

SUPREME COURT OF QUEENSLAND

CITATION: *Zen Ridgeway Pty Ltd v Adams & Anor* [2009] QSC 117

PARTIES: **ZEN RIDGEWAY PTY LTD as trustee for THE LEE FAMILY TRUST ACN 109 450 740**
(the applicant)
v
JOHN ADAMS trading as ADAMS PRESTIGE CONSTRUCTION
(the respondent)

FILE NO/S: 4565/09

DIVISION: Trial Division

PROCEEDING: Originating Application

DELIVERED ON: 20 May 2009

DELIVERED AT: Supreme Court, Brisbane

HEARING DATE: 13 May 2009

JUDGE: Wilson J

ORDER: **That the caveat be removed.**

CATCHWORDS: REAL PROPERTY – TORRENS TITLE – CAVEATS AGAINST DEALINGS – REMOVAL – where applicant is the registered owner as trustee of land – where respondent lodged a caveat over the land – where applicant seeks removal of caveat – whether there is a serious question to be tried as to whether respondent has a caveatable interest in the land

EQUITY – TRUSTS AND TRUSTEES – POWERS, DUTIES, RIGHTS AND LIABILITIES OF TRUSTEES – INDEMNITY, LIEN AND REIMBURSEMENT – GENERAL PRINCIPLES – where applicant is registered owner as trustee of land – where judgment awarded against applicant for liability incurred as trustee – nature of applicant’s right of indemnity out of trust assets – whether respondent creditor may be subrogated to the applicant trustee’s right of exoneration or lien

Building and Construction Industry Payments Act 2004 (Qld), s 31
Corporations Act 2001 (Cth), s 459E
Land Title Act 1994 (Qld), ss 122(1)(a), 127
Trusts Act 1973 (Qld), s 72

Agape-Holistic Retreat Corporation Ltd v Agape-High-Q Holistic Horsemanship Corporation Ltd & Anor (unreported);

New Zealand High Court, 15 May 2008), cited
Chief Commissioner of Stamp Duties for NSW v Buckle
 (1998) 192 CLR 226, cited
Custom Credit Corporation Limited v Ravi Nominees Pty Ltd
 (1992) 8 WAR 42, cited
Daly v Union Trustee Co. of Australia Ltd (1898) 24 VLR
 460, cited
Deancrest Nominees Pty Ltd v Nixon [2007] WASC 304,
 cited
Fairland v Percy [1875] LR 3 P & D 217, cited
General Credits Limited v Tawilla Pty Ltd [1984] 1 Qd R
 388, cited
Hewett v Court [1983] HCA 7; (1983) 149 CLR 639, cited
In re Johnson; Shearman v Robinson (1880) 15 Ch D 548,
 cited
ISIS Projects Pty Ltd v Clarence Street Pty Ltd [2006]
 NSWSC 190, cited
Jennings v Mather [1902] 1 KB 1, cited
Kemtron Industries Pty Ltd v Commissioner of Stamp Duties
 [1984] 1 Qd R 576, cited
Moloney v Marler & Darvall [2004] QSC 228, cited
Nolan v Collie (2003) 7 VR 287, cited
Octavo Investments Pty Ltd v Knight (1979) 144 CLR 360,
 cited
Owen v Delamere (1872) LR 15 Eq 134, cited
Re Burman's Caveat [1994] 1 Qd R 123, cited
Re Exhall Coal Co. Ltd (1866) 35 Beav. 449 at 453; 55 ER
 970, cited
Re Geary [1939] NI 152, cited
Re Jorss' Caveat [1982] Qd R 458, cited
Re Morris (1889) 23 LR Ir 333, cited
Re Nymboida River Pty Ltd (in liqn); ex parte Nimdale Pty
Ltd (unreported; Supreme Court of Qld; Ambrose J; 30
 September 1988), cited
Re Pumfrey (1882) 22 Ch D 255, cited
Re Staff Benefits Pty Ltd (in liq) and Companies Act 1
NSWLR 207; 4 ACLR 54, cited
Re Wilson [1942] VLR 177, cited
Savage v Union Bank of Australia Ltd (1906) 3 CLR 1170,
 cited
Stevens v Hince (1914) 110 LT 935, cited
Vacuum Oil Co Pty Ltd v Wiltshire (1945) 72 CLR 319, cited

