

CAVEATS OVER JOINT AND COMMON INTERESTS IN LAND:

Note on *Lawrence & Hanson Group Pty. Ltd. v Young*

[2017] VSCA 172

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1. *LAWRENCE & HANSON GROUP PTY. LTD. V YOUNG*¹

Lawrence & Hanson Group Pty. Ltd. v Young is a decision of the Court of Appeal concerning a very common financing arrangement for trade goods. A supplier of electrical goods had standard terms and conditions under which it took personal guarantees from the directors of its customer companies. The standard terms also contained a charging clause under which the real property of those directors became security for their personal guarantees.

1.1 Caveat

In *Lawrence & Hanson Group Pty. Ltd. v Young*, as is frequently the case, the only land owned by the customer company's sole director, Mr. Young, was his matrimonial home, which he owned jointly with his wife. A caveat was lodged over this land.

1.2 Words of the Caveat

In the caveat:

- The opening words were:

“The caveator claims the estate or interest specified in the land described on the grounds set out. This caveat forbids the registration of any instrument affecting the estate or interest to the extent specified.”

These standard words are part of the Registrar's caveat form and do not vary from caveat to caveat.

¹ [2017] VSCA 172 (Unreported 30 June 2017), Court of Appeal of the Supreme Court of Victoria per Redlich and Kyrou J.J.A. and Keogh A.J.A.

- The land was identified by the volume and folio number of its certificate of title.
- The “Estate or Interest claimed” was “Interest as Chargee”.
- The “Prohibition” was “Absolutely”.
- the “Grounds of claim” was:

“Charge contained in an agreement with the following Parties and Date.

Parties

JOHN STANLEY YOUNG

Date

08/04/2014”

1.3 Decision at First Instance

The Trial Division of the Supreme Court removed the caveat on the basis that the interest claimed was too broad and impermissibly interfered with the interest of the other joint proprietor, Mrs. Young, who had not given any security. If necessary, the Court would also have removed the caveat having regard to the balance of convenience.

1.4 More Detailed Facts

There are a number of further facts which are relevant to the Court of Appeal judgment in this case:

- The supplier of the electrical goods was a limited partnership registered under Part 3 of the Partnership Act 1958 of Victoria.
- The caveator (the Appellant) was one of the two partners in the limited partnership; the caveator was in fact the “general partner” within the meaning

of the Act. Under section 67 of the Act, a limited partner is not permitted to take part in the management of the business of the limited partnership and does not have power to bind the limited partnership.

- The partnership's standard terms and conditions identified the "Seller" (the entity entitled to the benefit of the guarantee and the charge) as:

"L & H Group (ABN 19 730 781 473), a Limited Partnership carried on by Lawrence & Hanson Group Pty Ltd (ABN 69 080 350 812) and Carlow S.A.S. (ARBN 134 333 113) a limited liability company incorporated in France"

These words were erroneous in that Carlow S.A.S. was never a member of the limited partnership known as L & H Group — at all material times the partnership consisted of the caveator (the Appellant, Lawrence & Hanson Group Pty. Ltd.) as general partner and a different company, Sonepar Asia Pacific Limited, as limited partner.

- At first instance, Mr. and Mrs. Young as joint registered proprietors of their matrimonial home argued that the balance of convenience favoured the removal of the Appellant's caveat because interest was accruing at a high rate under the first and second registered mortgages and the maintenance of the caveat would inhibit their desire to obtain further finance by paying out the first and second mortgages, paying out other charge holders (whose charges were protected by other caveats), transferring the land to Mrs. Young only, granting a new first registered mortgage to a bank and thereby obtain fresh finance to repair one truck, complete the purchase of a second truck and acquire a third.

- The caveator had argued at first instance that the removal of its caveat in order to permit this refinancing transaction would result in the destruction of the security contained in the standard terms and conditions.

1.5 Issues on Appeal

There were four main issues on appeal:

- (a) Whether the absolute form of the prohibition made the caveat too wide;
- (b) Whether the fact that the caveator was one of the partners in the firm entitled to the security rather than the firm itself made the caveat unsustainable;
- (c) Whether the mis-statement of the partners in the firm entitled to the security rendered the contract ineffective, the security invalid and hence the caveat unsustainable; and
- (d) Whether the balance of convenience favoured the removal of the caveat.

2. THE NATURE OF THE PROCEEDING

The proceeding was an application under section 90(3) of the Transfer of Land Act 1958 for the removal of the caveat. It was common ground that a proceeding under section 90(3) is similar to an interlocutory injunction application in that to sustain the caveat, the caveator must show that:

- (a) there is a prima facie case that the caveator has the interest in land claimed in the caveat (and implicitly that the caveat does not go beyond the protection of that interest); and

(b) the balance of convenience favours the retention of the caveat.

The Court of Appeal accepted that this is the appropriate test.²

3. ENCUMBERING JOINT OR COMMON INTERESTS IN LAND

It is trite law that one of a number of joint proprietors or proprietors in common of land may separately encumber his, her or its own interest in the land.³ It follows that in the circumstances of the present case, it was open to Mr. Young as the guarantor of the liabilities of his company to charge his interest as one of two joint proprietors of his matrimonial home in favour of the Appellant without the concurrence of his wife as the other joint proprietor.

