SUPREME COURT OF QUEENSLAND

CITATION:	*Australia & New Zealand Banking Group Ltd v Menzel & Anor* [2015] QSC 127
PARTIES:	**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED** ABN 11 005 357 522 (applicant) **v** **MARGARET FRANCES MENZEL** (first respondent) **MAX RICHARD MENZEL** (second respondent)
FILE NO/S:	SC No 2498 of 2015
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 April 2015
DELIVERED AT:	Brisbane
HEARING DATE:	23 April 2015
JUDGE:	Philip McMurdo J
ORDER:	**Delivered ex tempore on 23 April 2015:** **1. Order as per draft.** **2. The respondents' oral application to lodge a further caveat is refused.**
CATCHWORDS:	EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INJUNCTIONS FOR A PARTICULAR PURPOSE – where the respondents were restrained from lodging any further caveats or other land title documents over the properties PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – where the respondents' case was not presented in a way expected of parties who are legally represented – normal practice for parties to provide an outline of submissions – where the respondents' outline of argument was in the form of a two-page document handwritten and signed by the respondents' counsel – where the way the oral argument was presented provided a stark illustration of the need for an outline of argument which is properly presented so the court

can be appraised of the issues in the case

REAL PROPERTY – TORRENS TITLE – CAVEATS AGAINST DEALINGS – REMOVAL – application for removal of four caveats – where the applicant held the first registered mortgages over the properties and had contracted to sell them pursuant to its power of sale as mortgagee – where settlement of the contracts of sale was held up by the presence of the caveats

Property Law Act 1974 (Qld), s 84, s 85

COUNSEL:	J McKenna QC, with G Coveney for the applicant P E King for the first and second respondents
SOLICITORS:	DibbsBarker for the applicant Reardon & Associates for the first and second respondents

HIS HONOUR: The present question is whether the application for removal of caveats which was filed on 11 March 2015 and which by a series of adjournments is before the Court today for hearing, should be further adjourned. On 27 March 2015 it was before the Court in this list. It was adjourned to 16 April and the parties agree that it has been further adjourned to today's date. But on that date, 27 March, Justice Daubney made some directions for the provision of a document by the respondents which was described as a "fully particularised statement of fact and contentions".

A document has been filed in apparent response to that direction. But, at the same time, as I've already said, his Honour did adjourn the originating application rather than dismiss it or stay it. In other words, it is clear, even without the benefit of the transcript, which I have seen, that the originating application was adjourned for further hearing within this list rather than sent off for a trial. The respondents submit that that is what should occur and I was addressed at length about the various causes of action which it is said I would find articulated within this document which was filed in apparent response to his Honour's order. Nevertheless, the present applications must be determined and determined today if that can done without injustice to the respondents.

Counsel for the respondents submitted that in many respects his clients are disadvantaged because they are without all of the evidence that they would wish to have for the determination of the originating application. That may be so, but in no respect did he identify to my mind some subject matter upon which further evidence for the respondents is to be forthcoming but for which there is an explanation for its present absence. In particular, it does not seem to me that any of the passages of the evidence within the affidavit of Mr Emery filed on 21 April raised matters which required an evidentiary response from the respondents which they could not have provided today.

In an endeavour to understand what the respondents' concern about the hearing of the application today was, I asked counsel for the respondents to explain by reference to the applicant's outline of argument why they were without all of the evidence today that they would wish to present. It is sufficient to say that in no respect did counsel for respondent identify an issue by reference to that document which would provide a basis for the adjournment which he sought. The application, therefore, for the adjournment of this originating application is refused.

...

HIS HONOUR: This is an application for the removal of caveats lodged on 26 February 2015. Further caveats, however, were lodged by the respondents, Mr and Ms Menzel, on 27 March 2015 and the applicant seeks an order for their removal also. At least one thing that was clear from the lengthy oral argument by counsel for the respondents, Mr and Ms Menzel, was that his clients rely upon the case articulated in the second but not the first caveats. Nevertheless, I will in a moment make some reference to them.

The observation, however, which must be made at the outset is that the respondents' case has not been presented in a way which is to be expected at least of parties who are legally represented. It is a requirement which is well understood by nearly every practitioner for matters on this applications list, at least anything which is seriously contested, that there be an outline of submissions. What the Court has in this case is two-page document written and signed by the respondents' counsel which was presented to the Court on 27 March. That has not been added to or overtaken by any outline of argument in a form which a Court and other parties to the litigation are entitled to expect.

