lplccolumn@liv.asn.au

CAVEATS, CHARGES AND THEIR TRAPS

Charges over property can provide hidden traps in conveyancing.

Charges are more prevalent than many people realise. They can be created in many ways and often are incorporated into leases, guarantees and in some circumstances in terms of trade. Some estate agents create equitable charges over their vendor's property to secure the payment of their commission and expenses.

Practitioners acting for purchasers should not take for granted the existence of charges and ensure they do check searches before settlement.

Caveats

There have been a string of claims in the past few years where third party caveats had been lodged on title before settlement and the purchasers' solicitors failed to do title searches to pick up the caveats before settlement. In many instances these third party caveats relate to charges granted over the land pursuant to lease agreements or guarantees in financing arrangements to do with the vendors' businesses.

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Failing to do a check search

In one example the purchaser was the sister of the vendor. She, or at least her solicitor, lodged a caveat on the title (trusting family that it was). A week later a further caveat was lodged by the vendor's creditor pursuant to rights to do so under a guarantee dated some two years earlier. The guarantee was in relation to debts owed by the vendor's business which had failed four months earlier.

While the purchaser's solicitor was cautious enough to lodge a caveat, they failed to undertake a check search before settlement. Settlement occurred and the transfer and mortgage were lodged for registration, but the second caveator got wind of it and obtained an injunction preventing the Registrar from registering the transfer.

While the purchaser's caveat was first in time in terms of lodging, the creditor had an equitable caveatable interest that was created first in time. Lodging a caveat is said to act as an injunction, preventing registration of an interest contrary to the caveator's interest. It also serves to notify the world of a caveator's interest.[1] But the act of lodging the caveat does not of itself usually give the caveator priority.

Where you have two unregistered interests, here represented by two caveats, the priority of those competing equitable interests is usually resolved by looking at the date the interest was created, not at the date the caveat was lodged. But that is subject to the type of interest and the circumstances and conduct of the caveators.

To overturn a prior interest the textbooks and the cases say you have to look at various issues, in particular the whole conduct of the parties, including whether there has been fraud, gross negligence, or an agent exceeding authority.

The failure to lodge a caveat by the creditor here was unlikely to justify the creditor losing its priority as a first-in-time equitable interest; particularly where the sister/purchaser did not pay a deposit and therefore had not acted to her detriment up until the point the second caveat was lodged. She had also failed to protect her interest by doing a check search before settlement which would have shown the caveat.

Had a check search been done before settlement, the second caveat would have been found and the purchaser would have had the option of not settling until they had obtained a withdrawal of caveat.

Compare that outcome with the following example.

Protecting the purchaser's interest

The purchaser's solicitor lodged caveats over two sale properties. On settlement day they did final searches at approximately 1.30pm which showed no new dealings. The settlement meeting was scheduled for 2.30pm. After settlement the documents were immediately stamped. They were then lodged the same day for registration.

What could possibly have gone wrong?

At 1.47pm on settlement day, a finance company lodged caveats over both titles claiming an equitable interest pursuant to an unregistered mortgage over all the land owned by the vendors. The interest claimed was such that it prevented the transfers from being registered.

Advice obtained from counsel was that the purchaser's interests should have priority because of the:

- finance company's conduct in failing to lodge the caveat earlier; and
- purchaser's conduct (through their solicitor) in doing everything they could have done to protect their interest in the property, i.e. lodging caveats, doing check searches and lodging the documents for registration.

The purchaser's solicitors did manage to get the caveats removed.

Risk management lessons

While lodging a caveat on behalf of a purchaser protects a purchaser from interests being registered on title that are contrary to the purchaser's interests, it does not prevent other caveats being lodged on title. Lodging a caveat will not entitle the purchaser to notice of another caveat. It is essential that purchasers' solicitors do timely check searches before settlement.

Practitioners might also consider using the property transaction alert service available at http://tinyurl.com/82uztng. This service allows anyone, for a small fee, to register to receive email alerts when anything happens on a particular title. This includes notice of lodgement of caveats, plans of subdivision, transfers and mortgages.

While a very useful service, particularly if you would like early notice of any caveats lodged on title, it is not a substitute for a caveat as it will not prevent registration of an instrument contrary to your client's interests. ●

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1. According to Barwick CJ in *J & H Just (Holdings) Pty Ltd v Bank of New South Wales* [1971] HCA 57.