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| PARTIES: | PATRICIA MACMICHAEL<br><br>and<br><br>ANTHONY MACMICHAEL<br><br>and<br><br>ATHOL GEOFFREY JAMES<br><br>and<br><br>N H R FORSTER PTY LTD<br>(ACN 000 041 734) |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | Civil |
| FILE NO: | No 133 of 1996 |
| DELIVERED: | 3 June 1998 |
| HEARING DATES: | 14, 18 and 19 May 1998 |
| JUDGMENT OF: | ANGEL J |

**CATCHWORDS:**

Conveyancing – Relationship of vendor and purchaser – Position of parties after completion – Equitable lien – Unpaid vendor's lien – Whether interest on purchase price is capable of giving rise to an unpaid vendor's lien

*Rose v Watson* (1864) 10 HLC 672 referred to
*In re Drax* [1903] 1 Ch 781 referred to
*In re Stucley* [1906] 1 Ch 67 referred to
*Hewitt v Court* (1983) 149 CLR 639 referred to

Conveyancing – Land titles under the Torrens system – Certificates of Title – Notifications – Power of Registrar – Only power to make entries provided for by the *Real Property Act* (NT) – No power of registration or notification of court orders or judgments

Real Property Act ss64 and 105

*Crowley v Templeton* (1914) 17 CLR 457 applied

Conveyancing – Land titles under the Torrens system – Caveats against dealings – Lapse, removal and withdrawal – Removal – Application for caveator to show cause why the caveat should not be removed – Onus of proof – Caveator to establish an arguable case

*Eng Mee Yong & Ors v Letchumanan* [1980] AC 331 applied

Conveyancing – Land titles under the Torrens system – Caveats against dealings – Lapse, removal and withdrawal – Removal – Application for caveator to show cause why the caveat should not be removed – Court not able to determine the ultimate issue without the consent of the parties

*In re The Kauri Timber Company (Limited)* (1889) 7 NZLR 452 applied

**REPRESENTATION:**

*Counsel:*

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| Applicant: | Mr J Waters QC and Mr J McCormack |
| Respondent: | Mr A Wyvill |

*Solicitors:*

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| Applicant: | Geoff James |
| Respondent: | Da Silva Hebron |

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| Judgment category classification: | A |
| Judgment ID Number: | ang98009 |
| Number of pages: | 12 |

ang98009

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 133 of 1996

BETWEEN:

**PATRICIA MACMICHAEL**
First Plaintiff

AND:

**ANTHONY JOHN MACMICHAEL**
Second Plaintiff

AND:

**ATHOL GEOFFREY JAMES**
Third Plaintiff

AND:

**N H R FORSTER PTY LTD**
**(ACN 000 041 734)**
Defendant

ANGEL J

REASONS FOR JUDGMENT

(Delivered 3 June 1997)

This is an interlocutory summons pursuant to s191 IV of the *Real Property Act* requiring the defendant to show cause why a caveat should not be removed.

In this action the first plaintiff purchaser sued the defendant vendor, inter alia, for specific performance of a contract for the sale of land. A significant issue related to the terms of the contract. The first plaintiff asserted and the defendant denied that it was a term of the contract that the defendant would provide vendor finance. On 29 October 1997 after a trial on some of the issues in the action, I gave judgment for the plaintiff and decreed specific performance. The defendant vendor appealed. On 21 April 1998 the Court of Appeal allowed the appeal with costs, set aside the orders I had made and substituted judgment for the defendant vendor on the plaintiff's claim for specific performance. There are other claims and other incidental issues yet to be determined in the action.

The contract remained on foot and the plaintiff purchaser, immediately following delivery of the Court of Appeal judgment, served a Notice to Complete upon the defendant vendor. Subsequent to service of the Notice to Complete there passed between the solicitors for the defendant vendor and the solicitors for the plaintiff purchaser a staccato, at times somewhat acrimonious, correspondence. There is no need to recount the contents of that correspondence, save to say that the defendant vendor claimed penalty interest pursuant to Clause 16.1 of the contract between the parties and ultimately agreed to settle without requiring payment of that penalty interest at settlement "on the basis that they reserve all their rights and all their remedies as they have in relation to same" (sic).

