

*Jerambak Holdings Pty Ltd & Ors v Austral-Asean Pty Ltd & Anor*  
[2005] NTSC 38

PARTIES: JERAMBAK HOLDINGS PTY LTD  
(formerly GLENCOE PTY LTD)  
(ACN 009 615 105)  
and  
THE BRUNEI MEAT EXPORT  
COMPANY (ACN 067 518 094)  
and  
THE BARKLY MEAT PROCESSING  
COMPANY PTY LTD  
(ACN 077 832 656)

v

AUSTRAL-ASEAN PTY LTD  
(ACN 066 455 721)  
and  
REGISTRAR GENERAL OF THE  
LAND TITLES OFFICE NORTHERN  
TERRITORY

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
NORTHERN TERRITORY  
EXERCISING TERRITORY  
JURISDICTION

FILE NO: SC 209 of 2001 (20119731)

DELIVERED: 8 July 2005

HEARING DATES: 7 and 8 July 2005

EX TEMPORE JUDGMENT OF: RILEY J

## **CATCHWORDS:**

### **CAVEAT – APPLICATION TO REMOVE CAVEAT**

Caveatable interest claimed in the properties pursuant to a constructive trust – where does the balance of convenience lie? – disposal of the properties would deprive the plaintiffs of the benefit of success in the proceedings – extensive delay in the defendants seeking relief and close proximity of trial - balance of convenience lies with retention of the caveats.

*Goldstraw v Goldstraw* [2002] VSC 491, applied

*Re Burman's Caveat* [1994] 1 Qd R 123 at 125, applied

*Whallin v Bailbart Investments Pty Ltd* (1987) 47 SASR 198 at 203, applied

*Palmer v Mullins Investments Pty Ltd (in liquidation)* (SC(WA), Murray J, 26 June 1992), considered

*Eng Mee Young v Leutchumanan* (1980) AC 331, considered

*Heller Financial Services Ltd v Amor & Anor* (SC(NSW), Santow J, 8 August 1997), considered

## **REPRESENTATION:**

### *Counsel:*

Plaintiff:	P. Sest with R. Hocking
Defendant:	S. McNicol in person by leave

### *Solicitors:*

Plaintiff:	Ward Keller
Defendant:	--

Judgment category classification:	B
Judgment ID Number:	ril0518
Number of pages:	10

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

*Jerambak Holdings Pty Ltd & Ors v Austral-Asean Pty Ltd & Anor*  
[2005] NTSC 38  
No 209 of 2001 (20119731)

BETWEEN:

**JERAMBAK HOLDINGS PTY LTD**  
**(formerly GLENCOE PTY LTD)**  
**(ACN 009 615 105)**  
First plaintiff

and

**THE BRUNEI MEAT EXPORT**  
**COMPANY (ACN 067 518 094)**  
Second plaintiff

and

**THE BARKLY MEAT PROCESSING**  
**COMPANY PTY LTD**  
**(ACN 077 832 656)**  
Third plaintiff

AND:

**AUSTRAL-ASEAN PTY LTD**  
**(ACN 066 455 721)**  
First defendant

and

**REGISTRAR GENERAL OF THE**  
**LAND TITLES OFFICE NORTHERN**  
**TERRITORY**  
Second defendant

CORAM: RILEY J

EX TEMPORE  
REASONS FOR JUDGMENT

(Delivered 8 July 2005)

- [1] This is an application made on behalf of Austral-Asean Pty Ltd and Austral-Asean Holdings Pty Ltd, for the removal of various caveats from land in Darwin. The caveators appear to resist the applications and they seek to extend the effect of the caveats until further order.
- [2] Austral-Asean Holdings Pty Ltd (Holdings) is the registered proprietor of unit 5 lot 6489 Town of Darwin, unit 10 lot 6596 Town of Darwin and unit 16 lot 6596 Town of Darwin. Caveats have been placed on each of those properties by Jerambak Holdings Pty Ltd, the Brunei Meat Processing Company Pty Ltd and by the Barkly Meat Processing Company Pty Ltd. Those companies are the plaintiffs in the substantive proceedings which are numbered 72 of 2000.
- [3] The same companies are the caveators in respect of unit 65 lot 6379 Town of Darwin of which Austral-Asean Pty Ltd (Austral-Asean) is the registered proprietor.
- [4] The history of the proceedings is conveniently set out in the affidavit of Ross Alexander Hocking sworn 4 July 2005. I need not repeat that history in detail. A summary will suffice for present purposes.
- [5] The substantive proceedings are taken on behalf of the plaintiffs against various defendants associated with Steven Craig McNicol (including Austral-Asean and Holdings) and also against defendants associated with Peter Blunt. The broad basis of the claims is that Mr McNicol and Mr Blunt acted in breach of fiduciary duties owed to the plaintiffs and also

fraudulently of the plaintiffs in relation to a series of identified transactions. Those transactions were undertaken when Mr McNicol and Mr Blunt were both alleged to be officers and/or managers of the plaintiff companies. One of the heads of relief sought is the declaration of constructive trusts in relation to funds said to have been obtained by the defendants from the plaintiffs in the identified transactions.