It is unnecessary here to set out the reasons for this requirement of an outline of argument because they are or ought to be obvious. But the present case and the way the matter has been argued this morning does provide a stark illustration of the need for an outline of argument which is properly presented so that the Court can be appraised of the issues in the case and can, with all reasonable expedition but by doing justice to the parties, dispose of cases of this complexity within an interlocutory hearing.

The applications, as I have said, now relate to some four caveats. They are made in this context. The applicant is a registered mortgagee of two parcels of land of which the respondents are the registered owners. They are sugarcane farms. The applicant has contracted to sell those properties under two contracts dated 25 and 27 February 2015. At present each has an imminent settlement date but at least one thing which is common ground is that the bank is entitled under each of those contracts to extend the date for settlement to a date or dates in August 2015. The purchasers, pursuant to terms of those contracts, are already in possession of the properties.

The applicant has entered into those contracts as a mortgagee exercising its power of sale. It gave a notice of exercise of power of sale purportedly according to section 84 of the Property Law Act last December. The position between the parties, insofar as the claimed indebtedness and default of the respondents is concerned, has long been the subject of some discussion and negotiation but it is sufficient to say that last year, more particularly on or about the 22nd of May 2014 after a mediation at which the respondents were legally represented, the parties entered into what was described as a "farm debt mediation agreement" and by that agreement it was acknowledged that, amongst other things, the various facilities and securities which are the subject of the bank's claim were "valid and binding".

The agreement also recited that the borrowers, that is to say the respondents, were indebted to the bank with respect to those facilities in certain amounts which totalled in

excess of $3 million. By this agreement, it was provided that the respondents would pursue an opportunity to sell the properties and that, if the properties were unsold by 31 October 2014, the borrowers would provide vacant possession and otherwise do things or refrain from doing things to the end of facilitating a sale of the properties by the bank.

There were attempts made by the respondents to sell. By their counsel today, they have said – and I will assume this has some evidentiary foundation without making a finding of fact about it – that the bank hampered their attempts to sell. Be that as it may, they were unable to sell at the price that they thought ought to be obtained.

Importantly for the present applications, by this May 2014 agreement, they agreed upon a course whereby the property would be sold, if not by them, then by the bank, to recover what they acknowledged within the agreement to be a very substantial debt or debts.

I go then to the caveats, the first set of them being dated 26 February. The grounds of each of those caveats were stated as follows:

> *Mortgagee is fraudulently transferring title contrary to the provisions of and in breach of a certain farm debt mediation agreement*

The agreement there being identified is the one to which I have just referred. The respondents, as I have noted already, no longer rely upon that ground or those grounds and, it would appear, do not seek to maintain the presence of these caveats.

The caveats dated 27 March 2015 contained this under the heading Grounds of Claim:

> *The caveator claims an interest as owner of the land having a right to set aside the sale purportedly made on or about 25 February by the bank as having been made in breach of duty under section 85 and in breach of section 84 of the Property Law Act and in breach of a mediation agreement dated 22 May 2014 which agreement was terminated prior to 25 February 2015.*

It may be observed here that there is an apparent logical flaw in the claim that the bank sold in breach of a contract which the respondents maintained had already been terminated.

The argument for the respondents returned several times to a document filed on 13 April 2015 by the respondents headed "Counter-Claim with Statement of Facts and Contentions of Cross-Claimants". That covers a very broad range of complaints and alleged causes of action.

A trial of the entirety of the case which is advanced by this document would obviously be lengthy and would require considerable preparation. I did not understand it to be suggested by either side, most importantly the respondents, that that is a case which could be fairly tried and determined by the Court prior to the date to which settlement of the contracts of sale could be extended. I have to say that there is every indication that such case could not be fairly tried before then.

The grounds within this second set of caveats appear to be in two categories. One is clear enough, which is a complaint that the bank contracted to sell these properties without taking care to obtain the proper price, in breach of relevant provisions of the Property Law

Act. The second is not so clear: that which suggests the sale was in breach of the mediation agreement of 22 May 2014.

I go then to the respondents' outline of argument, such as it is, for some clarification of that second ground and otherwise for the purpose of discussing the respondents' case. The document begins with three paragraphs which have been written under the heading "Service", none of which, it was conceded, are presently relevant.

