

SUPREME COURT OF QUEENSLAND

CITATION: *Layton v Miller* [2009] QSC 377

PARTIES: **GEOFFREY LAYTON**
(plaintiff)
v
CHERYL ANNE MILLER
(defendant)

FILE NO: BS4838 of 2008

DIVISION: Trial Division

PROCEEDING: Trial

DELIVERED ON: 23 November 2009

DELIVERED AT: Brisbane

HEARING DATE: 1 October 2009

JUDGE: Mullins J

ORDER: **1. It is declared that the defendant holds the estate in fee simple in the land described as Lot 46 on RP903443 in the County of Canning Parish of Beerwah Title Reference 50138978 (the land) subject to an equitable charge in favour of the plaintiff to secure repayment of the sum of \$383,353.85 (without interest) to the plaintiff on the sale of the land or the death of the defendant, whichever is the earlier.**
2. Leave is given to the plaintiff to lodge a further caveat on the title of the land claiming the interest referred to in order 1 above.
3. The defendant must do all such acts and sign all such documents as may reasonably be required to enable the further caveat on the title of the land to be lodged by the plaintiff with the consent of the defendant in respect of the equitable charge referred to in order 1 above.
4. The defendant must pay the plaintiff's costs of this proceeding to be assessed.
5. Each party has liberty to apply to contend for a different costs order or otherwise in respect of the terms of these orders on notice to the other party on or before 3 December 2009.
6. There is otherwise liberty to each party to apply on two days' notice in writing to the other.

CATCHWORDS: EQUITY – GENERAL PRINCIPLES – EQUITABLE CHARGES AND LIENS – MONEY EXPENDED OR BENEFIT CONFERRED ON PROPERTY OF ANOTHER – where plaintiff provided purchase moneys for real property

registered in the name of the defendant – where parties were not in a relationship at time moneys were paid by the plaintiff and total payment was significant – where no agreement as to the terms on which plaintiff provided the moneys for the purchase by the defendant of the property – whether there was a gift or a loan made by the plaintiff of the purchase moneys – where plaintiff intended to protect eventual repayment of the purchase moneys by securing repayment against the title of the property by means of a caveat, but did not intend to acquire an interest as beneficial owner of the land – where defendant denied that plaintiff has any interest in the property or entitlement to repayment of the purchase moneys – whether plaintiff entitled to equitable relief by way of an equitable charge over the property for the repayment of the purchase moneys

Land Titles Act 1994, s 129

Calverley v Green (1984) 155 CLR 242, followed
Charles Marshall Pty Ltd v Grimsley (1956) 95 CLR 353, considered
Muschinski v Dodds (1985) 160 CLR 583, considered

COUNSEL: TF Pincus for the plaintiff
 The defendant in person

SOLICITORS: Hopgood Ganim Lawyers for the plaintiff

- [1] The plaintiff and the defendant met through an internet dating service in March 2006 and a sexual relationship developed, but it ended after an argument between them on 12 January 2007. The plaintiff and the defendant were not de facto partners.
- [2] The plaintiff was and is a successful businessman. The defendant was in less secure financial circumstances, but owned her own home in Brisbane which was subject to a mortgage in favour of her bank, and was in employment.
- [3] After their relationship ended, there were a couple of occasions when the defendant had contact from the plaintiff before she contacted him around June 2007. At that time the plaintiff indicated to the defendant that he would be happy to pay her a sum of money each month to alleviate her financial problems. He made payments of \$1,000 to the defendant's bank account on four occasions between 13 June and 31 August 2007 and made a payment of \$1,500 on 30 October 2007. He made further payments to the defendant's bank account of \$1,500 on each of 14 December 2007 and 30 January 2008 and a payment of \$2,000 on 3 January 2008.
- [4] This proceeding is about the funds that the plaintiff provided to the defendant to purchase a house at the Sunshine Coast. The defendant paid \$1,000 to the real estate agent by way of deposit on 26 November 2007, \$400 to the defendant's

solicitors' trust account for the conveyance on 4 December 2007 and the balance purchase price and outlays of \$381,953.85 to the defendant's solicitors' trust account on 11 December 2007. The plaintiff contends this total amount of \$383,353.85 must be repaid when the defendant sells the Sunshine Coast house. The defendant claims the payment was a gift to her.