Settlement took place at the Lands Title Office in Darwin on 8 May 1998. Mr James, the solicitor for the plaintiff purchaser, and Ms Porter, the solicitor for the vendor defendant, effected settlement. Ms Porter, in exchange for three ANZ bank cheques, one payable to the Darwin City Council, one payable to the Commonwealth Bank of Australia (the defendant vendor's mortgagee) and one payable to the defendant vendor, handed Mr James two Commonwealth Bank of Australia discharge of mortgage documents together with the duplicate Certificate of Title of the subject property and certain Lands Title Office lodgment slips completed by the Commonwealth Bank. Following settlement Mr James waited at the Lands Title Office without lodging his documents for registration. Ms Porter said to Mr James "What is the document you are waiting for?". Mr James said, "An Application to Note Court Order". Mr James was asked whether he had a withdrawal of caveat document. Mr James said he did have a withdrawal of caveat document (which related to withdrawal of the plaintiff purchaser's caveat lodged pending settlement) and said that he had been informed by the Deputy Registrar of Titles that the Lands Title Office would require evidence that an order with interlocutory injunction of Justice Mildren which had been noted on the title had been rescinded by order of the Court of Appeal before permitting registration. Representatives of the defendant vendor inquired of Mr James as to details of the plaintiff purchaser's proposed mortgage. Mr James told them that it was none of their business but that in fact there was a mortgage to him personally as nominee of an undisclosed lender. Mr James informed representatives of the defendant vendor that the mortgage was for $390,000.00. Later Mr James was informed that the defendant vendor was

lodging a caveat. Ms Porter told him "We ….. would be acting against our client's interests if we allowed you to register a mortgage. We will allow you to register ….. (the withdrawal of caveat, transfer and discharges of mortgages). I am marking the caveat that way.". The caveat thereafter lodged by the defendant vendor claimed a vendor's lien "for that part of the purchase price unpaid (namely penalty interest in the sum of $137,385.20) and interest thereon from 8 May 1998 in such amount as the Supreme Court may determine". As grounds of the claim, the caveat recited "Pursuant to Clause 16.1 of the Contract of Sale dated 22 February 1996, the caveator was entitled to be paid the sum of $137,385.20 at the settlement of the sale of the subject land but the Purchaser wrongfully failed to pay this sum".

The caveat was permissive in form, permitting registration of the discharge of the Commonwealth Bank mortgages, withdrawal of the plaintiff purchaser's caveat, notation of the discharge of Mildren J's order which had been noted on the title, and registration of the transfer to the plaintiff purchaser. It prohibited all other dealings not expressed to be subject to the caveator's claimed lien.

I interpolate to say that with the exception of s105, the *Real Property Act* does not authorise the "registration" or "notification' of Court orders or judgments upon the title. That, and the following sections deal with and are confined to sale of land by Court order or decree or in the execution of judgment. There was no justification for the notation of Mildren J's interlocutory orders on the title or for the Deputy Registrar-General's

requirement for the preparation and lodging of the document comprising Exhibit AGJ5 to the affidavit of Mr James, which purports to record the Court of Appeal's orders on the Register. No lis pendens can be registered, s250. Equitable interests are preserved, s249, and can be protected by caveat, s191. A Court Order operates inter partes but leaves the register unaffected. See generally *Whallin v Bailbart Investments Pty Ltd* (1987) 47 SASR 198, especially at 202, 203; *Eng Mee Yong v Letchumanan* [1980] AC 331 at 335-337, per Lord Diplock, *Damodoran v Choe Kuan Him* [1980] AC 497 at 503, 504, per Lord Diplock. The Registrar can not make on the register entries of a kind for which no express provision is made in the *Real Property Act* and which are inconsistent with the whole scheme of the Act. S64 of the *Real Property Act* permits cancellation or rectification of certificates or entries to give effect to Court orders or judgments; it does not permit notification of the Court's orders themselves. The only way of dealing with estates or interests in Torrens system land is by alteration of the Register. The modes by which such alteration can be procured are prescribed by the *Real Property Act*. No other modes are authorised. The *Real Property Act* provisions are exclusive. See *Crowley v Templeton* (1914) 17 CLR 457 at 463, per Griffith CJ.

The plaintiff purchaser has now taken out a summons pursuant to s191 IV of the *Real Property Act* requiring the defendant vendor to show cause why its caveat should not be removed and for such other orders as to the Court seem just.

I think the form of the caveat is generally acceptable. It satisfies the requirements of the *Real Property Act*, save in its reference to Mildren J's order, which is unauthorised by the provisions of the *Real Property Act*. I have power to permit it to be amended, *Elliott v Blanchard* (1970) 17 FLR 7, and would be disposed to allow any amendment necessary to cure what might be termed extraneous matters or matters of form or style or detail, rather than of substance. If necessary I will hear further from the parties on this.

