropriate undertaking the caveat should be removed.

### **Background**

- [4] The applicant ("RCBC") is the registered owner of Lot 4, Bli Bli Rd, Nambour (title reference 108035103) ("Lot 4"). Its application concerns caveat number 710611610 ("the caveat"), which was lodged by the respondent, Bli Bli #1 Pty Ltd ("Bli Bli"), over that land.
- [5] By an amended caveat, lodged on 14 June 2007, Bli Bli claims an equitable interest in the property on the ground that:

"The Registered Owner holds its interest in the fee simple as constructive trustee for and on behalf of Kimlin Investments Pty Ltd ACN 105 972 825 as trustee for the Kimlin Family Trust, Pugs Pty Ltd ACN 081 709 855 as trustee for the Brett Cook Family Trust, Bli Bli #2 Pty Ltd ACN 114 650 494 and the Caveator pursuant to an agreement between the parties made in or about April 2006, as particularised in the attached Statement of Claim."
- [6] Bli Bli's claim was filed in the Supreme Court on 14 June 2007. Pursuant to it, Bli Bli and Bli Bli #2 Pty Ltd ("Bli Bli #2") sought declarations that:
  - a) a fiduciary relationship existed between Kimlin and PUGS and each of the plaintiffs,
  - b) Kimlin and PUGS breached fiduciary duties arising out of this relationship;

- c) by reason of these breaches, RCBC holds one third of any benefits and advantages acquired by reason of it being knowingly concerned in the breaches of the fiduciary duties on constructive trust for the plaintiffs; and
- d) RCBC holds one third of its interest in Lot 4, or in a portion of Lot 4 described in the statement of claim as the “JV Land,” on constructive trust for the plaintiffs.

- [7] The essence of Bli Bli’s claim is that it was the assignee of an aliquot part-interest in an option to acquire Lot 4. The other interest holders in the option were Kimlin Pty Ltd (Mr Ross Cook’s company) (“Kimlin”) and PUGS Pty Ltd (Mr Brett Cook’s Company) (“PUGS”). It is alleged that RCBC was aware of the interest of Bli Bli, agreed to protect its interest and indicated that the option would be exercised to obtain the land. This was never done.
- [8] Bli Bli alleges that the indication given by RCBC was dishonest, that the defendants (Kimlin, Mr Ross Cook, PUGS and Mr Brett Cook) intentionally did not exercise the option but instead incorporated Ross Cook and Brett Cook Pty Ltd, negotiated the sale of Lot 4 to RCBC and then dishonestly caused the title in Lot 4 to be transferred into RCBC’s name. It is alleged that the dishonesty accompanying this transfer is a “fraud” within the meaning of s 184(3)(b) of the *Land Title Act 1994* (“the Act”).
- [9] On 21 May 2008, RCBC brought an application in the above matter for several orders, including the removal of the caveat pursuant to s 127 of the Act.
- [10] The application was heard by Daubney J on 30 June 2008, and was dismissed with reasons on 19 November 2008. In dealing with the application for removal, his Honour noted that:

“[59] Section 127 of the Act provides that a caveatee may, at any time, apply to the court for an order that a caveat be removed.

[60] On such an application, the caveator (in this case, the first plaintiff) bears the onus of demonstrating that:

- a) there is a prima facie case to be tried which would justify the continuation of the caveat; and
- b) the balance of convenience favours the retention of the caveat.

[61] The latter consideration requires “a sufficient likelihood of success to justify in the circumstances the preservation of the status quo”.

- [11] As to the first consideration, Daubney J found that there was a serious question to be tried as to the caveator’s interest.<sup>1</sup> This finding is accepted by both parties in the current proceeding.
- [12] As to the second consideration, Daubney J reasoned:

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<sup>1</sup> *Bli Bli #1 Pty Ltd & Anor v Kimlin Investments Pty Ltd & Ors* [2008] QSC 289, [62].

“[63] It is then necessary to consider where the balance of convenience lies. The third defendant [RCBC] did not take me to any evidence that it would be prejudiced in the event the Caveat remained. On the other hand, if I order removal of the Caveat, the plaintiffs’ interest in the property itself is liable to be lost, leaving them only with a claim for damages.

[64] The third defendant, however, contended that, notwithstanding the fact that the plaintiffs have previously provided security for the defendants’ costs up to and including the first day of trial, they would not be sufficiently protected by any undertaking as to damages given by the plaintiff corporations. This concern, however, would appear to have been met by the fact that the director of the plaintiffs, as the only person with a pecuniary interest in the plaintiffs’ claim, has “come out from behind the skirts of the company” to give a personal undertaking.

[65] In those circumstances, the balance of convenience favours the plaintiffs and I would refuse the application for an order that the Caveat be removed.”

- [13] The major causes of contention between parties are the applicant’s willingness or lack thereof to provide financial information concerning the development and the adequacy of undertakings offered by RCBC to protect the respondent’s interests.

