

Property and Construction Law Update

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1

OVERVIEW

Caveats: *BCA Asset Management Group Pty Ltd v Sand Solutions (Vic) Pty Ltd & Ors* [2021] VSC 177

Restrictive Covenants: *Re Ferraro* [2021] VSC 166

Building dispute forum: *Impresa Construction v Oxford Building & Ors* [2021] VCC 1146

2

What will we learn?

- Caveat without proper basis = indemnity costs (even if voluntarily withdrawn).
- Repeated unsubstantiated caveats = solid basis for injunction.
- The terms of a restrictive covenant must identify benefited land.
- Covenants can be removed from title *ex parte* if no benefited land identified.
- Extensive delays to hearing of domestic building disputes in VCAT
- Parties may argue that court, not VCAT, should hear building disputes

3

The caveat case

BCA Asset Management Group Pty Ltd v Sand Solutions (Vic) Pty Ltd & Ors

- [2021] VSC 177
- Associate Justice Derham
- 13 April 2021

What's so good about this case?

- It's short (18 pages)
- Dot point summary of caveat removal principles
- Reference for grant of injunction to prevent future caveats
- Reference for indemnity costs despite voluntary withdrawal of caveat

4

What is the case about?

Land: 223 Cooper Rd, Devenish VIC

Landowners: Mr & Mrs Attwood

Protagonists:

- Mr Colling
- Broken Creek Developments P/L (**BCD**)
- Devenish Sands P/L (**Devenish**)
- Sand Solutions P/L (**Sand Solutions**)



Issue: Mr Colling wants to maintain rights to extract sand from the land...

5

Lodging a caveat is easy

- Feb 2010 – Mr Colling & BCD lodge **'First Caveat'** alleging constructive trust.
- Jun 2010 – Sand Extraction Agreement (**SEA**): Attwoods, Devenish & Colling.
- Jan 2011 – The First Caveat is withdrawn.
- Jul 2011 – DPI issue Work Authority to Devenish.
- Nov 2011 – Mr Colling lodges **'Second Caveat'** alleging constructive trust.
- Jan 2013 – Sand Solutions is incorporated.
- Jul 2014 – Work Authority transferred from Devenish to Sand Solutions.
- Aug 2014 – Devenish is wound up in insolvency.
- Apr 2015 – Liquidator disclaims any Devenish interest in property under SEA.
- Sep 2016 – The Second Caveat is withdrawn.

6

...perhaps, too easy

- Jul 2017 – Sand Solutions seeks access to land for remediation (ie. no right).
- Nov 2017 – Attwoods sell the land to BCA.
- Mar 2018 – Sand Solutions lodges 'Third Caveat' claiming profit a prendre.
- Attwoods commence proceeding.
- The Third Caveat is withdrawn.
- Court orders costs on standard basis.
- May 2018 – Sale to BCA settles.



7

...and another one...

- Feb 2021 – Sand Solutions lodges 'Fourth Caveat' for easement under SEA.
- Mar 2021 – BCA requests withdrawal of Fourth Caveat. No response.
- BCA commences proceeding.
- The Fourth Caveat is withdrawn.

BCA now seeks:

- Injunction to prevent further caveats being lodged.
- Indemnity costs.

8

Caveat principles

Transfer of Land Act 1958 (Vic)

- Interest in land required to lodge: s.89(1).
- Person affected can apply for removal: s.90(3).

Settled principles set out by Warren CJ in *Piroshenko v Grosjman* (2010) VR 489:

- Summary procedure analogous to interlocutory injunction (but order is final).
- Court's power is discretionary.
- Caveator bears onus to establish prima facie case of interest in land.
- If prima facie case, Caveator must also establish balance of convenience.
- Strength of prima facie case affects extent of balance of convenience.
- Caveat is not to be used as a bargaining chip.

9

Injunction principles

Australian Broadcasting Corporation v O'Neill (2006) CLR 57

- Plaintiff must establish:
 1. Prima facie case of putative legal or equitable right.
'sufficient likelihood of success to justify in the preservation of the status quo' (or in this case, an application to discharge the order).
 2. Damages not adequate remedy for injury suffered by plaintiff.
 3. Balance of convenience favours granting the injunction.
Court 'must take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong ...'

Bradto Pty Ltd v State of Victoria (2006) 15 VR 65

10

Costs for improper caveats

Factors supporting order for costs on an indemnity basis:

- The nominated basis for lodging caveat was without merit.
- Plaintiff sought withdrawal of caveat before commencing proceeding.
- Plaintiff warned caveator that plaintiff would suffer damage from caveat.
- Plaintiff alerted caveator's solicitor that indemnity costs would be sought.
- Person who lodges caveat without proper grounds must be held to account.
- Innocent registered proprietor should not be out of pocket for difference between standard and indemnity costs order due to delinquent caveator.

