

# SUPREME COURT OF QUEENSLAND

CITATION: *Cowley v Macwood Pty Ltd & Ors* [2015] QSC 343

PARTIES: **GRAEME CHARLES COWLEY**  
(applicant)

v

**MACWOOD PTY LTD T/AS HOT STUFF PROPERTY  
PTY LTD AS/TRUSTEE FRANK ROBERT COWLEY,  
JOHN WELLESLEY COWLEY, GARY ROY COWLEY  
& JENELLE MAURENE COOKE**  
(respondent)

FILE NO/S: S53/2012

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING  
COURT: Supreme Court Mackay

DELIVERED ON: 21 October 2015

DELIVERED AT: Mackay

HEARING DATE: 20-21 October 2015

JUDGE: McMeekin J

ORDERS: **Orders as per the draft, initialled and placed with the  
papers.**

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES - APPOINTMENT,  
REMOVAL AND ESTATE OF TRUSTEES – RETIREMENT  
AND REMOVAL – REMOVAL BY THE COURT –  
GROUNDS FOR REMOVAL – where the applicant is a  
minority beneficiary under a trust – where the statutory trustee  
was appointed to effect sale of the trust property in 2013 –  
where the trust property remains unsold – whether there are  
grounds for removal of the trustee – whether the trustee should  
be removed

*Property Law Act 1974 (Qld), s 39(1)(a)*  
*Trusts Act 1973 (Qld), s 32(1)(c)*  
*Miller v Cameron (1936) 54 CLR 572*

COUNSEL: M Hodge for the applicant  
S Naylor sol for the respondent  
G Smart sol for the statutory trustee

SOLICITORS: SB Wright, Wright & Condie for the applicant  
Macrossan & Amiet for the respondent  
SR Wallace & Wallace for the statutory trustee

- [1] **MCMEEKIN J:** Mr Graeme Cowley seeks the removal of statutory trustees for sale. That order is opposed by all other persons having an interest in the lands the subject of the trust (“the respondents”). The natural persons are siblings.
- [2] The trustees were appointed pursuant to an order of the court made on 26 February 2013. The order was made with the consent of all parties. The trustees appeared separately on the application as there were allegations that amounted, or may have amounted, to allegations of breach of trust.
- [3] There are two parcels of land that are the subject of the trust. The parties refer to the parcels as the “Seaforth Property” and the “Halliday Bay Property”. The applicant has a 20% interest in the Seaforth property and a 10% interest in the Halliday Bay property. The respondents are united in their approach, and always have been, and so hold the majority interest.
- [4] The applicant is concerned that little has been done to bring about the sale of the properties since the appointment of the trustees. He sought that appointment in late 2012. The appointment of the trustees came about as a result of his wish to have the lands sold. The respondents were initially opposed to that course. Thus the applicant has been waiting for three years to obtain his share of the proceeds of sale.
- [5] There is a dispute as to whether the applicant was initially willing to delay the sale because of soft market conditions. Whatever may have been his initial position it has been clear now since September 2013 that he was desirous of the properties being sold.
- [6] The test for removal of trustees was explained by Dixon J in *Miller v Cameron* (1936) 54 CLR 572 at 580. The relevant question is whether “the welfare of the beneficiaries is opposed to his continuing in occupation of the office”. The considerations that can bear on that question are “possibly large in number and varied in character”. The decision to remove Dixon J described as a “delicate” one.
- [7] In my judgment the trustees should not be removed.
- [8] There are several relevant factors. Mr Graeme Cowley has the evident view that the trustees are favouring the respondents’ interests over his. While I understand why he holds that view I do not think it is justified. There has been a very long delay and

longer than there should have been but I do not think this has come about by reason of any deliberate attempt by the trustees to inappropriately favour one side over the other.