[6] The three plaintiffs each lodged a caveat over the four properties referred to above. Those caveats were lodged on 23 August 2000 and, in each instance, the caveatable interest identified was based upon the claims for a constructive trust made in the substantive proceedings.

[7] As was required by the relevant legislation, the plaintiffs have sought and obtained an extension of time for the removal of caveats until further order of this Court. At various times the so-called McNicol defendants have indicated an intention to apply to remove the caveats. As long ago as 25 October 2002, at a time when the McNicol defendants had legal representation, a summons was filed seeking removal of the caveats. That summons forms the basis of the present application. The proceedings have been closely case-managed by myself and I have on numerous occasions raised with the legal representatives of the McNicol defendants the issue of whether or not the application was to proceed. On 1 June 2005 the legal representatives for the McNicol defendants sought and were granted leave to file a Notice of Ceasing to Act on behalf of those defendants and that has now occurred. On 1 June 2005 Mr McNicol foreshadowed his intention to

pursue the application for removal of the caveats and that application was therefore listed for hearing yesterday and today. I have, in a separate hearing, granted leave to Mr McNicol to represent both the corporate defendants, in relation to this particular application alone. In so doing I followed the reasoning of Kearney ACJ in *Alice Springs Abattoirs Pty Ltd v Northern Territory of Australia* (1996) 111 NTR 9.

- [8] In summary, the plaintiffs allege that they were induced to enter the identified transactions by representations and conduct in breach of fiduciary duties owed to the plaintiffs by Mr Blunt and Mr McNicol and/or by their fraudulent conduct. In consequence of so doing the plaintiffs say they paid prices for assets which were a gross over-value and that the defendants were the ultimate beneficial recipients of the overpayments. By reference to the pleadings and to statements filed pursuant to the orders of the court, the plaintiffs say that there is no dispute that the McNicol defendants received, as a minimum, an amount of approximately \$2m of the plaintiffs' funds. Indeed the fact that funds were received by the McNicol defendants from the plaintiffs appears not to be in serious dispute. The issues raised on the pleadings include the amount received, whether those payments were authorised by the plaintiffs and whether the circumstances surrounding those payments as alleged by the plaintiffs in fact existed. The receipt of those funds, it is said by the plaintiffs, predated the acquisition of the caveated properties by Austral-Asean and Holdings. It is not in dispute that those two companies were at all material times owned and controlled by

Mr McNicol and his wife. Holdings is described by Mr McNicol in an affidavit as “the trustee for the McNicol Family Trust” and appears to have no other function than that of trustee.

[9] It is the case for the plaintiffs that the funds improperly divested from them by the defendants were, inter alia, applied to the purchase of the properties, the subject of the caveats. That being so the plaintiffs claim an interest in the identified properties pursuant to a constructive trust. An interest based on a constructive trust can form the basis of a caveat: *Goldstraw v Goldstraw* [2002] VSC 491.

[10] As I have indicated, the claims made by the plaintiffs in the substantive proceedings are disputed by the defendants and a counterclaim has been lodged seeking monies alleged to be due and owing, damages for wrongful dismissal of Mr McNicol and a claim for damages alleging a breach of fiduciary duty.

[11] As to the claims made by the plaintiffs to a constructive trust in relation to each of the caveated properties, Mr McNicol says that prior to the purchase of those properties “Austral-Asean Pty Ltd and associated entities had accrued substantial income and profits, well in excess of the funds invested in equity in the four caveated assets. I argue that the caveated properties were capable of being purchased by Austral-Asean and associated entities without any contribution from income from the impugned transactions”. There is no direct denial by Mr McNicol that the funds were used as alleged

or, at least, as part of a mixed fund for the purchase of the properties. Any information that would demonstrate or suggest the contrary would be in the possession of Mr McNicol and not the plaintiffs and no such information has been identified or produced. Mr McNicol has, in his submissions, made assertions as to the financial position of the companies but has not referred to any source or other material that may support what he says. He was given the opportunity to produce such documents but failed to do so.

[12] The inference that arises from the coincidence of the receipt of the funds and the purchase of the properties has not been addressed. The inference that the funds of the plaintiffs were used in whole or in part to purchase the properties is strengthened by the evidence of Mr McNicol as to the fragile financial state of the McNicol defendants at the time of the actual purchase. He gave evidence that the decisions to purchase the properties were made when the group was profitable. That profitability included the funds received from the plaintiffs. In November 1998 his employment was terminated and the financial position of the McNicol defendants “dramatically” deteriorated immediately thereafter. The unit properties were purchased in April and October 1999. In the absence of evidence as to an alternative disposition there is a clear inference that the funds used for the purchases came from the plaintiffs.