The parties not consenting to my finally determining the question as to whether the defendant vendor has an unpaid lien in the circumstances, cf *In re The Kauri Timber Company (Limited)* (1889) 7 NZLR 452, on this summons, I am only concerned with the question whether the defendant caveator has a prima facie or reasonably arguable case and that the caveat has not been lodged frivolously; *In Re Faulke's Caveat* (1906) 26 NZLR 392; *Kelly v Bentinck* (1902) 22 NZLR 235, 255; *Ex Parte Muston & Anor*; *Anderson Caveator* (1903) 3 SR (NSW) 663, 664. The onus is on the respondent to the summons, ie, the defendant vendor, to show why the caveat should not be removed; see *Whallin v Bailbart Investments Pty Ltd* (1987) 47 SASR 198; *Galvasteel Pty Ltd v Monterey Building Pty Limited* (1974) 10 SASR 176. I refer to onus in the sense used by Lord Diplock in *Eng Mee Yong & Ors v Letchumanan* [1980] AC 331 at 337. In order to maintain the caveat, the caveator must establish that it is reasonably arguable that the caveator has the caveatable estate or interest in the land claimed in the caveat.

In the present case the defendant vendor claims an equitable lien independent of possession of the land or of any documents of title. Such a lien is a creature of equity for the purpose of doing that justice which arises in the equity as an incident to the agreement for sale. It is not dependent upon any express agreement. It is part of the scheme of equitable adjustment of the mutual rights and obligations of the parties and applies to every ordinary contract of sale of land in the absence of a contrary intention; *Thompson v Palmer* (1933) 49 CLR 507, 524*; Davies v Littlejohn* (1923) 34 CLR at 185; *Barry v Heider* (1914) 19 CLR 197; *Wossidlo v Catt* (1934) 52 CLR 301, 307. As I have said it arises independently of any agreement and is applicable to Torrens title land: *Barry v Heider* (supra); *Wossidlo v* Catt (supra); Heid *v Reliance Finance Corporation* (1983) 154 CLR 326. Arguably (at least) such a lien will arise with respect to interest payable under the contract or payable in equity on the unpaid balance of the purchase money; *Rose v Watson* (1864) 10 HLC 672, 11 ER 1187: *In re Drax* [1903] 1 Ch 781 at 792, 793 per Collins MR, 794 per Romer LJ 795-797 per Cozens-Hardy LJ; *In re Stucley* [1906] 1 Ch 67 at 77 per Vaughan Williams LJ, 82 per Stirling LJ, 84 per Cozens-Hardy LJ; *Hewitt v Court* (1982-83) 149 CLR 639 at 663 per Deane J. I say arguably because counsel for the plaintiff argued penalty interest could not found a lien. I am presently of the view that argument is contrary to both authority and principle but I do not finally decide the question. A lien arises unless there is a "clear and manifest inference that it was the parties' intention to exclude it" or for it to be postponed to another interest; *Barclays Bank v Estates and Mortgage* (1997) 1 WLR 415 at 421, 424. An unpaid vendor of Torrens title land may caveat his own registered title claiming a lien, see *Barry v Heider*

(supra); *Wossidlo v Catt* (supra); *Heid v Reliance Finance Corporation* (supra).

The genesis of the defendant vendor's claim for penalty interest is Clause 16.1 of the contract which provides:

> "16.1 If for any reason whatsoever except the neglect or default of the vendor:
>
> (a) this contract shall not be completed on the date for completion then the Purchaser shall pay interest at the rate specified in Item N on the whole of the purchase price from the date for completion until the date on which completion actually takes place
>
> (b) any part of the purchase price (except the deposit) is not paid when payable, then the Purchaser shall pay interest at the rate specified in Item N on such part from the date such amount is payable until the date such part is actually paid.".

