

# SUPREME COURT OF QUEENSLAND

CITATION: *Buranda Properties Pty Ltd v Buranda Properties Pty Ltd as t'ee* [2010] QSC 357

PARTIES: **BURANDA PROPERTIES PTY LTD ACN 107 067 785  
(RECEIVERS & MANAGERS APPOINTED)**  
(applicant)  
v  
**BURANDA PROPERTIES PTY LTD ACN 107 067 785  
AS TRUSTEE UNDER INSTRUMENT 707885873,  
711154298, 710393984 and 711290541**  
(respondent)

FILE NO/S: BS8836 of 2010

DIVISION: Trial Division

PROCEEDING: Originating application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 10 September 2010

DELIVERED AT: Brisbane

HEARING DATE: 31 August 2010

JUDGE: Margaret Wilson J

ORDER: Upon the undertaking of each of Buranda Properties Pty Ltd as trustee under instruments 707885873, 71154298, 710393984 and 711290541, Mr Paul Brenton Cunningham and Mrs Tracey Lee Cunningham to compensate anyone who suffers loss as a result of caveat number 713392309 being found to be lodged or maintained without reasonable cause:

THE ORDER OF THE COURT IS THAT:

1. The Application is dismissed.
2. The costs of and incidental to the Application be reserved pending the decision of the Federal Court in Proceedings NSD 1033/2010 (now in the Queensland Registry) between Buranda Properties Pty Ltd as trustee for the Cunningham Property Trust as the Applicant and Westpac Banking Corporation as the Respondent or further earlier order of this Court.

CATCHWORDS: REAL PROPERTY – Torrens title – caveats against dealings – removal – other matters – where applicant gave various securities to Westpac Banking Corporation including a fixed and floating charge over all its assets and an undertaking – where Westpac exercised powers under the securities to

appoint receivers and managers to the mortgaged property in May 2010 – where applicant lodged a caveat in August 2010 – whether there is a serious question to be tried – whether the balance of convenience favours removal of the caveat

CONTRACTS – general contractual principles – construction and interpretation of contracts – commercial contracts – where facility provided by Business Finance Agreement – where Variation Agreement extended the term of the facility and required realisation programme and further securities from the applicant – whether Variation Agreement affected Westpac’s discretion to refuse consent to a sale

*Allen’s Asphalt Pty Ltd v S P M Group Pty Ltd* [2010] 1 Qd R 202, cited

*Elderslie Property Investments No 2 Pty Ltd v Dunn* [2008] QCA 158, considered

*Genrich v Maitland Holdings Pty Ltd* [1982] Qd R 58, cited  
*Inglis v Commonwealth Trading Bank* (1971) 126 CLR 161, cited

COUNSEL: T Sullivan SC with E Goodwin for the applicant  
M M Stewart SC with N M Cooke for the respondent

SOLICITORS: Mallesons Stephen Jaques for the applicant  
Lazarus Legal Group for the respondent

- [1] **Margaret Wilson J:** This is an application to remove a caveat. It came before the court on 27 August 2010, when it was adjourned to 31 August 2010. Submissions were received on 31 August and the decision reserved. The following are my reasons for dismissing the application.
- [2] The applicant is Buranda Properties Pty Ltd (Receivers & Managers Appointed). The respondent is Buranda Properties Pty Ltd as trustee under four instruments.
- [3] Buranda Properties Pty Ltd ("the Company") gave various securities to Westpac Banking Corporation, including a fixed and floating charge over all its assets and undertaking in its own capacity and as trustee and various registered mortgages over land. Under the deed dated 7 May 2010 Westpac exercised powers under the securities to appoint receivers and managers to the mortgaged property.
- [4] Mr Paul Cunningham is the sole director of Buranda Properties Pty Ltd. He disputes the validity of the appointment of the receivers and managers, and has caused a proceeding in the Company’s name to be commenced in the Federal Court against Westpac seeking (inter alia) an order terminating their appointment. He apparently contends that since he is disputing the appointment of the receivers, he has a residual power to act in the name of the Company.
- [5] On 4 August 2010 Mr Cunningham lodged a caveat in the name of the Company as trustee as caveator over various properties at Woolloongabba which had been mortgaged to Westpac. They are all within the block bounded by Logan Road, Maynard Street, Sword Street and Deshon Street, although they do not comprise all

of the land in that block. The interest claimed in the caveat is that of registered owner of the land. The grounds are stated as follows –

- "1. The Caveator is the Registered Proprietor of the Land
2. The appointment of the Receiver on 7 May 2010 is invalid and of no effect."