- [5] Although the plaintiff's claim in the statement of claim was pleaded on the basis that there was an agreement between the parties for the advance of the moneys by the plaintiff to the defendant that would be secured over the house property, the evidence of the plaintiff himself did not support the existence of a concluded agreement in the terms as pleaded. Ultimately the issue in the trial was the intention of the plaintiff at the time the moneys were paid to purchase the property: *Calverley v Green* (1984) 155 CLR 242, 246, 261 (*Calverley*). The parties were not in a relationship at the time the moneys were paid by the plaintiff, the total payment was significant and the moneys were used to purchase real property registered in the name of the defendant. In these circumstances, the defendant bears the onus of showing on the balance of probabilities that the moneys were paid as a gift. I am not satisfied that the defendant is able to discharge that onus. I am satisfied that the plaintiff has shown that the payments he made were in the nature of a loan and that he intended the defendant's property should be charged in his favour with the repayment of the sum of \$383,353.85 on the defendant's death or earlier sale of the Sunshine Coast property.

Evidence relevant to the plaintiff's intention at the time the moneys were paid

- [6] During the relationship the plaintiff was made aware by the defendant that she was under some financial pressure and was having trouble paying her credit card debt (at Transcript 1-13). Between July 2006 and January 2007 the plaintiff paid some of the defendant's small debts (such as \$2,400 to pay out a personal loan and \$3,893 for a hospital account) and regular payments to her credit card account. The plaintiff said that in about July 2006 he also offered to pay off the defendant's mortgage over her home in Brisbane to relieve her of making mortgage payments, and in return he would take a caveat over the property for the amount of the payment (at Transcript 1-15; 1-45). The defendant's evidence was that the offer was simply to pay out her mortgage and there was never any mention of a caveat (at Transcript 1-48). The defendant's sister could recall that on various family occasions during 2006 to which the plaintiff accompanied the defendant, she heard the plaintiff say that he wanted to pay off the mortgage over the defendant's Brisbane house. The defendant's mother gave evidence to similar effect. Both the plaintiff and defendant gave evidence of the plaintiff's offer to pay out the mortgage being renewed or referred to on a number of occasions during the course of their relationship. The defendant did not accept the offer before the relationship ended.
- [7] It is necessary to deal with the conflict in the evidence as to whether the plaintiff raised with the defendant that he would be looking for a caveat over the defendant's property, if he paid out the defendant's mortgage over the Brisbane property. The offer involved a relatively large sum of money (over \$100,000). The purpose of the offer was to give to the defendant more cash to meet her other commitments. It is unlikely that each time the plaintiff made the offer (such as the occasions in the

presence of the defendant's relatives) that he expressly referred to requiring a caveat in his favour over the Brisbane property. I accept the plaintiff's evidence, however, that the possibility of the caveat was raised between the plaintiff and the defendant. This evidence is credible because of the purpose of the plaintiff's offer, the quantum involved and the experience of the plaintiff as a businessman.

