

SUPREME COURT OF QUEENSLAND

CITATION: *Edens Landing Pty Ltd v Thornton Place Pty Ltd & anor*
[2015] QSC 365

PARTIES: **EDENS LANDING PTY LTD**
ACN 124 650 380
(applicant)
v
THORNTON PLACE PTY LTD
ACN 106 520 254
(first respondent)
EDENS GREEN QLD PTY LTD
ACN 168 587 004
(second respondent)

FILE NO/S: BS No 11368 of 2015

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 18 December 2015

DELIVERED AT: Brisbane

HEARING DATE: 11 December 2015

JUDGE: Martin J

ORDER: **The applicant is to bring in a minute of order reflecting these reasons.**

CATCHWORDS: REAL PROPERTY – TORRENS TITLE – CAVEATS AGAINST DEALINGS – REMOVAL – OTHER MATTERS – where the applicant and second respondent entered into a call and put option deed over the land – where the second respondent nominated the first respondent as its nominee under the deed – where the first respondent exercised the call option – where the first respondent placed a caveat over the land – where the applicant seeks a removal of the caveat – where the first respondent seeks a declaration that it has validly exercised the option under the deed and specific performance of the contract of sale – where the director of the second respondent was an undischarged bankrupt at the time of signing the deed – whether the director was acting as an agent of the company – whether there is a prima facie case justifying the continuation of the caveat – whether the balance of convenience favours the retention of the caveat

Corporations Act 2001 (Cth), s 127, s 201F, s 206A(2), s 206B(3)

Nielsen v Capital Finance Australia Ltd & Ors [2014] 2 Qd R 459

Re Burman's Caveat [1994] 1 Qd R 123

Wright Enterprises Pty Ltd v Port Ballidu Pty Ltd [2008] QSC 78

COUNSEL: D de Jersey for the applicant
JK Meredith for the first respondent

SOLICITORS: Wilson Lawyers for the applicant
Romans and Romans for the first respondent

- [1] On 17 September 2015 the first respondent ('Thornton Place') lodged a caveat over a parcel of land in Logan City ('Lot 3'). That lot is owned by the applicant ('Edens Landing') as trustee for the Edens Landing Unit Trust and, by this application, it seeks to have that caveat removed.

Background

- [2] On 8 October 2014 Edens Landing, as grantor, entered into a "Call and Put Option Deed" ('the Deed') in which the second respondent ('Edens Green') was named as the grantee. The Deed is signed by Edens Green "pursuant to section 127 of the Corporations Act" by Allan Thompson.
- [3] Pursuant to the Deed, Edens Landing granted Edens Green (or nominee) an option to purchase Lot 3 within eight months from the date of the deed for the sum of \$892,500 on the terms set out in the contract in schedule 1 of the Deed ('the call option').
- [4] In the event that Edens Green failed to exercise the call option within eight months of the date of the deed, Edens Green granted Edens Landing an option to require Edens Green to purchase Lot 3 for the sum of \$892,500 on the terms set out in the contract in schedule 1 ('the put option'). The put option could be exercised by Edens Landing within five days after the expiration of the eight month call option period.
- [5] On 29 January 2015 a purported deed of variation was executed. The signature on the deed for Edens Green is described as having been "executed... Pursuant to section 127 of the Corporations Act" but the identity of the person who signed is not given. The signature is very similar to that which appears on the signature block in the Deed for Edens Green.
- [6] The deed of variation purports to:
- (a) provide that if Edens Green was unable to obtain approval for a development application in respect of Lot 3 by the date that fell 8 months after the date of the Deed it could, by notice in writing given to Edens Landing at any time

before 8 June 2015¹, extend the date for the exercise of the call option to 8 August 2015; and

- (b) provide that if the date for exercise of the call option was so extended, then the date for the exercise of the put option would also be extended consistently.

[7] On 7 August 2015 the solicitors for Edens Landing received correspondence and documents from the solicitors for Thornton Place. Those documents included:

- (a) a nomination notice by Edens Green naming Thornton Place as its nominee under the Deed,
- (b) a notice of exercise of the call option by Thornton Place,
- (c) a contract of sale for Lot 3,
- (d) an irrevocable authority concerning the security bond paid pursuant to the Deed, and
- (e) a notice waiving the cooling-off period for the contract under section 167 of the *Property Occupations Act 2014*.

The directors of Edens Green

[8] Allan Thompson was made bankrupt on 28 August 2014. He was still an undischarged bankrupt when the most recent search was conducted on 28 May 2015.

[9] On 9 September 2014 Mr Thompson was the only director and sole shareholder of Edens Green. On that day he signed a Form 484 (Change to Company Details) pursuant to which he certified that:

- (a) he ceased to be a director of Edens Green on 9 September 2014,
- (b) Lambert Wang was appointed a director of Edens Green on 9 September 2014, and
- (c) he ceased to be registered as the beneficial holder of 50 shares in Edens Green.

[10] Lambert Wang was a director of Edens Landing from 7 October 2008 to 10 September 2013.

[11] Further notices of changes to company details of Edens Green were notified:

- (a) 15 December 2014: Lambert Wang certified that Chung-Wei Jerry Jen was appointed as a director of Edens Green,
- (b) 16 December 2014: Chung-Wei Jerry Jen certified that Lambert Wang ceased to be a director on that day, and

¹ The deed says "8 June 2014". There was no contest that this was an obvious error.

- (c) 13 April 2015: Domenico D'Alessandro certified that Chung-Wei Jerry Jen ceased to be a director on 10 April 2015 and that Domenico D'Alessandro was appointed as a director and secretary on that date.