[6] The caveator bears the onus of persuading the court that the caveat ought to remain.<sup>1</sup> The principles applicable to an interlocutory injunction apply to the question whether a caveat should be removed.<sup>2</sup> Thus the court has to consider whether there is a serious question to be tried and the balance of convenience, as well as whether damages would be an adequate remedy. Other issues can be whether the caveat is too wide, and whether the respondent should pay the amount owing into court.<sup>3</sup>

[7] By a Business Finance Agreement made on 20 December 2007, Westpac provided a facility of \$32.57 million secured against properties then valued at \$57 million. The facility was to expire on 30 June 2009. On 1 September 2009 Westpac and the Company entered into a Variation Agreement. There was a series of Common Provisions applicable to the two facilities and the various securities.

[8] The Business Finance Agreement provided (inter alia) –

"No partial release of Lender security properties to be allowed as they are to remain as a contiguous holding as security by the Lender."

[9] The Common Provisions provided, inter alia –

**"C2 YOUR OTHER OBLIGATIONS**

You promise to do all of the following at all times

...

**No Dealings**

Not:

...

- Sell or otherwise dispose of any Property or any interest in it (except sale of Property subject to a floating charge, in the ordinary course of your business);

...

Unless the Lender first gives its consent. "

**"D3 WHAT HAPPENS ON DEFAULT?**

At any time after a Default Event which has not been waived (whether or not it is continuing) the Lender can do any one or more of the following to the extent permitted by law.

...

In the case of a Mortgage, Charge or a Security Document:

...

- Sell the Property in one or more lots or with other Property; and
- Appoint one or more receivers and managers."

<sup>1</sup> *Genrich v Maitland Holdings Pty Ltd* [1982] Qd R 58 at 63, 69.

<sup>2</sup> *Allen's Asphalt Pty Ltd v S P M Group Pty Ltd* [2010] 1 Qd R 202 at [45]; [2009] QCA 134.

<sup>3</sup> *Inglis v Commonwealth Trading Bank* (1971) 126 CLR 161.

**"D13 CONSENTS AND OPINIONS**

The Lender may do all of the following at its absolute discretion (unless otherwise expressly provided) to the extent permitted by law:

- Give or withhold consents;
- Be satisfied or unsatisfied;
- Form opinions;
- Make determinations or variations; and
- Exercise its rights and powers."

[10] The Variation Agreement did not alter the limit of the facility, but it extended the term to 31 August 2010. Essentially it required the Company to provide further securities and to implement a Realisation Program. Security was to be provided over properties not previously secured (except in some cases by the mortgage debenture) –

- 837 Stanley Street and 1020 Stanley Street East (a mortgage from the Company);
- 1 and 11 Sword Street (the Company to give a guarantee of obligations under a mortgage given by the registered proprietor); and
- a limited guarantee by Mrs Tracey Lee Cunningham (supported by mortgages Westpac already held).

Thus Westpac obtained security over properties falling into two groups –

- (i) Five properties on Sword Street, four properties on Logan road, one property in Maynard Street and two properties in Deshon Street; and
- (ii) Properties in Stanley Street and Stanley Street East.

[11] The Company was to implement a Realisation Program to achieve five reductions in debt –

- (i) \$2,733,500 by 15 October 2010;
- (ii) \$1,836,500 by 31 December 2009;
- (iii) \$6,450,500 by 31 March 2010;
- (iv) \$15,350,000 by 30 June 2010; and
- (v) The balance by 31 August 2010.

It was a requirement of the Realisation Program that four specified properties (1, 5, 7 and 9 Sword Street) be sold by 15 October 2009. It was a further requirement that certain proportions of the net proceeds of sale of those properties and the remaining properties be paid to Westpac. Otherwise it was left to the Company to implement the Realisation Program. It was expressly provided:-

"Despite anything else in this letter, where the Bank agrees to the sale of a property subject to its security, the terms and conditions of any such contract of sale must be satisfactory to the Bank in its sole discretion."