COUNSEL: RC Schulte for the applicant
 SB Whitten for the respondent

SOLICITORS: Maunsell Pennington for the applicant
 Mills Oakley Lawyers for the respondent

[1] **Wilson J:** Zen Ridgeway Pty Ltd ("the applicant") is the registered owner as trustee of four parcels of land in the County of Stanley Parish of Redlands. It seeks the removal of a caveat over the land lodged by the respondent.

The facts

- [2] The applicant is part of the Zen Property Group of companies which are land developers. Their activities are financed by the National Australia Bank Limited, which has a mortgage over the land and a debenture over the undertaking and assets of Zen Ridgeway Pty Ltd as trustee of the Lee Family Trust.
- [3] On 7 January 2009 the respondent obtained an Adjudication Certificate under the *Building and Construction Industry Payments Act 2004 (Qld)* against the applicant in the amount of \$75,221.51. It filed the certificate in the District Court at Southport pursuant to s 31 of that Act, and on 12 January 2009 obtained a judgment in its favour against the applicant as follows -

"THE JUDGMENT OF THE COURT IS THAT the Defendant [the applicant] pay to the Plaintiff [the respondent] money owing in the amount of \$75,221.51."

- [4] Subsequently the respondent gave the applicant a statutory demand pursuant to the *Corporations Act 2001 (Cth)* s 459E, but that was set aside by order made on 3 April 2009.
- [5] On 6 March 2009 the respondent lodged the caveat, claiming the following interest -
 "An equitable estate or interest in the fee simple as equitable mortgagee of the property for the sum of \$75,221.51 (together with interest accruing)."

The grounds of claim were stated as follows -

"The caveator is a trade creditor of Zen Ridgeway Pty Ltd A.C.N. 109 450 740 as trustee for The Lee Family Trust ("the caveatee") and has obtained a judgment in the District Court of Queensland against the caveatee for the amount of \$75,221.51 (together with interest accruing) in relation to moneys due and owing to the caveator pursuant to the *Building and Construction Industry Payments Act (2004) (Qld)* ("**BCIPA**") for construction work carried out by the caveator. By virtue of equitable rights of subrogation of the caveatee's lien over the land described in item 2 above to the extent of such judgment amount and/or at law and section 72 *Trusts Act* the caveatee is entitled to an equitable lien to the extent of such judgment amount over the land described in item 2 above."

- [6] This application to remove the caveat was filed on 30 April 2009.
- [7] On 7 May 2009 the respondent obtained an enforcement warrant, which was registered against the land the next day.

Principles

- [8] Under s 122(1)(a) of the *Land Title Act 1994 (Qld)* a caveat may be lodged by a person claiming an interest in a lot, and by s 127 a caveatee may at any time apply to this Court for an order that the caveat be removed.

- [9] The Court will order the removal of the caveat unless the respondent as caveator satisfies it that there is a serious question to be tried as to its interest in the land and that the balance of convenience favours the continuance of the caveat until trial of proceedings to establish that interest.¹ Here the respondent by his counsel has proffered an undertaking to pay any damages the applicant may have suffered or may suffer by reason of the continuance of the caveat.
- [10] The judgment against the applicant is for a liability incurred as trustee. It is well settled that a trustee is personally liable for debts incurred as trustee in the administration of a trust fund. A right of indemnity out of the trust estate arises concurrently with the incurring of such a liability; it may take the form of a right to reimburse itself for expenses reasonably and properly incurred ("a right of recoupment") or that of a right to pay expenses out of the trust fund ("a right of exoneration").² The trustee has a lien over the trust property to enable it to enforce the right of indemnity. The nature of a trustee's rights was explained by the High Court in *Chief Commissioner of Stamp Duties (NSW) v Buckle*³ -