[13] The situation now is that each of the defendant companies is in financial difficulties and, without access to the funds that would become available from the sale of the properties, is insolvent. The companies wish to have



the caveats removed so that they can dispose of the relevant real estate. They wish to use the proceeds to extinguish debts, including to the former legal advisers of the McNicol defendants, and to then set aside funds to finance the ongoing defence of the substantive proceedings by all of the McNicol defendants and also the pursuit of the counterclaim in those proceedings. In the absence of access to those funds the defendants will be unable to engage legal assistance and will be unable to be legally represented at the hearing.

- [14] An application for removal of a caveat is, in essence, in the nature of an application for an interlocutory injunction: *Re Burman's Caveat* [1994] 1 Qd R 123 at 125; *Whallin v Bailbart Investments Pty Ltd* (1987) 47 SASR 198 at 203. An obligation is imposed upon the caveator to establish that there is a serious question to be tried and that the balance of convenience lies in preserving the caveats.
- [15] In the circumstances of this matter, in the event that the plaintiffs establish the matters set out in the statement of claim, the existence of relevant constructive trusts may be established. On the basis of the pleadings and of the statements that have been delivered by or on behalf of the McNicol defendants and in light of the above discussion, there is an arguable case for such relief.
- [16] The real issue to be determined in this case is: Where does the balance of convenience lie? On the one hand the plaintiffs point to the existence of a

serious question as to the presence of a caveatable interest and say that, in those circumstances, the balance of convenience lies very strongly in favour of the retention of the caveat: *Palmer v Mullins Investments Pty Ltd (in liquidation)* (SC(WA), Murray J, 26 June 1992); *Eng Mee Yong v Letchumanan* (1980) AC 331. If the caveats are removed it is the stated intention of the McNicol defendants to dispose of the property. On the basis of the information available to the Court at this time (including the submissions of Mr McNicol), that property is the only prospect of recovery available to the plaintiffs. To allow the removal of the caveats will, in effect, deprive the plaintiffs of the capacity to recover the funds or part of the funds in the event that they are successful. It will deprive the plaintiffs of their claimed proprietary interest in the property, the subject of the caveats.

[17] In support of the submission that the balance of convenience lies with the plaintiffs reference was made to the very lengthy delay on the part of the McNicol defendants in pursuing these proceedings. The caveats were lodged on 23 August 2000. It was not until 25 October 2002 that a summons seeking the removal of the caveats was filed and served. Notwithstanding prompting by the plaintiffs (as detailed in the affidavit material) and persistent reference to the issue by the Court at various case management conferences, the McNicol defendants did not pursue the matter until 9 March 2005. The caveats have been in position for almost five years. The trial of the proceedings is to commence in February 2006 and preparation on the

part of all parties is in an advanced state. In relative terms, the application comes very late in the proceedings. In explaining the delay Mr McNicol referred to the personal difficulties he experienced throughout the period. Whilst personal issues may have, to some extent, contributed to the delay, the fact remains that there was extensive delay as a consequence of the failure of the McNicol defendants to act.

[18] The principal basis for the application to remove the caveats, as identified by the McNicol defendants, is the expressed need to dispose of the assets with a view to paying existing debts and allowing for the engagement of legal representation for the purposes of the trial. The fact that the McNicol defendants desire to sell their property in order to raise money for the purposes of pursuing the ongoing litigation is a factor to be taken into account in determining where the balance of convenience lies. Denial of the opportunity for the defendants to sell the property and obtain funds for that purpose “clearly is a factor to be weighed in their favour”: *Heller Financial Services Ltd v Amor & Anor* (SC(NSW), Santow J, 8 August 1997).

[19] In considering the balance of convenience, a factor to be taken into account, when there are strong arguments in favour of competing positions, is the preservation of the status quo. In the circumstances of this case the status quo is the position that prevailed prior to the present application being pursued. Maintenance of the status quo serves to preserve the claimed proprietary interests of the plaintiffs in the property. That is a matter in favour of the retention of the caveats.

[20] In my view the balance of convenience lies with the retention of the caveats. There is an accumulation of factors in favour of the arguments presented by the plaintiffs. It reflects the status quo. The acknowledged fact that the disposal of the properties would effectively deprive the plaintiffs of a claimed proprietary interest in the properties and of the benefit of success in the proceedings, coupled with the extensive delay in the McNicol defendants seeking relief and the relative proximity of the trial, lead me to find in favour of the plaintiffs.

[21] The application is dismissed.

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