- [12] The Company met its debt reduction obligations on 15 October 2009 and 31 December 2009.
- [13] On 22 February 2010 Madsen Finance, a broker acting on behalf of Mr Cunningham and the Company, sent a letter to Westpac informing it that Mrs Cunningham had offered to purchase 170 Logan Road for \$4.2 million and 174 Logan Road for \$2.3 million to be settled by 29 March 2010. Mrs Cunningham was a shareholder of the Company and a beneficiary of the trust of which the Company was trustee.
- [14] On 4 March 2010 Mr Kiburg, then the Director of the Asset Structuring Group of Westpac in Queensland, refused the bank's consent to the proposed sale. It is common ground that he wished to preserve the opportunity of selling all of the Woolloongabba properties in one line.
- [15] On 31 March 2010 the Company did not meet its debt reduction obligation. The next day Westpac demanded immediate payment of principal, interest and fees totalling \$28,222,355.39.
- [16] On 7 May 2010 Westpac appointed receivers and managers to the Company's assets.
- [17] By 31 July 2010 the Company owed Westpac more than \$29.5 million plus costs and interest. Interest has been accruing at \$9,332.88 per day.
- [18] Counsel for the respondent company submitted that in refusing to consent to the sale of 170 and 174 Logan Road to Mrs Cunningham, Westpac breached the Variation Agreement. The submission went on that had the bank consented to the sale, the Company would have received money which would have permitted it to remain on track in meeting the debt reduction obligations pursuant to the Variation Agreement.<sup>4</sup>
- [19] Counsel for the applicant submitted that the Variation Agreement did not take away Westpac's absolute discretion not to agree to any particular sale and not to be satisfied as to the terms and conditions of any particular sale.
- [20] Thus, there is a question of the proper construction of the Variation Agreement.
- [21] The principles applicable to the construction of commercial agreements were summarised by Muir JA in *Elderslie Property Investments No 2 Pty Ltd v Dunn*<sup>5</sup> as follows:-

"[20] The object of contractual construction is to 'ascertain and give effect to the intentions of the contracting parties.'<sup>6</sup> Those intentions, to be determined objectively, are 'what a reasonable person would have understood [the words of the contract] to

<sup>4</sup> Another valuer, Mr Peter Phippen of Abbots Valuers, has recently been engaged by Mr and Mrs Cunningham to assess the value of 170-174 Logan Road as at 22 February 2010. He has not completed his valuation, although he has expressed a preliminary view that \$6.5 million in late 2009 would have been a very good offer and that it is unlikely to be bettered in the current market.

<sup>5</sup> [2008] QCA 158 at [20]-[22].

<sup>6</sup> *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715 at 737; [2003] UKHL 12.

mean.<sup>7</sup> And to ascertain that 'normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.<sup>8</sup> Such a reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation which they were in at the time of the contract.<sup>9</sup> The Deeds, as commercial contracts, 'should be given a businesslike interpretation.' The interpretation of each Deed requires 'attention to...the commercial circumstances which the document addresses, and the objects which it is intended to secure.'<sup>10</sup> Commercial contracts are to be construed with a view to making commercial sense of them.

[21] In *Wickman Machine Tool Sales Ltd v L Schuler AG*<sup>11</sup> Lord Reid said:

'The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.'

[22] In *Antaios Compania Naviera SA v Salen Rederierna AB*<sup>12</sup>, Lord Diplock expressed stronger views concerning the imperative to make business sense of commercial contracts, stating:

'If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.'

[22] I have already set out the essential provisions of the Variation Agreement. The Company was required to sell the four Sword Street properties and complete that sale by 15 October 2009. The submission of counsel for the respondent that Westpac necessarily had an obligation to permit this to happen has much to commend it. An unfettered right to insist on a sale of all the Woolloongabba properties in one line would be irreconcilable with the obligation to permit the sale of the Sword Street properties by 15 October 2009. Their alternative submission also has considerable force, that is, that entering the Variation Agreement, thereby agreeing that the lots need not be sold in one parcel, was itself an exercise of the absolute discretions specified in the earlier documents. They submitted that the provision of the Variation Agreement that the terms and conditions of any contract of sale must be satisfactory to Westpac in its sole discretion allowed the bank to refuse consent because, for example, a proposed sale was at an undervalue, but not because of the desire to sell all of the properties in one line.

<sup>7</sup> *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179; [2004] HCA 52.

<sup>8</sup> *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179; [2004] HCA 52.

<sup>9</sup> Per Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society*; [1998] 1 WLR 896 at 912; [1997] UKHL 28.

<sup>10</sup> *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 58; [2000] HCA 65.

<sup>11</sup> [1974] AC 235 at 251; [1973] UKHL 2.

<sup>12</sup> [1985] AC 191 at 201.