Then there appear five paragraphs under the heading "Arguable Case Balance of Convenience". The first of these points is that the applicant, it said, has "joined the wrong party". As this was sought to be explained, the point seems to be that the bank should have joined the purchasers and not the respondents who lodged these caveats. That submission is nonsensical and need not be further discussed.

The second paragraph is that "there is no inconvenience in deferral", by which the respondents mean that the balance of convenience is affected by the bank's ability to extend the date for settlement of the contracts. But as I have explained, there is no prospect of a trial of the case within the period ending on the date to which the settlement of the contracts could be extended.

The third paragraph in the submissions is that "the bank has breached an implied term of the mediation agreement to reasonably market the properties". This appears to be a reference to the respondents' case that the bank has not taken the steps required by the Property Law Act in the exercise of its power of sale.

Fourthly, it is submitted in this outline that "the buyers, as a result of the breach, have obtained a windfall at the expense of the respondent – in excess of 50 per cent of the price." Again, that seems to be a reference to the Property Law Act case, but with an emphasis upon the position of the buyers. As I understand the argument, it is that the court ought not to be concerned with the potential prejudice to them as arms length purchasers when their contract is so favourable to them.

Fifthly, the outline submits that there is no or was no default for the purposes of the notice given under section 84 of the Property Law Act "but a default under the mediation agreement to sell". That submission is far from clear. The default referred to in the notice of exercise of power of sale was a default in payment of the secured debt. As I have noted, earlier in 2014 the fact of the debt and the fact of the then default was acknowledged by the respondents.

Now, to these five paragraphs, counsel for the respondent asked me to add the entirety of the document filed on 13 April 2015, that is to say, his clients' counter-claim and statement of facts and contentions. It ought to be clear from the remarks I made about the requirement for a proper outline of submissions in cases of this kind that the suggestion that I in some way treat each of these allegations as a submission for the purpose of today's application, rather than an allegation of a fact relevant for a cause of action to be later tried, is quite unacceptable.

The onus, of course, in cases such as this, is upon the parties in the position of the present respondents. These cases, it is well established, are decided in a way which is analogous to the determination of an application for an interlocutory injunction. Therefore, the usual inquiry for the Court is first whether there is a serious case to be tried upon the cause of

action which is said to be the foundation for the caveat. Then, if there is a serious case to be tried, the question becomes whether the balance of convenience does or does not favour the caveat remaining on the title. The respondents undoubtedly have a caveatable interest in the sense that they are the registered owners of the land. But they must do more than that and establish at least a serious case on a cause of action which is relevant for the caveats which they seek to defend.

As to their complaint of a sale at an undervalue, they have presented no valuation evidence. There is evidence which can be presently accepted as truthful of a belief by the respondents as to the value of their properties. But there is no evidence in any form which would properly prove the true value. Nor have the respondents, at least as revealed by their counsel's submissions, identified any particular failure of the bank in the way in which it has set about the sale of these properties. As I see it, there is no serious case which has been raised on this ground.

As for the alternative ground set out in the caveats, it remains the position, notwithstanding the lengthy oral argument by counsel for the respondents, that this ground is quite unclear, at least to the extent that it extends beyond what is within the first ground. In other words, it might be understood to be a complaint of the same kind but with a different legal basis, which is that the properties have been sold at an undervalue. Therefore, insofar as the grounds within the relevant caveats are concerned, the respondents have failed to demonstrate a serious case to be tried.

In any event, the balance of convenience, in my view, favours the removal of the caveats. The bank's case, as summarised at paragraph 51(a) of its counsel's submissions, is that the balance owing by the respondents exceeds the sale price of the properties by almost $1.8 million. Counsel for the respondents challenged that but only by saying that it failed to bring into account the value of the crop on the properties which I was told on his case was of the order of $500,000. In response to that submission, counsel for the bank submitted that the value of the crop had effectively been included in that comparison resulting in the almost $1.8 million figure. It is sufficient to say that, if the respondents are correct in that respect, there is still a very substantial difference between the balance owing and the sale price of the properties.

Whilst the caveats remain and if the sale under the present contracts or other contracts is impeded, obviously interest will continue to accrue and it may be safely inferred that the gap between the debt and the likely sale price is likely to increase.

It was submitted by counsel for the respondents that regard must be had to the fact that the respondents' property is at risk and that they ought to be able to preserve their property until their case was tried. Against that, however, the respondents did agree in the settlement agreement of May 2014 to a course under which the property would be sold. For some months, according to their case, they attempted to sell it or sell them, that is, the properties. Moreover, at least through their counsel, they have complained that they were prevented from effectively selling the properties by some interference by the bank. That agreement of May 2014 and the respondents' attempts to sell according to that agreement are relevant here to the balance of convenience.