11

The outcome

- No basis for easement or profit a prendre (plaintiff not party to SEA).
- No basis for any caveat.
- History of caveats = prima facie case this will continue.
- Damages not adequate remedy for cases concerning 'quieting of title'.
- Injunction granted.
- Costs of proceeding on indemnity basis.

Additional comment: (not addressed in the decision)

- There was no appearance on behalf of defendants at the hearing.
- Note the risk of a costs order against legal practitioners which also could be made under *Civil Procedure Act* and Court's inherent jurisdiction.

12

The restrictive covenant case

Re Ferraro

- [2021] VSC 166
- Associate Justice Matthews
- 12 April 2021

What's so good about this case?

- It's also short (18 pages)
- Summary of covenant modification/removal principles
- Reference for removal of a restrictive covenant *ex parte*
- It applies reasoning in *Re Hunt* [2017] VSC 779



13

What is the case about?

- 43 Linda Crescent, Hawthorn
- 2 lots on one current title
- Restrictive covenants affect both lots
- Proposed redevelopment
- Council refuses planning permit



14

Power to modify/discharge

Section 84(1) of the Property Law Act 1958

The Court may wholly or partially discharge or modify any restriction (subject or not to payment of compensation to any person suffering loss in consequence of the order) upon being satisfied that:

- by reason of **changes in the character of the property or neighbourhood or other circumstances** which the Court deems material, the restriction ought to be deemed obsolete or the continued existence thereof would **impede the reasonable user of the land without securing practical benefits** to other persons; or
- the persons entitled to the benefit of the restriction have **agreed either expressly or by implication** by their acts or omissions to the restriction being discharged or modified; or
- the proposed discharge or modification will **not substantially injure the persons entitled to the benefit** of the restriction.

15

Outcome

- Applied Emerton J in *Beman Pty Ltd v Boroondara City Council* [2017] VSC 207.
- Followed Lansdowne AsJ in *Re Hunt* [2017] VSC 779.
- Application proceeded *ex parte*.
- Declaration made that land no longer affected by the restrictive covenant.

- A HUGE SHORTCUT TO THE MORE COMMON APPROACH...!

16

The VCAT case

Impresa Construction v Oxford Building & Ors [2021] VCC 1146

Judge Burchell

- 18 August 2021

What is so good interesting about this case?

- It's short (23 pages)
- Advise clients in issuing proceedings in VCAT of exceptional delays
- Reference this case in resisting stay application under s 57 of the DBCA

17

What is the case about?

- The builder, Oxford Building Group Pty Ltd (**Oxford**), applied for a stay of a proceeding in the County Court involving its subcontractor, Impresa Construction Pty Ltd (**Impresa**)
- Oxford sought a stay under s 57 of the *Domestic Building Contracts Act 1995* (Vic) (**the DBCA**)
- Section 57 provides that if a person starts an action arising 'wholly or predominantly from a domestic building dispute', the Court must stay any such action on the application of a party to the action, if:
 - the action could be heard by VCAT under subdivision 1 of Part 5 of the DBCA ('VCAT jurisdiction'); and
 - the Court has not heard any oral evidence concerning the dispute itself
- If Oxford was successful, either Oxford or Impresa would have had to separately apply to VCAT for an order in respect of the dispute

18

The arguments and the outcome

- Oxford submitted that the preconditions of s 57 were met and therefore the Court had no residual discretion - it must grant the stay
- Impresa argued that a contract between a builder and a sub-contractor is not a 'domestic building contract' for the purposes of the DBCA, and the proceeding therefore cannot be stayed under s 57

Held:

- The contract between Oxford and Impresa is not a 'domestic building contract' within the meaning of the DBCA
- The DBCA does not apply to contract that is between a builder and sub-contractor

19

The observations

- Her Honour noted the delays in VCAT hearings and the vacation of hearing dates since the start of the coronavirus pandemic
- 'Given the current state of under-resourcing at VCAT', in a practical sense, the action could not be heard by VCAT (and therefore the precondition at s 57(2)(a) cannot be satisfied)
- One of the main objectives of the DBCA is 'to enable disputes involving domestic building work to be resolved as *quickly*, as *efficiently* and as *cheaply as is possible* having regard to the needs of fairness': section 4.
- In light of this objective, the backlog of matters and shortage of resources at VCAT currently means that this matter in fact could not be heard by VCAT
- 'Parties in VCAT can apply to lift any stay granted by this Court pursuant to s57 of the Act. Another alternative is to seek an order under section 77 of the *Victorian Civil and Administrative Tribunal Act 1998* to globally refer matters back to this Court.'

20

Conclusions & Key Takeaways

1. Caveats without proper basis must be withdrawn **early**.
2. Seek injunction after **repeated** unsubstantiated caveats.
3. Check whether terms of restrictive covenant identify **benefited land**.
4. Remove covenants from title **ex parte** if no benefited land identified.
5. In issuing domestic building dispute proceedings, note delays in VCAT and **consider issuing in another forum** instead
6. There may be **grounds for a s 57 stay application to be resisted** on the basis that the policy rationale behind that section is 'frustrated'

21

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