- [8] The plaintiff said that he was telephoned one night in October 2007 by the defendant who sounded depressed and referred to financial problems and that in the course of that conversation he suggested to her that she should move to somewhere in the vicinity of the Sunshine Coast with her animals (at Transcript 1-17). The plaintiff said that in about mid-November 2007 the defendant then contacted him, said she had found a house on the Sunshine Coast and asked him whether he would be prepared to revisit his offer of the previous year, because she could not afford to buy the Sunshine Coast house without his help (at Transcript 1-20; 1-42). The plaintiff responded that he would, but there was no further discussion at that time about the terms on which he would provide the financial assistance (at Transcript 1-20). The defendant's recollection as to the timing of this conversation differs from that of the plaintiff. The defendant thought the conversation in which the plaintiff offered to fund the purchase of a property for her may have occurred in June or July 2007. She said the offer was in terms that he would help her, so she did not have a mortgage at all, and she responded that she would sell her house in Brisbane and go and live on the Sunshine Coast (at Transcript 1-48). The defendant was adamant that there was never any discussion between them about a caveat or anything similar (Transcript 1-61).
- [9] On 19 November 2007 the plaintiff sent an email to the defendant stating that her Brisbane house should be on the market either that day or the next and that she had begun looking for a property in the Sunshine Coast region. (I infer that the plaintiff was mistaken when he recalled that the plaintiff had informed him that she had found a home on the Sunshine Coast at the same time she asked him to revisit his offer.) This email confirms that, as at 19 November 2007, the defendant was still looking for a house on the Sunshine Coast. Within a week the defendant had paid the deposit of \$1,000 for the purchase of the Sunshine Coast property.
- [10] On 4 December 2007 the defendant sent an email to the plaintiff stating "I have applied to increase my credit card, so at the end of this I can give you some of the extras you have paid for me." In a second email later that day, the defendant asked the plaintiff to transfer \$400 to her solicitors' trust account for the conveyance of the Sunshine Coast property and stated "I will keep track of all these moneys, to repay you".
- [11] On 10 December 2007, the defendant sent an email to the plaintiff asking for his advice about the price she should accept for the sale of her Brisbane house and stated "I want to sell it asap so you can get your money, so that is an incentive for me, But the more I get for it the more you get."
- [12] On 12 December 2007, after the plaintiff had made the final payment for the purchase of the Sunshine Coast property, the defendant asked the plaintiff in an

email “also I was wondering when did you want me to sign that paper you were having drawn up about the money?” Later that day the defendant responded:

“The lawyers have been slack in getting the paperwork done... Technically we do not know the each others share until your house sells so there is no hurry. I will keep on to it and let you know.”

- [13] The plaintiff and the defendant had dinner together after the completion of the purchase, but before the plaintiff moved to the Sunshine Coast property around 19 December 2007, to celebrate having organised the purchase of the property. By this stage the plaintiff was in a relationship with another woman. The plaintiff accepted (at Transcript 1-27) that the defendant accurately recalled that at the end of that dinner he said “good-bye” to the defendant and words to the effect “now she had the house, the mortgage was out of the road, we could get on with our lives because I was in a relationship with somebody else.”
- [14] There was an exchange of emails between the plaintiff and the defendant on 17 January 2008. The defendant asked the plaintiff “do you think we would ever get back together.” The defendant responded that it was unlikely. The defendant then asked the plaintiff as to why he would hand over so much money, if he did not want to have a relationship with her. She concluded that email with the statement “I will hand the money over when the house sells.” The defendant responded with a further email in which he stated “I like you and I have continued to support you because I thought I was helping you get on with your life when you were in dire financial trouble.”
- [15] Some time after the emails exchanged on 17 January 2008, but before 3 March 2008, the plaintiff telephoned the defendant to get documentation started for his security over the Sunshine Coast property. The defendant’s response was that she was not going to sign anything, had never had to sign anything and that was never the agreement. After that telephone call, the plaintiff sent the defendant a couple of text messages that asked about the proceeds from the sale of her Brisbane property. The plaintiff did not get any positive response from the defendant. The defendant settled the sale of her Brisbane property in February 2008 and retained the net proceeds from the sale of that property (after paying out the mortgage) of about \$160,000.
- [16] The plaintiff again followed up the defendant with a letter dated 3 March 2008 in which he referred to the defendant’s email dated 12 December 2007 and the statement made in that email inquiring about signing the paper the plaintiff was having drawn up about the money. In the letter of 3 March 2008, the plaintiff enclosed an authority addressed to the defendant’s solicitors and requested the defendant to sign it, so that he could instruct his solicitors to contact her solicitors and obtain details of the Sunshine Coast property for the purpose of preparing a document that recognised the plaintiff’s interest in the Sunshine Coast property.
- [17] The defendant sent a letter dated 5 March 2008 in reply in which she referred to a conversation that she said they had at their last dinner together in December 2007:

“Yes, I did ask you about signing something for the house; we were just talking about it. And in Dec 07, you said NO not to worry about it that you did not need the money. Our verbal agreement was that one day if and when I come into some money I could pay some of the money or all of it, it was up to me.”