#### **Applicant’s case - change of circumstances**

- [14] RCBC’s case in these proceedings is that there has been a material change of circumstances since the decision of Daubney J which alters the balance of convenience. It submits that the change in circumstances alone warrants the removal of the caveat, notwithstanding the conceded existence of a serious question to be tried.
- [15] The factors which are said to constitute the ‘change of circumstances’ are set out in the affidavits of Brett Cook and others. These may be summarised as follows:
- On 1 December, the applicant was granted approval for Operational Works (bulk earthworks) in relation to Lot 4 by the Maroochy Shire Council. This approval allows RCBC to commence subdivisional works under a development permit to reconfigure Lot 4 (Major Urban Subdivision – 19 Industrial Lots plus Balance Area) with a view to selling the subdivided lots at a profit. The development approval will expire on 1 December 2010 in the event that the approved operational earthworks are not complete.
  - RCBC is unable to start development work without access to additional project finance (required amount likely to exceed \$5 million). Inquiries made with the applicant’s current financier and other financial institutions indicate no financier will consider an application for finance over Lot 4 while the caveat remains. Other evidence suggests the application fee for

additional finance will exceed \$65,000. For these reasons, the applicant has refrained from preparing or submitting any formal applications for finance.

- Significant costs (thus far in excess of \$3.5 million) have been and continue to be incurred by the applicants as a result of holding Lot 4 and preparing for its development.
- If RCBC is unable to complete the development as required by the conditions of the development approval, RCBC's significant expenditure thus far will have been wasted. Alternatively, RCBC will be required to re-apply for development approval, which would result in significant additional costs and delays.
- Unless the caveat is removed, a survey plan of Lot 4 cannot be registered to allow for its subdivision and sale.

The applicant also notes that the respondent's claim has not progressed to any significant degree since their earlier application.

[16] Correspondence sent since the judgment of Daubney J on the earlier application reveal efforts were made by both parties to negotiate terms upon which the caveat might be consensually removed. Affidavit evidence shows that:

- By letter of 5 March 2009, Bli Bli offered to consent to the further encumbering of the land upon the condition that it be informed of the terms of the borrowing and being satisfied that the money would be used for the purpose of developing Lot 4. Bli Bli also offered to remove the caveat to allow RCBC to sell the land upon being satisfied of the *bona fides* of any sale and the retention of one third of the "net proceeds of sale".
- By letter of 23 April 2009, RCBC rejected Bli Bli's offer and instead offered to undertake to keep proper records of the development and to retain one third of the net proceeds "of the development" in its solicitors' trust account.
- By affidavits dated 19 May 2009, Messrs Cook have both offered undertakings that "RCBC will hold one third of the net proceeds of sale of Lot 4 (or any subdivided part of it) in trust for Bli Bli pending the determination of the claim proceeding, or further earlier order".

[17] The applicant submits that it cannot provide any financial information sought by the respondent because such information does not yet exist. Due to the unwillingness of financiers to deal with property the subject of a caveat and the high costs of submitting an application, no application has yet been made. The applicant submits that the undertakings given by Messrs Cook provide adequate protection of Bli Bli's claimed interest.

#### **Respondent's case – inadequate protection**

[18] The respondent submits that without access to loan applications and other financial documentation, there is no evidence that the development proposed by RCBC is likely to realise any profit. Even if the project is successful, it submits

the meaning of ‘profit’ is too vague to offer any reasonable assurance of return for Bli Bli. It notes that Messrs Cook offer no guarantee that the costs of the project to be deducted from the sale proceeds to determine ‘profit’ will be reasonable. Further, if the caveat is removed and further finance is obtained, the respondent will have no say over how that money is spent and it raises the concern that significant sums may be consumed by Mssrs Cook or related entities in exorbitant management and/or consultant fees. For these reasons, the respondent submits the caveat should be maintained.

### **Balance of convenience**

- [19] The principles to be applied in determining whether the balance of convenience justifies the removal of a caveat are set out in *Buchanan and Anor v Crown and Gleeson Business Finance Pty Ltd*<sup>2</sup>, another case in which the applicants acknowledged a serious question to be tried but submitted that, in the circumstances, the balance of convenience did not favour maintaining the caveat. There, Breton J stated:

[6] ... [O]n an application for the withdrawal of a caveat, the caveator bears the onus of persuading the Court that the caveat should be maintained, which is measured by reference to the same considerations which informs the Court's discretion to grant an interlocutory injunction. Although it is sometimes said that this approach descends from the decision of the Privy Council in *Eng Me Yong v Letchumanan* [1980] AC 331, in fact it was established in New South Wales before then, and was most clearly articulated by Waddell J (as he then was) in *Martyn v Glennan* [1979] 2 NSWLR 234, where his Honour explained that the principle to be applied by the Court on such an application is to inquire whether the defendant would in all the circumstances be entitled to an interim injunction, and if not to order that the caveat be withdrawn. If the defendant makes out the necessary prima facie case that it has a caveatable interest, then the further question of the balance of convenience arises. On the balance of convenience, the onus is on the caveator to show that the balance of convenience favours maintenance of the caveat [*Eng Me Yong*, 337; *Re Jorss' Caveat* [1982] Qd R 458; *Re Ridge Incentive Programs Pty Ltd (in liquidation)* (1985) Q ConvR 54–172]. And it would not be proper to continue the caveat unless the caveator gives the usual undertaking as to damages [*Martyn v Glennan*].