"The term 'trust assets' may be used to identify those held by the trustee upon the terms of the trust, but, in respect of such assets, there exist the respective proprietary rights, in order of priority, of the trustee and the beneficiaries. The interests of the beneficiaries are not 'encumbered' by the trustee's right of exoneration or reimbursement. Rather, the trustee's right to exoneration or recoupment 'takes priority over the rights in or in reference to the assets of beneficiaries or others who stand in that situation'.⁴ A court of equity may authorise the sale of assets held by the trustee so as to satisfy the right to reimbursement or exoneration. In that sense, there is an equitable charge over the 'trust assets' which may be enforced in the same way as any other equitable charge.⁵ However, the enforcement of the charge is an exercise of the prior rights conferred upon the trustee as a necessary incident of the office of trustee. It is not a security interest or right which has been created, whether consensually or by operation of law, over the interests of the beneficiaries so as to encumber them in the sense required by s 66(1) of the [*Stamp Duties Act*]."

And in *Nolan v Collie*⁶ Ormiston JA said:

"It seems that what in particular is relied upon is the assertion made in the authorities that upon subrogation the party subrogated acquires some equitable interest in the relevant assets. That may be so, indeed there is no doubt that the right of indemnification continues to affect the trust property even though there is a new trustee, but the interest recognised is intended merely to preserve the right of the trustee, not

¹ *Re Jorss' Caveat* [1982] Qd R 458; *Re Burman's Caveat* [1994] 1 Qd R 123.

² See *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319; *Custom Credit Corporation Limited v Ravi Nominees Pty Ltd* (1992) 8 WAR 42 at 52.

³ (1998) 192 CLR 226 at 246 – 247.

⁴ *Vacuum Oil Co Pty Ltd v Wiltshire* [1945] HCA 37; (1945) 72 CLR 319 at 335.

⁵ See *Hewett v Court* [1983] HCA 7; (1983) 149 CLR 639 at 663.

⁶ (2003) 7 VR 287 at 313.

to create a priority of the kind frequently given where other charges are imposed except a right to claim priority over the beneficiaries.¹⁷

In principle the trustee's lien is a caveatable interest.⁸

- [11] Under s 31 of the *Building and Construction Industry Payments Act 2004* the judgment against the applicant is a judgment for a debt. In *General Credits Limited v Tawilla Pty Ltd*⁹ McPherson J said of a simple common law judgment for a money sum or debt -

"It is well settled that such a judgment cannot be enforced by execution levied upon trust assets even though the judgment against the trustee is founded on a debt incurred by him in the capacity of trustee: see *Jennings v Mather*;¹⁰ *Savage v Union Bank of Australia Ltd.*; ¹¹ *Octavo Investments Pty Ltd v Knight*.¹²"

His Honour explained why this is so in an essay *The Insolvent Trading Trust*¹³ -

"The reason is that *fi fa* does not extend to equitable assets unless the whole beneficial interest is in the judgment debtor.¹⁴ In the case of trust assets, that will be the case only where the balance on a final account is in favour of the trustee, so that nothing at all is due to the beneficiaries.¹⁵ Generally that will not be known to the creditors until the account is taken."

- [12] A creditor to whom the trustee has incurred a debt in the administration of the trust may be subrogated to the trustee's right of exoneration or lien.¹⁶ A creditor's right of subrogation is explained in *Lewin on Trusts*¹⁷ -

"Although unsecured creditors and other claimants do not have a direct claim against the trust property in respect of unsecured liabilities incurred by trustees in the administration of the trust, and cannot levy execution upon the trust property they may by subrogation have a right to stand in the place of the trustee and enforce their liabilities against the trust property to the extent that the

⁷ The qualified nature of the trustee's interest has now been explained by the High Court in *Commissioner of Stamp Duties (NSW) v Buckle* (1988) 192 CLR 226 esp at 244 – 7.

⁸ *Custom Credit Corporation Pty Ltd v Ravi Nominees Pty Ltd* (1992) 8 WAR 42 at 53; *Re Nymboida River Pty Ltd (in liqn)*; *ex parte Nimdale Pty Ltd* (unreported; Supreme Court of Qld; Ambrose J; 30 September 1988).