4. THE ABSOLUTE FORM OF THE PROHIBITION

The Court of Appeal held that the absolute form of the prohibition was not too wide. It disagreed with the judge at first instance on this point. According to the Court of Appeal, the critical words of the caveat (with my underlining)⁴ were:

“This caveat forbids the registration of any instrument affecting the estate or interest [claimed in the caveat] to the extent specified”

Although the specification of the extent of the prohibition was “Absolutely”, the prohibition of registration was not a prohibition of the registration of any instrument affecting the land but only a prohibition of the registration of any instrument

² Court of Appeal judgment at [34] to [40].

³ *Hedley v Roberts* [1977] V.R. 282 applied by the Court of Appeal at [41] of the judgment.

⁴ The full words are set out on page 3 above.

affecting the interest claimed by the caveator.⁵ It followed that the caveat was “drafted carefully” to limit its operation to Mr. Young’s interest in the land and did not encompass any interest of Mrs. Young.⁶

4.1 The Standard Words of the Caveat

It can be seen, therefore, that the attention of the Court in referring to the careful drafting of the caveat was concentrated, in the first place, on the standard words at the beginning of the caveat⁷ setting out the actual prohibition. It may be noted, as the Court of Appeal did⁸, that these standard words follow from the words of section 89(1) of the Transfer of Land Act 1958.

It may also be noted that concentrating appropriately on the standard words at the beginning of a caveat justify, in many cases, the standard practice of Victorian practitioners of using the word “Absolutely” to specify the extent of the prohibition. It will, in many cases, be entirely appropriate that a caveator forbid absolutely the registration of an instrument which would affect the caveator’s estate or interest in the land if the consequence of that registration would be to destroy or at least impair the priority of the interest claimed.

⁵ Court of Appeal judgment at [95].

⁶ Court of Appeal judgment at [96].

⁷ See page 3 above.

⁸ Judgment at [3] and [97].

4.2 The Identification of the Interest Claimed

The Court of Appeal accepted⁹ that the words of the “Grounds of claim” in the caveat¹⁰ which referred to a charge contained in an agreement with Mr. Young specified as the party “made it clear” that the caveat only applied to instruments dealing with Mr. Young’s interest in the land.

4.3 Interstate Cases

The judgment of the Court of Appeal in *Lawrence & Hanson Group Pty. Ltd. v Young* is consistent with the approach taken in New South Wales and Western Australia¹¹ both in referring to the need to examine carefully the language of the particular caveat and in the result that a caveat claiming an interest as chargee pursuant to a charge granted by one of two joint proprietors of land does not impermissibly affect the interest of the other joint proprietor.

5. CAVEAT BY ONE PARTNER ONLY

The Court of Appeal accepted that one of a number of partners in a partnership has a caveatable interest in land in which the partnership has a caveatable interest.¹²

⁹ Court of Appeal judgment at [95].

¹⁰ The full words are set out on page 4 above.

¹¹ *Allen Taylor & Company Pty. Ltd. v Harrison* [2010] NSWSC 1021 (distinguishing *Andrews v Wilcox* [2008] NSWSC 280) and *Awadallah v Hymix Australia Pty. Ltd.* [2015] NSWSC 117 (disapproving *Andrews v Wilcox*) and *Cooke Consulting Pty. Ltd. v Jellie* [2015] WASC 250. The New South Wales cases are cited in the Court of Appeal judgment at [42] to [47] and [97].

¹² Court of Appeal judgment at [78].

6. MIS-STATEMENT OF IDENTITY OF PARTNERS

The Court of Appeal held that there was no uncertainty about the identity of the contracting parties under the standard terms of agreement and that it could not be argued that such agreement was incomplete or unenforceable. It held that the words stating the composition of the limited partnership were unnecessary and hence that the error in the name of the limited partner could have no bearing on the legal efficacy of the agreement.¹³

It is suggested that this conclusion by the Court of Appeal is consistent with the general approach of courts in commercial cases to give commercial efficacy to instruments despite errors contained in them. It is also a conclusion which is dependent on the particular facts of the case. On orthodox principles, a contract cannot be construed in a vacuum: in particular cases the factual matrix might show, for example, that a misdescription of the composition of a partnership had an importance which was absent in the present case.

7. BALANCE OF CONVENIENCE

It was not necessary for the judge at first instance to determine the balance of convenience given that his honour had held that the caveat was impermissibly wide. The learned judge said, however, that if he had had to consider the balance of convenience, he would have held that it favoured the plaintiffs, Mr. and Mrs. Young,

¹³ Court of Appeal judgment at [73].

because if the caveat were not removed, they would be unable to remain in business, pay debts and retain the family home.¹⁴

The Court of Appeal held that the judge at first instance did not balance the advantages to the registered proprietors from the transaction proposed by them against the prejudice that the removal of the caveat would have on the Appellant's security interest.¹⁵ The fact that the removal of the caveat would result in the complete extinguishment of the Appellant's security interest without any provision for the payment from the proceeds of the refinancing transaction of the amount secured by its charge rendered the judge's analysis erroneous.¹⁶ According to the Court of Appeal, the judge, in effect focused almost exclusively on the prejudice to the registered proprietors rather than balancing the interests of the parties.¹⁷

The Court of Appeal also doubted, although it did not finally decide,¹⁸ whether, in a case such as the present, it could ever be appropriate for the Court to exercise its discretion under section 90(3) of the Transfer of Land Act 1958 (with my underlining):

“in a manner which gives priority to interests arising after the genuine and substantial proprietary interest of the caveator and has the result of completely destroying that interest.”

¹⁴ Court of Appeal judgment at [54].

¹⁵ Court of Appeal judgment at [108].

¹⁶ Ibid.

¹⁷ Court of Appeal judgment at [111].

¹⁸ Court of Appeal judgment at [106].