- [9] It is true, as Mr Hodge of counsel for the applicant points out, that the trustees made a decision to market the property and then changed their minds in October 2013 apparently because of the opposition of the respondents, but that was based on the not unreasonable advice they had received that a re-zoning was possible and should improve the likely sale price – and so would be in every owner’s interests. Having received that advice the trustees were not dissuaded from marketing the property until they received the majority opinion that the sale ought to be delayed. But they were entitled to take that view into account. Section 39(1)(a) of the Property Law Act 1974 obliged the trustees to consult the respondents, they holding a majority interest, and give effect to their wishes “so far as consistent with the general interest of the trust.” Obtaining the best price for the land would usually be seen to be “consistent with the general interest” of a statutory trust for sale. The real problem is the length of time it took to get the response to the re-zoning application.
- [10] There was some debate as to whether the trustees were entitled to delay for that purpose but it seems to me that they were entitled to do so – see s32(1)(c) of the *Trusts Act* 1973. Whether they should have done so was a matter for their judgment. The long delay that eventuated was not expected in October 2013.
- [11] The delay from September 2013 until April 2015 is explained, at least to a large degree, by that attempted re-zoning of the lands. That attempt took far longer than expected. The State government intervened and so the normal time frame, whatever that might be, was extended considerably.
- [12] Mr Hodge was critical of the trustees for not getting more precise advice as to the likely benefit and the likely time frame that would be involved. In hindsight that criticism seems well founded but it is notable that no like complaint was made at the time. There is no evidence still about the possible benefit of a re-zoning but mention was made by Mr John Cowley, one of the respondents and who is a developer, in an email that the sale price may have doubled on a successful re-zoning. Trustees risk a suit for breach of their duty if they ignore expert advice that the sale price could be

markedly bettered by what might be expected to be a not unreasonable delay for the purpose of pursuing an application to re-zone.

- [13] What is notable is that while Mr Graeme Cowley has protested from time to time he has not pressed the matter. The correspondence exhibited shows that there were long delays between his complaints. Until August 2014 the general impression is that while Mr Graeme Cowley was unimpressed with the delays he was not actively urging that the re-zoning attempt be abandoned. But by 29 October 2014 he was, through his solicitors, threatening removal of the trustees.
- [14] There is some criticism of the trustees for not acting more quickly once the draft Mackay Region Planning Scheme was published on 22 December 2014. The draft scheme clearly meant that the re-zoning would be unsuccessful. The problem then was that the State election was called, the government went into care-taker mode, and having waited so long the thought was that the parties may as well wait and see whether the New Year brought any change of direction from the State or local governments. The proposed Planning Scheme was still only a draft scheme.
- [15] By January 2015 it was apparent that the re-zoning would not be approved. On 12 January 2015 Mr Graeme Cowley again threatened to bring action in the Court if the trustees did not carry out their duty.
- [16] The trustees sought some further advice from the marketing advisors. They kept Mr Graeme Cowley's solicitors informed. By 1 April 2015 the trustees had reached the view that there was no point to any further delay and decided that the property needed to be marketed and sold. It is not without significance that Mr Graeme Cowley, despite his threats, took no action. Thus I am satisfied that the delay until then is explicable and there is no inference adverse to the trustees that can be drawn.
- [17] Their delay after that time is not so satisfactorily explained.
- [18] One trustee was engaged in study in Singapore for a period and contracted an illness for a period. There is no evidence about the position of the other trustee. Why that meant that the other trustee could not have engaged agents and progressed matters is not explained. No active step at all was taken until late July and even then the action was to seek instructions as to whether Mr Graeme Cowley would be amenable to being bought out by the respondents. Why that step was not taken long before was

not explained, if it was thought to be necessary precursor to a sale. And why Mr Graeme Cowley would have any concerns about being bought out is not clear to me – he had been agitating for the property to be sold to enable him to realise his interest for years. Who provided the money seems irrelevant from his view point.