...

[8] Where there is a seriously arguable or undisputable caveatable interest, the Court retains a discretion, based on the balance of convenience, as to whether it will maintain the caveat or require its withdrawal. There is a valuable discussion of the cases and principles by Sheryl Jackson *Removal of a Valid Caveat — How Convenient* (1996) 4 APLJ 1. The circumstance that a caveator has

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<sup>2</sup> [2006] NSWSC 1465

a caveatable interest is not conclusive that the caveat will not be removed. The Court will order the withdrawal even of an indisputably valid caveat where the balance of convenience favours that course. An instance of this is to be found in *Australian Property & Management Pty Ltd v Devefi Pty Ltd* (1997) 7 BPR 15,255, and reference was made to it in *Esther Investments Pty Ltd v Wilson International Pty Ltd* [1982] ANZ ConvR 647.”

- [20] As such, it is well established that the balance of convenience is an independent criterion in assessing an application for removal of a caveat. As such, the balance of convenience may justify a court order to remove a caveat notwithstanding the existence of a “serious question to be tried”. The onus lies on the caveator to justify the caveat’s continuation.<sup>3</sup>
- [21] Factors which have been identified as relevant in determining the balance of convenience have been discussed in several judgments. They include:
- Amount claimed as a proportion of value of land the subject of caveat: *Re Burman’s Caveat* [1993] 1 Qd R 123;
  - Whether alternative security is offered: *Re Burman’s Caveat*;
  - Whether the caveat is too wide – that is, whether it goes beyond what is necessary to protect the caveator’s interest: *Queensland Estates Pty Ltd v Co-Ownership Land Development Pty Ltd* [1969] Qd R 150 at 155-156;
  - Whether the party applying for removal of the caveat has an interest in the land superior to that of the caveator, and in particular, whether that party is being prevented by the caveat from a legitimate exercise of its rights: *Buchanan*
  - Whether the caveat prevents the registered proprietor from the legitimate exercise of a right in respect of the land, including a proper sale or refinance (as was suggested in *Esther Investments v Wilson International*): *Buchanan*; and
  - Whether the removal of the caveat will derogate from the caveator's claim: *Buchanan* at 465.

This last consideration was given particular emphasis in *Buchanan*, and it was stated that “it is a rare case where a valid caveat will be removed for reasons of the balance of convenience”.<sup>4</sup>

- [22] Against the above statement, however, must be balanced such statements as are found in *Australian Property & Management Pty Ltd v Devifi Pty Ltd*:<sup>5</sup>

“[T]he Court has said in cases such as *Martyn v Glennan* that it will not allow caveats, even if they are legitimate caveats, to oppress the registered proprietor unduly. *The Court does not live in some commercial vacuum. The Court knows that the mere presence of a*

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<sup>3</sup> *Re Burman’s Caveat* [1994] 1 Qd R 123, reaffirming the decision of the Full Court in *Re Jorss’ Caveat* [1982] Qd R 458 at 465.

<sup>4</sup> At [11].

<sup>5</sup> [1997] 7 BPR 15,235 at 15,257

*caveat may prevent a whole series of bona fide commercial transactions taking place and if a case gets into that sort of area the Court will be extremely careful as to whether the caveat should be retained. An example is Re Clements Caveat [1981] Qd R 341. If in such a circumstance a substitute security can be given then the Court is often minded to order that the caveat be removed.”* (emphasis added)

#### **Factors relevant to balance of convenience here**

- [23] I am satisfied that the existence of the caveat is stifling the commercial development of the land in question. The original undertakings offered by RCBC were subject to too many variables and, thus, it was too difficult to adequately assess their value.
- [24] After the hearing of this application an affidavit was filed on behalf of the applicant in which an offer to undertake was made to hold one third of the net proceeds of the sale of Lot 4 (or any subdivided part of it) in trust pending the determination of the major proceeding. That is almost identical to the offer made by Bli Bli and referred to above.
- [25] Bli Bli also argued that there had been substantial delay in the making of the second application. There has. There has also been substantial delay in the prosecution of the major proceeding. Nevertheless, that is not necessarily a reason to tie up the development of the subject land. The speedy resolution of the major proceeding can be enhanced by the making of directions – which I intend to do after hearing from the parties.

#### **Conclusion**

- [26] I will order that the caveat be removed upon RCBC providing an undertaking to maintain in trust an amount equal to one third of the proceeds of sale of Lot 4.
- [27] I will hear the parties on costs and further directions.