



Our ref: AR:KC:25/01608

25 February 2005

Mr Russell Mathews  
254 Hawken Drive  
ST LUCIA QLD 4067

*By email: russellm@humbug.org.au*

Dear Russell,

**RE: Your claim on McVean and other matters**

I refer to our meeting on the 7 February and subsequently and to the number of emails which you have forwarded to me.

I now take this opportunity of setting out advices and comments having read the emails and according to the instructions

**1. Claim against McVean**

This is the principal matter under this file.

I read your email of the 4 February 2005 and particularly that a part of the email commencing at page 5 which appears to set out the facts.

There is a number of issues which are raised by that email in respect of your claim against Mr & Mrs McVean providing that the matters can be evidenced.

The issues are as follows:

- a. Whether you had an option to purchase the property; or in the alternative
- b. Whether Mr & Mrs McVean are holding the property on an Express Trust; or in the alternative
- c. Whether Mr & Mrs McVean are holding the subject property as under Constructive Trust.

The subject property from which this claim arises is situated as 254 Hawken Drive, St Lucia Brisbane. I have conducted a Real Property search and **enclose** a copy of same for your reference.

I refer you to the Title Deed which indicates essentially the registered proprietor and the date of acquisition which is to some extent relative in this matter.

As I have advised you verbally, the claims that have been raised above described as issues, really arise in the law of Equity. That being the case the legal interest registered in title bears little input on the real beneficial ownership or rights that may be available to other parties such as yourself as in these circumstances.

The general principle as set out in *Ford & Lee's Principles of the Law of Trust*, is that a trust is created where:

*“an obligation enforceable in equity which rests on person (the trustee) as owner of some specific property (the trust property) to deal with a property for the benefit of another person (the beneficiary) or for the advancement of certain purposes”.*

In the circumstances based on your instructions, it appears that such a trust was created when you and Mr & Mrs McVean as well as your parents had considered the acquisition of the Hawken Drive property. On your instructions it seems it was essentially acquired meant to be for you. Whilst at this stage the terms of that trust seem to be vague but it is clear to say that the property was specifically purchased to enable you to reside in it and provide you the freedom to take borders and derive an income from that property in order to be able to pay for the repayment of the loan which was taken out by the McVeans to purchase that property.

As you rightly indicate, in an email which was sent to you by Mr McVean, the evidence exists that either the property was purchased for you or that you have an option to purchase that property clearly exists.

**(i) Classification of the Trusts:**

I confirm that in my discussions with Mr Richard Gallaway, based on the limited instructions received both by me and subsequently with which he was briefed, there appear to be a number of possibilities in respect of the Trust created.

**A. Classification of Express Trust:**

If the possible intention by McVean was to purchase the property for you and to hold it for you until such time as you could acquire it then it is clearly an Express Trust.

To prove this Trust it would be necessary to obtain evidence of the positive intention by comments or other conduct of either McVean or collateral to the circumstances persons such as Mrs McVean or your mother. As the texts indicated a positive intention to create a Trust may be inferred from statements to which are less explicit.

**B. Classification of A Constructive Trust:**

As you are probably aware from your legal studies, this trust is construed to have been created without the intention being indicated of any party. Once again I refer you to Ford & Lee which defines this trust as being a:

*“ Means whereby a liability is imposed in equity on a person to account to certain property as if he had been a Trustee under an Express or Resulting Trust”.*

At this juncture I shall not go further into the law of trusts as firstly you may be aware o same as a result of your legal studies and the academic qualifications you hold and

secondly it is a matter to be considered in more detail by counsel to advise on brief considering the specific facts.

**(ii) The issue of the Option:**

I have dealt with this last as once again whether or not there is any document expressly evidencing the option is governed by the law of equity. The issue of part performance conduct and all other collateral evidence that may exist to prove that an intention is sufficient.

Whilst the statute of frauds has encompassed in the Property Law Act (Queensland) requires that any dealings in land in Queensland be in writing, the issue as to whether an option existed or not is an equitable right and shows an action and hence the statute of frauds may be satisfied by declaration by the Court that such a right exists.

**(iii) Remedies:**

You would also be aware of the remedies available in Equity in respect of those matters. Whether or not you promote the issue of the claim of an option or trust, you would need to consider the terms of each claim.