⁹ [1984] 1 Qd R 388 at 389.

¹⁰ [1902] 1 KB 1, affirming [1901] 2 QB 108.

¹¹ (1906) 3 CLR 1170 at 1186.

¹² (1979) 144 CLR 360 at 367.

¹³ P.D. Finn (ed) *Essays in Equity* (1985) London: Sweet & Maxwell, at 150.

¹⁴ *Stevens v Hince* (1914) 110 LT 935.

¹⁵ The beneficiaries are entitled only to the net produce after discharging all liabilities: *Re Exhall Coal Co. Ltd* (1866) 35 Beav 449 at 453; 55 ER 970 at 971; *Daly v Union Trustee Co. of Australia Ltd* (1898) 24 VLR 460 at 468, 469; *Re Staff Benefits Pty Ltd (in liq) and Companies Act* [1979] 1 NSWLR 207; 4 ACLR 54; *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties* [1984] 1 Qd R 576.

¹⁶ *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 at 335; *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367, 370.

¹⁷ (2008, 18th ed), para 21 – 38.

trustee would be so entitled. The trustee's right of indemnity is an asset of the trustee, and the trustee's creditors are entitled by subrogation to reach this asset and so enforce their claims against the trust property."

The creditor's right is derivative of the trustee's, and cannot exceed the extent of the trustee's legitimate claim on the trust estate.¹⁸ Further, it is subject to whatever interests in the trust assets the trustee has lawfully created in favour of third parties.¹⁹

- [13] However, the right of access to the trust assets by way of subrogation is inchoate unless the trustee is insolvent or it is otherwise reasonable to assume that obtaining a judgment against the trustee would be pointless.²⁰ The following passage from *Deancrest Nominees Pty Ltd v Nixon*²¹ is apposite to this case -

"... it has been held that a creditor does not have a right of subrogation simply by virtue of the existence of a debt owed to it by a trustee, but it must reasonably appear, at least, that any attempt to recover the debt from the trustee would be fruitless.²² That is, the right of subrogation does not exist simply as an alternative means by which a creditor may recover a debt owed by a trustee. In the present case, there is nothing to suggest that the debt could not reasonably be recovered by Deancrest from the trustees concerned."

Application of principles to the facts

- [14] On the material before the Court there is nothing to suggest that the judgment debt could not be recovered from the applicant, and so nothing to suggest that there is a matured right of subrogation.
- [15] In all the circumstances there is no serious question to be tried as to whether the respondent has a caveatable interest in the land.²³ It is not necessary to consider where the balance of convenience lies.
- [16] There should be an order for the removal of the caveat.

¹⁸ *In re Johnson; Shearman v Robinson* (1880) 15 Ch D 548 at 552; *Re Staff Benefits Pty Ltd (in liq) and Companies Act* [1979] 1 NSWLR 207; *Moloney v Marler & Darvall* [2004] QSC 228 at [37].

¹⁹ *ISIS Projects Pty Ltd v Clarence Street Pty Ltd* [2006] NSWSC 190 at [98]; Ford & Lee, *Principles of the Law of Trusts*, para 14.6030.

²⁰ Mitchell & Watterson, *Subrogation Law and Practice* (2007) para 12.24; *Owen v Delamere* (1872) LR 15 Eq 134; *Re Morris* (1889) 23 LR Ir 333; *Fairland v Percy* [1875] LR 3 P & D 217; *Re Pumfrey* (1882) 22 Ch D 255 at 263 (Kay J); *Re Geary* [1939] NI 152; *Re Wilson* [1942] VLR 177 at 183.

²¹ [2007] WASC 304 at [49].

²² *Re Wilson* [1942] VLR 177, 183.

²³ On an analogous question of a surety's right of subrogation to a mortgage, see *Agape-Holistic Retreat Corporation Ltd v Agape-High-Q Holistic Horsemanship Corporation Ltd & Anor* (unreported; New Zealand High Court, 15 May 2008) at [23].