- [18] When the plaintiff was asked in his evidence-in-chief about the conversation the defendant was referring to in that letter, he stated (at Transcript 1-28):

“I did say words to that effect, but on the assumption, from my point of view, that there would be a caveat over the property. My offer to her was she could have possession of the property for as long as she liked, so I could well be dead by the time she had to pay any moneys back. I did say to her, as I say, that I didn't need the money, which, I think, is obvious. If I had given it to her for a very extended period of time then I didn't need the money, but it was always – from my point of view, it was always on the basis I would have a charge over the property of some description.”

- [19] When the plaintiff was cross-examined on this aspect, he stated (at Transcript 1-39):

“... I gave you the use of the money on the subject I got a caveat in perpetuity. I didn't want that money back. I just had a charge over it and some day if you could afford to pay me, you could afford to pay me back, which is what you saying except you are not agreeing that there is a caveat and that's the big point of difference.”

- [20] The defendant concluded her letter of 5 March 2008 as follows:

“I will as we agreed that one day if and when I do come into some money, I will then give you what ever I can at that time, that was our agreement and that is what I will stick to. I am not signing anything as I don't know what the future will hold.”

- [21] When cross-examined on her reference in the letter of 5 March 2008 to an agreement, the defendant stated (Transcript 1-58):

“That was a verbal thing that Geoffrey and I said together. If I ever wanted to pay it back, it was up to me, not him. If I wanted to give him all of it one day, yes, I could or not. There was no – a definite I will. If I ever wanted to, Geoffrey said, I could. That was the only thing. So that's not agreeing to give money back on this day, that day or any day. It is if I ever came into money which he said I probably never would come into that amount of money which I probably wouldn't. So, therefore, it wouldn't be paid back”

- [22] On 23 April 2008 the plaintiff lodged a caveat over the Sunshine Coast property claiming a beneficial interest in the whole of the fee simple of the land “arising under a resulting trust and/or constructive trust created upon monetary contributions made by or on behalf of the caveator for the acquisition of such land.”

Whether the plaintiff intended to make a loan or a gift

- [23] The terms of the agreement pleaded in paragraph 7 of the statement of claim were that in mid-November 2007 the plaintiff agreed to advance to the defendant sufficient funds to enable the defendant to purchase a property of her choosing in the Sunshine Coast region and the defendant agreed to place the Brisbane property upon the market for sale, pay to the plaintiff the net proceeds of sale of the Brisbane property and consent to the plaintiff registering a caveat or other instrument to provide security for the plaintiff over the Sunshine Coast property to the extent of the difference between the advance and the balance of the net proceeds of sale of the Brisbane property paid to the plaintiff and that the plaintiff would have and retain a beneficial interest in the Sunshine Coast property, including any capital gain in the value of the Sunshine Coast property proportionate to the amount of the advance outstanding, as a percentage of the total purchase price. The dealings between the parties prior to and at or around the purchase of the Sunshine Coast property do not support any finding that the parties had reached mutually agreed terms on which the plaintiff would provide the moneys to facilitate the purchase by the defendant of the Sunshine Coast property. The plaintiff cannot prove his claim to the extent that it depends on showing an agreement was concluded between the parties.
- [24] The plaintiff's alternative claim to the one based on the existence of an agreement is an equitable claim based on the allegation that it is unfair, unjust and inequitable for the defendant to deny the plaintiff's contribution to the acquisition of the Sunshine Coast property in the circumstances of his providing the entire purchase price and that, as a result, the plaintiff has a beneficial interest in or, alternatively, entitlement to security over the Sunshine Coast property. This alternative equitable claim is based on the equitable principle that a legal owner should not be permitted to use the legal rights as an owner to abuse or subvert the intention which underlay the acquisition and possession of those legal rights: *Muschinski v Dodds* (1985) 160 CLR 583, 613.
- [25] The plaintiff was motivated in late 2007 to alleviate the defendant's financial burdens at the time, but the plaintiff was not in that category of persons who could be characterised in equity as having a natural obligation to provide for the defendant. Equity presumes that the plaintiff as the provider of the purchase price of the Sunshine Coast property did not intend for the defendant to take the property beneficially and a resulting trust in favour of the plaintiff arises, unless this presumption is rebutted by evidence which manifests an intention to the contrary: *Calverley* at 246, 255, 266-267.
- [26] In considering whether the presumption of a resulting trust is rebutted, the acts and declarations of the plaintiff before or at the time of the purchase or so immediately after the purchase as to be part of the transaction are primarily relevant, although subsequent declarations by the plaintiff that are against the interest of the plaintiff are admissible as evidence against the plaintiff: *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353, 365.

