

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY



No. S216 of 2019

BETWEEN: **FRANZ BOENSCH AS TRUSTEE OF THE BOENSCH TRUST**
Appellant

and

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SCOTT DARREN PASCOE
Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

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Part I:

1. This outline is in a form suitable for publication on the internet.

Part II:

2. The issues that arise for determination in the appeal should be addressed in the following logical sequence, (with references to the issue numbers in the appellant's submissions and oral outline).

The proper construction and application of s 74P(1) of the *Real Property Act 1900* (NSW) (Issue 5)

3. The primary judge's application of the section was supported by long-standing and widely-followed authority, to the effect that the applicant for compensation needs to establish that the caveator (a) did not have a caveatable interest, and (b) did not have an honest belief based on reasonable grounds that they possessed a caveatable interest: *Bedford Properties Pty Limited v Surgo Pty Limited* [1981] 1 NSWLR 106 at 108C-D, *Beca Developments Pty Limited v Idameneo (No 92) Pty Limited* (1990) 21 NSWLR 459 at 474G; *Commonwealth Bank of Australia v Baranyay* [1993] 1 VR 589 at 600; *Brogue Tableau Pty Ltd v Binningup Nominees Pty Ltd* (2007) 35 WAR 27 at [80]; *New Galaxy Investments Pty Ltd v Thomson* (2017) 18 BPR 36,811 at [11]-[17]; **RS [13]-[21]**.
4. This approach is partly subjective and partly objective. The use of the phrase "without reasonable cause" in a corresponding manner in other legislation, that is in relation to a party's actions, dictates that there be some subjective element; **RS [18]-[20]**. It is the proper test to be applied.

The terms of the claim of the interest in the caveat (Issue 4)

5. Assessed objectively, the caveat (at **AFM1 117**) was framed in terms which claimed an interest by reference to the rights of the trustee in bankruptcy, not by reference to those of the registered proprietor. As such it extended to any interest of the proprietor which had vested in the respondent in equity by virtue of s 58(1)(a) of the *Bankruptcy Act 1966* (Cth). This was wide enough to cover full legal and beneficial ownership, or in the alternative legal title subject to trust rights, and any trustee's right of indemnity; **RS [22]-[26]**. There was no inconsistency.

A caveatable interest by virtue of s 58(1) of the *Bankruptcy Act* and the appellant's registered proprietorship of the land (Issue 1)

6. Section 58(1)(a) of the *Bankruptcy Act* operated, in equity, to vest the bankrupt's interest in the land (as the proprietor of an estate in fee simple) in the trustee in bankruptcy, notwithstanding the ultimate finding in later proceedings that the bankrupt held the land as trustee, and the literal terms of s 116(2)(a) of the *Bankruptcy Act*: *Lewis v Condon* (2013) 85 NSWLR 99 at 120-121 [100]; **RS [28]**.

7. The trustee in bankruptcy took the title to the property subject to equities: *Official Trustee in Bankruptcy v Ritchie* (1988) 12 NSWLR 162 at 164G-165B, 173B-174F, 175B; **RS [28]**.

8. As the registered proprietor, the appellant had an undoubted interest in the land. There was at the time of sequestration no certainty as to whether he held any part or the whole of that interest on trust for others. Where there is even the most remote possibility of beneficial interest, the property passes to the trustee in bankruptcy: *Carter Holt Harvey Wood Products Pty Ltd v The Commonwealth* (2019) 93 ALJR 807 at [94]; *Carpenter v Marnell* (1802) 3 Bos & Pul 40 at 41 [127 ER 23 at 24]; *Carvahlo v Burn* (1833) 4 B & Ad 382 at 393 [110 ER 499 at 503]; *The Governors of St Thomas's Hospital v Richardson* [1910] 1 KB 271 at 277; **RS [29], [31]**.

9. This approach best addresses practical difficulties that might be presented to trustees in bankruptcy where it cannot be readily ascertained what property may be held on trust: *Re Transphere Pty Ltd* (1986) 5 NSWLR 309 at 312B-D; **RS [30]**.

Reasonable cause to lodge and refuse to withdraw the caveat (Issues 6 and 7)

10. The findings of the primary judge and the Full Court as to the reasonable grounds for the respondent's honest belief in any event adequately constitute reasonable cause on a purely objective basis for lodgment, and refusal to withdraw, the caveat; **RS [33]**.

11. The evidence that supported these findings is set out in the respondent's primary affidavit read at the hearing, (AFM2/487); **RS [34]-[48]**.

12. Legal advice as to the existence of a caveatable interest is a potentially significant matter to be taken into account in assessing whether the caveator had reasonable cause for lodging the caveat: *Brogue Tableau Pty Ltd v Binningup Nominees Pty*

Ltd (2007) 35 WAR 27 at [97]-[100]; *New Galaxy Investments Pty Ltd v Thomson* (2017) 18 BPR 36,811 at [327].

13. At the time of lodgment of the caveat the respondent had been provided with legal advice from counsel, via a solicitor, that there were strong prospects of having what counsel described as a “purported trust” set aside; **RS [36]**.
14. Thereafter the respondent continued to seek and receive legal advice as to the prospects of defeating the claimed trust. He had reasonable cause to maintain the caveat whilst those issues were litigated: *Gustin v Taajamba Pty Ltd* (1994) 6 BPR 97,468 at 4.25-5.20; *Edmonds v Donovan* (2005) 12 VR 513 at 549 [93]; **RS [41]**.

10 **Notice of Contention — the availability of a trustee’s right of indemnity (Issue 2)**

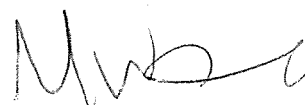
15. The respondent pleaded and argued before the primary judge that the existence of a trustee’s right of indemnity was an answer to the claim under s 74P(1); **RS [50]-[51]**.
16. A trustee’s right of indemnity (including the possibility of one) gives rise to a proprietary interest in the nature of a lien over trust property, which passes to the trustee in bankruptcy (*Carter Holt Harvey Wood Products Pty Ltd v The Commonwealth* (2019) 93 ALJR 807 at [28], [83], [139]), irrespective of what may be the outcome after a subsequent accounting: *Jennings v Mather* [1901] 1 KB 1 at 9; *Jennings v Mather* [1900] 1 QB 108 at 113-114; **RS [54]-[55]**.
- 20 17. The evidence at hearing revealed that the appellant appeared to have a lien over the land generated by rights of recoupment and exoneration on a number of bases; **RS [56]-[58]**. Unless the appellant was able to establish to the Court’s satisfaction on the balance of probabilities that there was no such proprietary interest, he failed to discharge his onus of showing that the respondent lodged or maintained the caveat without reasonable cause. He did not do so; **RS[59]-[60]**.

Dated: 10 October 2019

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D A PRIESTLEY SC



M F NEWTON