On the basis of your instructions it clearly appears that whilst the property was held for you under a trust or pursuant to an option right, the terms specifically were that at some stage you would acquire finance and purchase the property for yourself at a price which appears to be undeterminable at this stage.

Subject to Counsel's opinion our qualified advice based on that reservation is that you would be entitled to apply to the Supreme Court for a declaration the property is being held for you under either an Express or Constructive Trust and furthermore in the alternative a declaration that you have a right of option in respect of that property which is exercisable by you.

Accordingly it would also be possible for you to lodge a caveat in respect of that said property. I shall address the issue of caveats later in this letter.

**(iv) Caveat:**

As a collateral action to your actions instituted in the Supreme Court.

**Threshold Issues:**

Prior to considering your rights it is necessary to understand that there are a number of legal thresholds which must be confronted and overcome. I take this opportunity of providing you a summary of these matters.

***Section 11 of the Property Law Act 1974.***

Section 11 is based on the old English Statute of Frauds of 1677 which required that any dealings or interest in land in Queensland are to be in writing.

*Section 11 states:-*

1. *Subject to this Act with respect to the creation of interest in land by parole:*

- (a) *No interest in land can be created or disposed of except by writings signed by the person creating or conveying the same, or by the person's agent lawfully authorised in writing, or by will or by operation of law.*

***Indefeasibility of Ownership under the current system***

*Section 184 of the Land Titles Act provides:-*

1. *A registered proprietor of an interest in the lot holds the interest subject to the registered interest affecting the lot but freed from all other interests.*

*In particular the registered proprietor:-*

- (a) *Is not affected by actual or constructive notice of an unregistered interest affecting the land;*
- (b) *Is liable to a proceeding for possession of the lot or an interest in the lot and if the proceeding is brought by the registered proprietor of an interest affecting the lot.*

*Section 184 (3) to the Act provides that the sub-sections 1 and 2 above to not apply:-*

- (a) *To an interest mentioned in section 185; or*
- (b) *If there has been found by the registered proprietor whether or not there has been fraud by a person from or through whom the registered proprietor has derived a registered interest.*

Your caveatable interest therefore would arise out of either the right in the property pursuant to the option or in the alternative as a result of the express or constructive trust as may be applicable.

Under Section 122 (1) of the Land Title Act a caveat may be lodged by a person who claims an interest in a lot.

Section 36 of the Acts interpretation Act defines the term interest in relation to land as property as meaning:-

*A legal or equitable interest in the land or other property; or*

*A right, power or privilege over, or in relation to, the land or other property.*

Upon lodging of the caveat, the caveatee may serve a notice on the caveator to commence proceedings in a Court a competent jurisdiction within 14 days of the date of service of the notice to establish the interest claimed in the caveat in the fault of which the caveator does not commence proceedings within the prescribed time the caveat will lapse under Section 126 (5) of the *Land Titles Act*.

In the circumstances therefore it will be possible to lodge a caveat in respect of the property claiming a right and interest, a right under the option and interest pursuant as a beneficiary under the trusts and simultaneously institute proceedings out of the

Supreme Court of Queensland and file a notice of action with the Titles Office to ensure that the caveat otherwise does not lapse.

As you are aware, if an application is not brought by the caveatee, the caveat shall lapse within 3 months of the date it is lodged once it is registered under 126 (7) of the Act.

The lodgement of a caveat is a serious matter as it affects the registered title of the registered proprietor of the land and therefore must be taken with great caution. Costs may follow in the event of an application by a caveatee to the Supreme Court of Queensland to remove the caveat if the Court is of the view the caveat was lodged frivolously or vexatiously.

The grounds of the caveat must be clearly stated and therefore this should be done in conjunction with the Statement of Claim which would be filed with the Supreme Court.

**(v) Fiduciary Duties by Your Brother:**

Your indication and instructions that you wish to raise a damages claim against your brother for what you feel as a breach of fiduciary duties.

The conduct and action you have sited in my opinion would not constitute a breach of fiduciary duties.

Your brother's fiduciary duties are essentially to hold and maintain the property in good order and to ensure that he discharges his obligations as trustee under the Express or Constructive Trusts that may be in existence.