- [19] The trustees wrote to the respondents on 9 September 2015 asking that they meet and consider making an offer to Mr Graeme Cowley. In that same correspondence the trustees advised the respondents of the outcome of the discussions they had had with their marketing advisors. Mr Hodge was critical of the trustees for not sharing that information with Mr Graeme Cowley. The criticism I think was well deserved – why he should not be kept in the picture, particularly given his evident exasperation at the length of time the trustees were taking, is inexplicable to me.
- [20] On 2 October 2015 Mr Graeme Cowley lost patience and advised through his solicitors that he would be bringing an application. The present application was filed on Friday, 9 October and served on Monday, 12 October, the effect of the proposed application having been explained to the solicitors on 6 October 2015.
- [21] Since Mr Graeme Cowley gave notice of his intention to bring matters to a head the trustees have sprung into action. They caused their solicitors to write to Mr Graeme Cowley's solicitors confirming their commitment to sell the properties. They asked the various parties whether they would put them in funds to market the property. They have sought an accommodation from Westpac to fund the marketing programme. They have made enquiries of a valuer to have up to date valuations prepared within three weeks. They have sought advice as to the best approach to marketing the properties from Ray White Special projects. Their advice is to proceed by way of expressions of interest rather than by auction. All this has been done in a week.
- [22] Given the long delays that had occurred up until April 2015 it should have been apparent then to the trustees that they were obliged by their office to act and to do so immediately. The delay since is not satisfactory explained and was plainly contrary to Mr Graeme Cowley's wishes and interests and inconsistent with the trustees' duties. The excuses offered fall well short of a satisfactory explanation. The ease with which the several matters that have been attended to in the last week or so demonstrate Mr Graeme Cowley's point.

- [23] If I was persuaded that the trustees were animated by some motive against Mr Cowley I would of course not hesitate to remove them. However I am not so persuaded. While there was some evidence of the relationship between the male trustee and one of the respondents it does not seem to extend beyond a cordial and occasional relationship based on professional service rendered by a firm of which the trustee was a member some years ago, but not services rendered by the trustee personally. The impression that I have is that the trustees seem to have let other matters take precedence. They are accountants with professional practices and obviously other commitments. I think that they have misjudged the urgency with which they should have attended this task that they have accepted.
- [24] The practical problem is what to do. Mr Graeme Cowley wants the trustees removed and replaced by liquidation practitioners who would undoubtedly have experience in selling up assets. In the alternative he seeks that a local solicitor be appointed – a common practice in these applications. He wants an auction held.
- [25] I can understand his concerns. However there are some difficulties. The first is expense. The liquidation practitioners will charge a great deal more than the present trustees. While there is no evidence about the respective fees general experience suggest that the submission made is accurate. The second is delay. The new trustees (whoever they might be) will have to familiarise themselves with the properties and decide whether they wish to accept the present advice or pursue some other course. The third problem is that the only evidence that I have as to the course to follow in selling the land is the one advocated by Ray White Special Projects. I am reluctant to order an auction when the evidence is that it would not be in the interests of the parties to do so.
- [26] In my view the course that seems to be in the best interests of all the parties is to persist with the present trustees, put in place a set of directions as to how they should go about their task, include in those directions orders that will ensure that Mr Graeme Cowley is kept regularly informed of the steps being taken, and give to the parties liberty to apply to come back to the court if needed.
- [27] I will hear the parties as to the orders that I should make in the light of these reasons. These submissions will need to include the orders that ought to be made in relation to costs. I can indicate that the notion that Mr Graeme Cowley should be

required to pay the trustees costs and on an indemnity basis will not be accepted. His efforts over the years to have the trustees perform their duty and his eventual bringing of this application were fully justified.

### **Addendum**

- [28] Subsequent to the drafting of the above reasons and their publication to the parties further material was placed before me concerning primarily the various alternatives to marketing the properties. That evidence affects the comments made in [25] above.
- [29] I directed that the parties consider whether they could agree on a set of orders that were consistent with these reasons. That occurred and eventually orders were made in accordance with the draft supplied.