- [27] The plaintiff's evidence is consistent with his not intending at the time the moneys were paid at the defendant's direction for the purchase of the Sunshine Coast property to acquire an interest as the beneficial owner of the land, but with his intending to protect the eventual repayment of the purchase moneys by securing the repayment against the title of the Sunshine Coast property. The presumption of a resulting trust is rebutted by this clear evidence that is contrary to the assertion of beneficial ownership by the plaintiff of the Sunshine Coast property.
- [28] It may be that the plaintiff originally contemplated that the defendant would repay some of the moneys advanced for the purchase of the Sunshine Coast property from the sale of the Brisbane property, but that did not occur and the plaintiff in this proceeding by his evidence effectively abandoned any claim to pursue the defendant for repayment from the proceeds from the sale of the Brisbane property.
- [29] The plaintiff's evidence that he conveyed his intention to the defendant that he was providing the purchase moneys to the plaintiff as a long term loan and the defendant should give some security over the Sunshine Coast property to support the eventual repayment of the purchase moneys is supported by the evidence of the conversation between the plaintiff and the defendant at the celebratory dinner shortly after the purchase of the Sunshine Coast property when the defendant asked the plaintiff "about signing something for the house." It also was evidence that the interest of the plaintiff arising from the payment of the moneys for the purchase of the Sunshine Coast property was less than would follow by the application of the presumption of a resulting trust. The emails exchanged between the parties in December 2007 and January 2008 also confirm that the parties contemplated repayment by the defendant of the moneys that the plaintiff had paid in relation to the purchase of the Sunshine Coast property at some time in the future and that would be recorded in a document signed by the defendant.
- [30] There was opportunism in the defendant's approach to this proceeding in that she placed great reliance on the failure of the plaintiff to obtain anything from her in writing at the time the funds were provided for the purchase of the Sunshine Coast property, although at the time of the purchase she contemplated signing a document that the plaintiff would have obtained from his solicitors. Her defence focused on the lack of any concluded agreement being reached between them. There were sufficient references in the written communications from the defendant in December 2007 and January 2008 that were consistent with the plaintiff's version of events that convinced me to prefer the plaintiff's evidence to the defendant's evidence on their dealings that resulted in the purchase of the Sunshine Coast property. I accept the plaintiff's evidence that the understanding between them in the latter part of 2007 was that the funds were provided by the plaintiff to enable the defendant to purchase the Sunshine Coast property on like terms to those which the plaintiff had offered to pay out the mortgage over the Brisbane property.
- [31] In the circumstances of the plaintiff's earlier offers to pay out the defendant's mortgage over the Brisbane property on the basis that he would have the benefit of a caveat or other security lodged over that property, the quantum of the purchase moneys provided by the plaintiff for the purchase of the Sunshine Coast property in the defendant's name at a time when the parties were no longer in a relationship and

the content of the communications between them at or around the time of the purchase of the Sunshine Coast property, the plaintiff has shown that the payments he made were in the nature of a loan, and the repayment of which was intended by him to be charged on the Sunshine Coast property. It follows that the defendant has failed to prove that the moneys were paid as a gift.

