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Retention of Title Clauses and Caveatable Interests

Summary

The Western Australia Court of Appeal (by majority) has held that a subcontractor, whose supply contract had a retention of title (“**ROT**”) clause and who supplied materials to the owner of a property, by reason of a contract with the builder, did not have a caveatable interest over the land. The contract was between the landscaper and the builder, and the owner was not liable to the subcontractor as the owner had no notice of the ROT clause, and there was no direct debt to give rise to an equitable interest in land to secure that debt.

Facts

In *Perron Investments Pty Ltd v Tim Davies Landscaping Pty Ltd* [2009] WASCA 171 (7 October 2009), Link Projects contracted with the appellant, the owner of a property, to perform building works on the property. The owner engaged an architect (agent) to administer the contract. Link Projects engaged the respondent, landscapers, to perform part of the building works. The landscaper supplied landscaping services and materials, and issued invoices to Link Projects which remained unpaid. Link Projects went in liquidation.

In the landscape works quotation, a ROT clause stated that ownership of the goods supplied by the landscaper to Link Projects remained with the landscaper until payment in full was received. If payment was overdue in whole or in part, the landscaper had every right, and was authorised by the owner to enter upon the property where the goods may be stored or in use, to take possession of the goods.

This clause was intended to bind the owner. Whether it did bind the owner was where the Court of Appeal diverged. The landscaper lodged 2 caveats on the title of the owner’s property claiming it had:

- an equitable interest in the land for the amount of the unpaid invoices; and
- an equitable lien as unpaid vendor, if title to the goods affixed to the land.

First instance

The owner served caveat lapsing notices. The landscaper commenced proceedings to extend the caveats. Master Sanderson extended the operation of the caveats as there was a serious

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question to be tried. It was arguable that the architect, on behalf of the owner, agreed to the ROT clause which the architect/owner knew or ought to have known would create an equitable interest in the land.

Court of Appeal

The judges of the Court of Appeal diverged in their opinions. The appeal was allowed by majority and the caveats lapsed. The owner argued there was no evidence it was ever aware of the contract or had agreed to its terms. The majority found there was no evidence that the architect (and therefore his principal) was aware that Link Projects would enter into a contract with the landscaper on the terms of the quote. The landscaper had failed to discharge its onus of proving there was a serious question to be tried. The first caveat (which asserted an equitable interest in the land) failed. The majority did not deal with the issue of whether there would have been an equitable interest if the owner was aware of the terms of the subcontract.

In relation to the second caveat, the Court applied *Hewett v Court* [1983] HCA 7 in which Deane J had described an equitable lien as a '*right against property which arises automatically by implication of equity to secure the discharge of an actual or potential indebtedness*'. The Court of Appeal held that there was no equitable lien in this case because there is no actual or potential indebtedness of the owner to the respondent in respect of the landscaping work. The landscaper had no claim against the owner for payment of any amount owing under the subcontract.

Dissenting judgment

McLure JA in dissent found that there was limited evidence that the negotiations for the subcontract were conducted by the architect (on behalf of the owner), and the architect instructed Link Projects to enter into the contract on the terms in the quote. Therefore, Link Projects had read the quote. Her Honour then addressed whether there was an equitable interest in the land.

Her Honour held that goods, that became affixed to land, become part of the land, and the status changed from personal property to real property. In this case, the landscaping material could have either:

- remained chattels;
- lost their original identity by being mixed with goods belonging to another; or
- became fixtures without losing their original identity.

Where goods have lost their original identity, a ROT clause will not be effective. Her Honour assumed that at least some of the goods supplied became fixtures and had not lost their identity. She referred to *Kay's Leasing Corporation Pty Ltd v CSR Provident Fund Nominees Pty Ltd* [1962] VR 429 which held that a contractual right to own and take possession of fixtures under a ROT clause confers on the holder of that right an equitable interest in the land, which entitles the holder to enter upon the land to sever and remove the fixtures.

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The owner argued the “dubious principle” in *Kay’s Leasing* should not be extended to cover the facts of this case where the owner is not liable to the landscaper for the goods. Her Honour found it was “arguable” that *Kay’s Leasing* extends to circumstances where the owner is in effect a third party security provider, not for the debt, but for the right to sever and remove the fixtures. She did not have to decide this point and merely had to decide whether it was arguable because this was an appeal of an interlocutory hearing, and the test is whether there is a serious question to be tried.

Her Honour found that owner had failed to demonstrate that the Master erred in extending the caveat based on the ROT clause, and dismissed the appeal.

Comment

This case was an appeal of an interlocutory judgment regarding whether a ROT clause gave rise to caveatable interests, and whether the caveats ought be extended until final hearing. It does not deal with whether the ROT clause was ultimately enforceable. That issue is to be determined at a final hearing.

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