[12] The purported appointment of Lambert Wang as the director of Edens Green was invalid. Section 201F(1) of the *Corporations Act* provides: “(1) The director of a proprietary company who is its only director and only shareholder may appoint another director by recording the appointment and signing the record”. But, s 201F(3) provides:

“(3) If:

- (a) the office of the director of a proprietary company is vacated under subsection 206B(3) or (4) because of the bankruptcy of the director; and
- (b) the person is the only director and the only shareholder of the company; and
- (c) a trustee in bankruptcy is appointed to the person’s property;

the trustee may appoint a person as the director of the company.”

[13] For the reasons given below, Mr Thompson was, upon becoming bankrupt, disqualified from managing Edens Green and, so, could not appoint a new director.

Does Allan Thompson’s signature bind Edens Green?

[14] Allan Thompson purported to sign the Deed (and, apparently, the deed of variation) on behalf of Edens Green pursuant to s 127 *Corporations Act* 2001. That section provides:

“127 Execution of documents (including deeds) by the company itself

- (1) A company may execute a document without using a common seal if the document is signed by:
 - (a) 2 directors of the company; or
 - (b) a director and a company secretary of the company; or
 - (c) for a proprietary company that has a sole director who is also the sole company secretary—that director.

Note: If a company executes a document in this way, people will be able to rely on the assumptions in subsection 129(5) for dealings in relation to the company.

- (2) A company with a common seal may execute a document if the seal is fixed to the document and the fixing of the seal is witnessed by:
 - (a) 2 directors of the company; or
 - (b) a director and a company secretary of the company; or

- (c) for a proprietary company that has a sole director who is also the sole company secretary—that director.

Note: If a company executes a document in this way, people will be able to rely on the assumptions in subsection 129(6) for dealings in relation to the company.

- (3) A company may execute a document as a deed if the document is expressed to be executed as a deed and is executed in accordance with subsection (1) or (2).
- (4) This section does not limit the ways in which a company may execute a document (including a deed).”

[15] On the day he signed the Deed, Mr Thompson was an undischarged bankrupt.

[16] Section 206B(3) is in Part 2D.6 of the *Corporations Act* and provides that:

“A person is disqualified from managing corporations if the person is an undischarged bankrupt under the law of Australia, its external territories or another country.”

[17] Section 206A(2) of the *Corporations Act* is in the same Part and it provides that:

“A person ceases to be a director, alternate director or a secretary of a company if ... (a) the person becomes disqualified from managing corporations under this Part ...”

[18] Mr Thompson, then, was not a director or secretary of Edens Green when he purported to sign on behalf of that company. It is conceded by Thornton Place that there was no execution of the Deed in accordance with s 127. That, though, is not the end of the matter. Execution of a document in accordance with s 127 allows another person to assume due execution (see s 129 *Corporations Act*) but it is not the only way a company can validly execute a document.²

[19] Mr Meredith, who appeared for Thornton Place, submitted that even if the Deed and a deed of variation were not validly signed under s 127, they may nevertheless take effect as simple agreements under hand³. So much can be accepted, but there would need to be proof that Mr Thompson was the agent of Edens Green or, at least, had its approval, for the purposes of signing the documents. There is no evidence to that effect.

[20] It is submitted for Thornton Place that Mr Thompson’s authority can be assumed because if he had not been authorised to sign either the Deed or the deed of variation, then one would expect to find a statement to that effect in the evidence of Mr Wang. The only relevant part of Mr Wang’s affidavit is his statement that: “On 8th October, 2014 the company entered into a Call & Put Option Agreement in relation to lot 3, Loane Drive ...”. That is nothing more than an expression of his opinion as to the effect of the document. The absence of any reference to the authority of Mr Thompson cannot be

² See s 127(4) and *Wright Enterprises Pty Ltd v Port Ballidu Pty Ltd* [2008] QSC 78.

³ *Nielsen v Capital Finance Australia Ltd & Ors* [2014] 2 Qd R 459 at [36].

interpreted as an assertion that he had the authority of Edens Green to sign the Deed. In any event, Mr Wang was not validly appointed and so could not have authorised Mr Thompson to do anything with respect to Edens Green.

- [21] It follows, then, that neither the Deed nor the deed of variation was signed on behalf of Edens Green. Neither document binds Edens Landing. Edens Green, therefore, could not nominate Thornton Place pursuant to the Deed and Thornton Place could not obtain any interest in the property.

Removal of a caveat – the principles

- [22] On an application of this nature, the position of a caveator should be considered as being equivalent to that of an applicant for an interlocutory injunction⁴. The caveator bears the onus of demonstrating that there is a prima facie case justifying the continuation of the caveat and that the balance of convenience favours the retention of the caveat.
- [23] I am satisfied that Thornton Place has not demonstrated either a prima facie case or that there is a serious question to be tried with respect to the continuation of the caveat. It has not revealed any matter which supports an argument that it has an interest in the land.
- [24] Further, in the absence of any offer to provide an undertaking as to damages, the prejudice which will be suffered by the applicant, that is, a restriction on its capacity to deal with the land, is obvious.
- [25] I will make an order requiring the removal of the caveat.

Cross-application

- [26] Thornton Place seeks a declaration that it has validly exercised the option under the Deed and that an order that the contract attached to the Notice of Exercise of Option be specifically performed. In the light of the reasons given above, that application is dismissed.

Order

- [27] Edens Landing is to bring in minutes of order. There will need to be an order amending the title of the application to reflect the position of Edens Landing as a trustee. I will hear the parties on costs.

⁴ *Re Burman's Caveat* [1994] 1 Qd R 123.