In the circumstances your brother's attempts to clean the property, make repairs in fact go to show that your brother is trying to maintain the property in good condition.

If any difficulties are being created between you and Brisbane City Council officials, those could be the cause of separate complaint.

In the circumstances however the breach of your brother's fiduciary duties could constitute the fact that he;

- a. Does not acknowledge openly the option or if he does, nonetheless claiming to have lapsed; or it
- b. Is failing to agree to transfer the property to you for an agreed amount in terms of the Trust initially created when the property was acquired.

This aspect clearly needs to be looked at in some detail by any Counsel that is briefed to advise in the matter.

**(vi) Claims Against Coles, the University of Queensland, Brisbane City Council & Others.**

As you would appreciate each of these matters arise from different circumstances, different facts and possibly all involve separate areas of law.

In any claims that are raised it is necessary to characterise the area of law which gives rise to your claim.

Hence it may involve either breaches of Statute or alternatively a combination of breaches of Statute and Common Law.

Procedurally we would need to enter into separate Client Agreements for each matter or alternatively one Client Agreement to cover those matters. I would also require that a substantial amount be placed into my firm's Trust Account say approximately \$20,000.00 initially to cover anticipated professional costs and Barristers fees that may be incurred in obtaining advices.

I would expect that bearing in mind the complexity of the various issues you should anticipate costs of approximately \$2,000.00 to cover my costs on the brief and Counsel's advice on brief for each matter.

**(vii) Recommendations and Comment.**

I have had the benefit of reading through the report of Dr. Brian Hazell which you have emailed to me and for which I thank you.

In the light of that report I would state that two things follow:-

1. The issue of Unconscionable Conduct.

Based on that report and the various comments and diagnosis that Dr. Hazell makes about your condition, it would be clear to say that the persons dealing with you require to be careful in their conduct towards you and not to take advantage of you.

In that light particularly Mr & Mrs McVean being members of the family and knowing your history, would clearly be said to be in a trusting position in respect of your affairs and the Hawken Drive property.

To be fair to Mr & Mrs McVean, any attempts by them to try to clear the property and ensure that it complies with local health ordinances, is the discharge of their proper duties as Trustee in attempting to maintain your property and to ensure that it maintains its value without wastage.

Your medical condition therefore would clearly impose a special duty on Mr & Mrs McVean in the manner that they treat you and the arrangements with which they had entered into with you in respect of the Hawken Drive property.

Accordingly your claims that you had an option or that the property was held in trust for you would be more than plausible and it is my view that you would have a relatively good cause of action against Mr & Mrs McVean in respect of raising the claims I have referred to in this letter.

It would be my view to claim that Coles Myer, the Brisbane City Council or other entities with whom you have fallen into dispute would not have any special duty to deal with you as they are unaware of your medical and psychological condition.

The claim that they have dealt with you unconscionably would be a bit difficult unless they were aware of your circumstances and their conduct in some way took advantage of your disabilities.

I would need to obtain specific instructions of the facts concerning each of the parties against whom you claim you have a complaint. It will be from these facts that I will be able to determine the cause of action and the remedies available to you.

## 2. Our Association:

Once again it is because of the comments and diagnosis of Dr. Hazell in his report I acknowledge that I have a special obligation to ensure that you are not led into unnecessary and frivolous litigation.

It is for that reason that I have had a look at the issues you have raised in a sober manner and until such time as we reach agreement as referred to above by Client Agreements I am hesitant to simply provide to you indiscriminate advice as to your rights and remedies available to you against the various institutions against whom you have complaints.

It is obviously of some concern for me that at a later stage in our association that you do not raise a claim against me for either breaches of the Client Agreement or other obligations that I have to you.

It is for that reason to ensure that there is no misunderstanding between us that I would prefer that communication between us in most parts be via email and that my secretary is present in any personal attendances taking on instructions from you.

I therefore would be pleased if you would kindly consider the various matters raised in this letter and provide your instructions as to the course of action that you wish to undertake.

In the meantime I take this opportunity of **enclosing** my firm's tax invoice accompanied by a Trust Account statement relating to the professional services rendered to you to date on this matter.

I look forward to hearing from you.

Yours faithfully  
**ROUYANIAN & COMPANY**

**Andrew Rouyanian**  
**Encl.**