- [23] The only matters of context which may be taken into account are those known to both parties at the time the Variation Agreement was made. They included the following:-
1. The original facility had expired on 30 June 2009, and all moneys were due and payable.
  2. CB Richard Ellis had valued the property on 15 June 2009. The valuation had been commissioned by Westpac and Mr Cunningham had been given a copy of it. The valuer considered the market value of the land as one parcel as \$30 million. He then considered the value of combinations of lots into 'super lots' which would be sold as separate parcels. On that basis, the valuation was approximately \$40 million. If 170-174 Logan Road was sold as a super lot, the gross value would be \$11.1 million and the net value after costs of sale were deducted \$8.29 million.
- [24] The Variation Agreement conferred a considerable potential benefit on Westpac. The orderly realisation of the properties by the Company was likely to produce a greater return than a mortgagee's sale, and the stipulations for staged debt reduction and the application of proportions of the sale proceeds provided some security that the debt would be reduced as required. That the valuation evidence available at the time suggested that sale in 'super lots' would produce a greater return than sale as one parcel supports the construction of the Variation Agreement for which the respondent contends.
- [25] In the course of oral submissions, there was considerable discussion of events which took place after the Variation Agreement was made. Those events are not part of the matrix of facts which may be taken into account in construing the Agreement. Nor should Mr Kiburg's analysis and approach to the making of the Variation Agreement be taken into account, as there is no evidence that he conveyed his thoughts to Mr Cunningham.
- [26] I accept the submission of counsel for the respondent that there is a serious question to be tried whether the respondent's failure to meet the third milestone for debt reduction as required by the Variation Agreement was caused by Westpac's breach of that agreement in refusing to consent to a sale of 170-174 Logan Road because it preferred that all of the land be sold as one parcel.
- [27] I turn then to the balance of convenience.
- [28] Undertakings in the usual terms have been offered by the respondent and by Mr and Mrs Cunningham personally. There is evidence that Mr Cunningham has net assets of \$500,000 and that Mrs Cunningham has net assets of approximately \$6 million.
- [29] The debt owing to Westpac is in excess of \$29 million. Interest is continuing to accrue.
- [30] In June 2009 CB Richard Ellis valued the property at between \$30 million and \$40 million. In February 2010 Westpac retained another valuer, Jones Lang LaSalle, but there is no evidence of receipt of that valuation.

- [31] On the material before the court, then, if the caveat remains, the security available to Westpac (including the undertakings given by Mr and Mrs Cunningham) exceeds the value of the debt by a considerable amount. In other words, there is no unacceptable risk that Westpac will not recover its debt.
- [32] The hearing on 31 August 2010 extended over several hours and did not conclude until after 5.30pm. There was an auction scheduled for the next day. Clearly the continued presence of the caveat would prevent that auction proceeding. On the other hand, there was no evidence that it could not be postponed.
- [33] If the Company is ultimately successful in its dispute with Westpac, it may recover damages against the bank. While there is no reason to think Westpac would not be able to meet an award of damages, the complexity of the claim, and the costs and the delays involved in the litigation would be a considerable impost on Mr and Mrs Cunningham in the first instance and ultimately on the Company.
- [34] In all the circumstances, I consider that the balance of convenience supports the retention of the caveat.
- [35] In their written submissions, counsel for the applicant argued that it should be a condition of an order dismissing the application that the outstanding debt be paid into court. I understood that submission to have been prepared at a time before Mr and Mrs Cunningham proffered their undertakings as to damages. Indeed, the concluding words of the written submissions were, "If the caveat is to be maintained, the respondent should be required to pay the outstanding debt into court or Mr and Mrs Cunningham be asked to provide the usual undertaking as to damages".
- [36] In the circumstances I will not make it a condition of dismissing the application that the amount of the debt be paid into court.
- [37] I will hear the parties on costs and directions for the further conduct of the proceeding.

### **Addendum**

- [38] After hearing submissions on costs, I determined that the costs of and incidental to the application should be reserved pending the decision of the Federal Court in the proceedings between Buranda Properties Pty Ltd as trustee for the Cunningham Property Trust and Westpac Banking Corporation or further earlier order of this Court.

### **Orders**

- [39] Counsel subsequently agreed upon the form of the orders as follows:

Upon the undertaking of each of Buranda Properties Pty Ltd as trustee under instruments 707885873, 71154298, 710393984 and 711290541, Mr Paul Brenton Cunningham and Mrs Tracey Lee Cunningham to compensate anyone who suffers loss as a result of caveat number 713392309 being found to be lodged or maintained without reasonable cause:<sup>1</sup>

THE ORDER OF THE COURT IS THAT:



1. The Application is dismissed.
2. The costs of and incidental to the Application be reserved pending the decision of the Federal Court in Proceedings NSD 1033/2010 (now in the Queensland Registry) between Buranda Properties Pty Ltd as trustee for the Cunningham Property Trust as the Applicant and Westpac Banking Corporation as the Respondent or further earlier order of this Court.

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- 1 The undertakings were given on the basis that in any proceeding for compensation pursuant to one or more of the undertakings, it must be presumed that the caveat was lodged or continued without reasonable cause, unless the person or persons who provided the undertaking or undertakings the subject of that proceeding prove that the caveat was lodged or continued with reasonable cause.