The respondents can be compensated by an award of damages in the event that the properties are found to have been sold in breach of the requirement in the Property Law Act or some other requirement. On the other hand, if the caveats remain and the bank is

effectively precluded from selling the properties but the bank ultimately succeeds in the case, it is likely to suffer losses, which it would appear, the respondents could not make good by, for example, a worthwhile undertaking as to damages.

There is a particular risk to the bank in that, should the caveats remain, it could be exposed to a claim by its purchasers under the contracts which it has made. I must also take into account the effect on those third parties. As I have mentioned earlier, it was submitted for the respondents that they would enjoy a windfall. But if the bank is ultimately adjudged to have the merits in this dispute and, in particular, on the question of the sale price, there will have been probably no particular advantage to the purchasers of the kind which is suggested and certainly not a windfall from the making of these contracts.

For these reasons the respondents have failed to discharge the onus which is upon them and I have concluded that it should be ordered that each of the caveats lodged by the respondents dated 26 February 2015 and each of the caveats lodged by them dated 27 March 2015 be removed.

It was further submitted for the bank that there should be a restraint upon the lodgement of any further caveats without the Court's leave. In the circumstances, a case is made out for that order. The way in which the respondents' case has been presented today gives every reason to think that the respondents will consider it quite appropriate to lodge further caveats if they are not restrained. It is obvious to say that they have had more than one opportunity to set out a proper basis for restraining dealings with these lands and, further, the circumstances affecting the balance of convenience are unlikely to change if and when a further caveat is lodged.

...

HIS HONOUR: I should add to the reasons which I have given something of a correction but which is not material to my reasons or the outcome. The party which lodged the caveats of February was Ms Menzel and it was Mr Menzel who lodged one of the March caveats, the other being lodged by Ms Menzel. For the reasons I've given, it is appropriate that there be an order in terms of paragraphs 1, 2 and 3 of the draft handed to me by counsel for the bank.

...

HIS HONOUR: The remaining questions are one of costs and one of the future conduct of this or other litigation between the parties. As to that second matter, the respondents' counsel urged upon me a set of directions which would have the effect that his clients would become plaintiffs and their document filed 13 April would become their statement of claim. That had some attraction, although it was certainly unorthodox, because of its potential to save some money for the respondents rather than their having to start their own case in the usual way. However, that course which may not be unprecedented but which is certainly, in my experience, novel, would have other complications, one of which at least is that there would be no document which could constitute the claim rather than the

statement of claim, the difficulty being that the respondents are not the persons who commenced this proceeding.

It is also relevant that, despite the many things that have been said about the effect of Justice Daubney's orders of 27 March, his Honour, with respect, did not order a pleading to be filed, unsurprisingly there having been no pleading already in the case and the matter not having started by claim. Instead, he directed a document which had a certain content and which set out material facts as if it was a pleading. If the respondents then have to commence their proceeding in the usual way, they will not be disadvantaged, save, perhaps, for the filing fee. The respondents' case is not said to be affected by any relevant period of limitation, for example.

The question of costs is one in which the respondents submit that the costs ought to be reserved. That submission has even less force because of the fact that the judgment which I have given will dispose of the entirety of the present case, but, in any event, the respondents ought to pay the costs of this application. They failed to establish a serious question and the balance of convenience, as I have explained in the reasons, was against the caveats remaining. It will be further ordered that the respondents pay the applicant's costs of the application.

...

HIS HONOUR: I have already disposed of the originating application and signed the draft order presented by the applicant's counsel. That provides that the respondents not lodge for registration any further caveat without further order of the Court. The respondents immediately made an oral application for the Court's permission to lodge a further caveat, the grounds for which would be that the respondents would claim "as owners of the land which interest is not subject to any right or interest of the applicant or otherwise". I was told that each and every matter within that document filed 13 April would be advanced in support of that purported ground.

On its face, it does appear to be an argument that the applicant, despite its holding a registered mortgage, has no interest which would prevail against its mortgagors. Not only does that ground, as read out by counsel for the respondents, appear to be one which is without foundation, the balance of convenience remains as I judged it to be probably about an hour ago. I did not discern that anything had happened in the meantime which affected that balance. Therefore, the oral application is refused.