- [32] The alternative claim for equitable relief arising from the circumstances in which the payment of \$383,353.85 was made by the plaintiff to the benefit of the defendant was for a declaration that the defendant holds the Sunshine Coast property subject to an equitable charge in favour of the plaintiff to secure repayment in the sum of \$383,353.85. Mr Pincus of counsel who appeared for the plaintiff expressly informed the court (at Transcript 1-77) of his instructions that the plaintiff did not seek any order that would have the effect of the defendant being forced to sell the Sunshine Coast property or repay the loan prior to sale of the property at a time of her election or, upon her death. It was also acknowledged that no evidence was given that supported repayment of any amount beyond the principal sum. The equitable relief granted by the court should reflect these concessions. A declaration in the terms sought by the plaintiff to recognise the equitable charge claimed by him is appropriate equitable relief to prevent the unconscionable reliance by the defendant on her legal ownership of the Sunshine Coast property when the purchase price was paid by the plaintiff.
- [33] The declaration as to the existence of this equitable charge reflects an interest in the Sunshine Coast property in favour of the plaintiff which is different to that which was claimed in the caveat. The issue then arises as to how the charge in favour of the plaintiff against the title of the Sunshine Coast property can be preserved. Although in the course of argument, I raised the possibility of a vesting order, on reflection I consider that Mr Pincus' submission that the plaintiff should be permitted to lodge a further caveat is an appropriate course.
- [34] In order to give the equitable relief to the plaintiff appropriate to the interest in the Sunshine Coast property that has been found to exist in his favour, consequential relief should be ordered to enable the plaintiff to lodge a caveat in support of the equitable charge that will be the subject of the declaration made in this proceeding. Because the grounds of claim that support the interest claimed in the existing caveat of the estate and fee simple also apply to the equitable charge, leave must be given under s 129 of the *Land Titles Act* 1994 to lodge a further caveat by the plaintiff that is limited to the equitable charge.

Orders

- [35] At the conclusion of the trial, I indicated that it was likely that I would be making findings in favour of the plaintiff and against the defendant and heard preliminary submissions on costs, in order to avoid further appearances. I did, however, indicate to the parties that on the publication of my reasons, I would give each party 10 days in which to apply on notice to the other, if either party wished to contend for a different order for costs or wished to raise any issue about the terms of the orders made by me. There should otherwise be liberty to apply in case there are

problems in carrying out the terms of the orders. As the plaintiff succeeded in his alternative claim for relief, the defendant should pay the plaintiff's costs of the proceeding.

[36] Pending any further submissions, the orders I make are:

1. It is declared that the defendant holds the estate in fee simple in the land described as Lot 46 on RP903443 in the County of Canning Parish of Beerwah Title Reference 50138978 (the land) subject to an equitable charge in favour of the plaintiff to secure repayment of the sum of \$383,353.85 (without interest) to the plaintiff on the sale of the land or the death of the defendant, whichever is the earlier.
2. Leave is given to the plaintiff to lodge a further caveat on the title of the land claiming the interest referred to in order 1 above.
3. The defendant must do all such acts and sign all such documents as may reasonably be required to enable the further caveat on the title of the land to be lodged by the plaintiff with the consent of the defendant in respect of the equitable charge referred to in order 1 above.
4. The defendant must pay the plaintiff's costs of this proceeding to be assessed.
5. Each party has liberty to apply to contend for a different costs order or otherwise in respect of the terms of these orders on notice to the other party on or before 3 December 2009.
6. There is otherwise liberty to each party to apply on two days' notice in writing to the other.