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Caveatable Interests

Summary

The Supreme Court of NSW held in *Bellissimo v JCL Investments Pty Ltd* [2009] NSWSC 1260 that a landowner's consent to a caveat being lodged was insufficient to grant an equitable interest in the land to the caveator. Whether an interest arises depends on construction of the document under consideration.

Facts

The plaintiff, a solicitor, lodged a caveat on land of the first defendant. A lapsing notice was lodged. The plaintiff sought orders to extend the caveat's operation. The application was unopposed as the first defendant did not appear. The second defendant was the Registrar-General. The Court noted there is no provision for it to "dismiss a lapsing notice". The plaintiff still has to justify the extension of a caveat.

On the caveat, the plaintiff described his caveatable interest as "*an equitable interest pursuant to a Deed of Guarantee ... between the caveator and registered proprietor.*" The caveat stated that the interest arose by virtue of the following facts:

"An equitable interest in property as a result of unpaid costs ... for legal services provided by the caveator in accordance with deed of guarantee ... where the guarantor gives consent to the caveator to lodge a caveat over the subject property"

The Deed of Guarantee recited that the plaintiff had been retained to act for a company and Ms Lewis. Pursuant to clause 2, the first defendant and Ms Lewis guaranteed the payment of the plaintiff's costs and disbursements. Pursuant to clause 2(iii), the first defendant consented to the plaintiff lodging a caveat over the subject property "*whereby it is hereby agreed that Frank Bellissimo has a caveatable interest in the property and that Frank Bellissimo will withdraw the caveat only upon payment of costs and disbursements...*"

Authorities

In some cases, an agreement that one party has authority to lodge a caveat in respect of the property of another impliedly carries with it an agreement to confer an interest in the land. In that case, the interest in the land will sustain a caveat.

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That implication will be made only if “there is no sufficient indication to the contrary”: *Coleman v Bone* (1996) 9 BPR 16,235; *Iaconis v Lazar* [2007] NSWSC 1103. This always depends on construction of the document under consideration: *Express Loans & Finance Pty Ltd v Hunter* [2004] NSWSC 142.

In *Express Loans*, the defendant signed an agreement authorising the caveator to lodge a caveat if fees as agreed were not paid on demand. The Court held that the agreement was merely for the lodgement of a caveat and did not create a charge over the land. The purpose of that clause was to impede the registered proprietor’s path, but goes no further.

Where a borrower of limited commercial experience signs such a clause without evidence that the lender explained the clause, the Court may conclude that the borrower never intended to give a charge: *Iaconis*.

Judgment

The Court held that had the parties intended the Deed to create a charge, that ought be explicit, rather than be left to implication. It was more likely that the parties only intended clause 2(iii) to prevent the registered proprietor from dealing with the land without the plaintiff’s consent. The Court held that “[s]uch a negative covenant does not create an interest in land.”

Further, section 211 *Duties Act 1997* (NSW) provides that a mortgage is unenforceable to the extent of any amount secured on which duty has not been paid. Duty had not been paid. The plaintiff offered an undertaking to pay duty forthwith. However, the Court applied *Boral Recycling v Wake* [2009] NSWSC 712 which held that there is no point allowing the mortgage to be stamped as it would only make the mortgage enforceable from the date of stamping.

The summons was also defective as it only sought an extension of the caveat without seeking final relief.

Finally, the Court held the form of the caveat was defective as it failed to adequately described the “equitable interest” as required by section 74F *Real Property Act 1900* (NSW). An “equitable interest” in land “could relate to a multiplicity of types of interest”. To merely describe the interest as an “equitable interest” fails to comply with fundamental requirements.

Comment

Parties to “consent to caveat” clauses should ensure that the clause reflects the party’s intentions. The potential caveator should ensure that the clause explicitly states that a charge is being granted, and that stamp duty is paid before lodgement of the caveat. Landowners should ensure that they are not granting more than they wish to grant if they have no intention of granting an equitable interest in the land.

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