The contract provided that the date for completion was on or before 30 June 1996. Settlement was attempted in early July but went off. The present proceedings were initiated a short time later on 16 July 1996. Undoubtedly one reason settlement went off was because the plaintiff purchaser insisted that the vendor defendant provide vendor finance and the defendant vendor refused. The Court of Appeal held, inter alia, that the defendant vendor was not contractually bound to provide vendor finance. One question in the present application is whether the defendant vendor has demonstrated a prima facie case or a serious question to be tried as to whether settlement went off without

any neglect or default on the part of the vendor defendant. A further reason why settlement was not effected on 1 July 1996 (the original settlement date of 30 June 1996 having been deferred by mutual agreement) was that neither the defendant vendor nor the defendant vendor's mortgagee had the duplicate Certificate of Title present in Darwin for settlement. However time, then, was not of the essence. I think it is at least arguable that penalty interest was thereafter payable on account of the actions of the plaintiff purchaser in wrongfully insisting upon vendor finance notwithstanding any concurrent fault of the defendant vendor in not having the title present for settlement or insisting on settling without giving an agreed credit of $90,000.00 towards the purchase price. These are issues that must go to trial when the whole of the surrounding circumstances relating to the aborted settlement are subjected to evidence. On an application such as this I am not able to make a final order or declaration concerning the rights of the parties as to penalty interest, as there has been no full ventilation of the facts. The caveator has an arguable case. There are substantial issues of fact and law to be tried, not only on the issue as between the first plaintiff and the defendant as to whether there is an unpaid vendor's lien, but, if established, whether the lien has priority over the plaintiff purchaser's intended mortgagee who or which provided payment towards the purchase price. Mr James, as nominee of an undisclosed lender is the named mortgagee in the as yet unregistered mortgage instrument granted by the first plaintiff. He, by leave, was added as a third plaintiff to be bound by the result. The issue of priority between the defendant and the third

plaintiff should conveniently be heard with the issue as to the existence of the claimed lien. Questions of waiver and estoppel said to arise both as regards the existence of the lien and the question of priority will also have to be determined on full evidence. The lender, having paid or caused monies to be paid to the vendor, may have priority over any defendant's lien for unpaid penalty interest by virtue of subrogation of the lien with respect to the unpaid purchase price which gave rise to the penalty interest, cf *Evandale Estates Pty Ltd v Keck* [1963] VR 647.

It was submitted, inter alia, that the alleged entitlement to penalty interest could not run from 1 July 1996 because the vendor defendant refused to settle at the time on any basis other than receiving the full purchase price without the agreed credit of $90,000.00, that the parties clearly acquiesced in disregarding the 30 June and 2 July 1996 settlement dates and that no notice to complete was ever given by the defendant vendor to the plaintiff purchaser at any subsequent time. Thus, it was argued, no penalty interest had ever been set in train. However these arguments overlook the questions of anticipatory breach, and bearing in mind the Court of Appeal's ruling that the plaintiff purchaser could not insist on settlement as she had done (with vendor finance) there arise further arguments. Mr Waters QC, when pressed, ultimately conceded that the defendant had an arguable case for the claimed penalty interest.

The whole matter must go to trial. The matters arising are simply not suitable for disposition upon the present application. It is clear that my power is discretionary: *Evandale Estates Pty Ltd v Keck* [1963] VR 647 at 652; *McMahon v McMahon* [1979] VR 239 at 245. In the circumstances I think it is appropriate to make orders similar to those made by that learned judge, Williams J, in *In re Thomson and Chipps; Ex parte Findlay* (1886) 5 NZLR SC 52, and *In re Greer; Ex parte Knight* (1900) 18 NZLR 686 at 688, including his orders as to costs.

I also think it is appropriate that the defendant vendor, the caveator, give an undertaking as to damages in the manner adverted to by Cox J in *Whallin v Bailbart Investments Pty Ltd* (1987) 47 SASR 198 at 203.

Thus the status quo will remain; the first plaintiff purchaser is free to lodge her documents for registration, the third plaintiff proposed mortgagee may lodge a mortgage subject to the caveat (for what it will prove to be worth) and the parties shall have to proceed to trial on the issues of penalty interest and priority.

There will be orders as follows:

1. that upon the defendant giving the usual undertaking

as to damages the first and third plaintiffs might suffer as a consequence of this order the defendant's caveat be removed unless the defendant within 28 days issues and serves upon the first and third plaintiffs proceedings either within the present action or by fresh action as it may be advised claiming a lien in the sum of $137,385.20 over the land being Lot 2855 Town of Darwin situate at 62 East Point Road Fannie Bay and comprised and described in Certificate of Title Register Book Volume 365 Folio 027 in priority to any interest of the third plaintiff in the said land.

2. That the costs of and incidental to the summons be costs in the defendant's claim for lien and priority.

3. If proceedings are not issued and the caveat is removed that the plaintiffs' costs of and incidental to the summons be paid by the defendant caveator.

I shall hear the parties as to the disposition of the remaining issues in these proceedings, including the matters referred back to me by the Court of Appeal. There will be general liberty to apply.