New South Wales Supreme Court

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Dunecar Pty Ltd (In Liq) v Colbron [2001] NSWSC 1181 (11 December 2001)

Last Updated: 27 December 2001

NEW SOUTH WALES SUPREME COURT

CITATION: Dunecar Pty Ltd (In Liq) v Colbron [2001] NSWSC 1181

CURRENT JURISDICTION: Equity Division
Corporations List

FILE NUMBER(S): 5743/01

HEARING DATE{S): 10/12/01

JUDGMENT DATE: 11/12/2001

PARTIES:
Dunecar Pty Limited (In liq) (P)
Warwick Colbron (D)

JUDGMENT OF: Young CJ in Eq

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:
J E Thomson and C D Wood (P)
L J Aitken (D)

SOLICITORS:
Gordon & Johnstone (P)

Colbron & Associates (D)

CATCHWORDS:
CONVEYANCING [189]- Caveats- Caveat by third mortgagee- Dispute as to whether sufficient equity for caveator- Caveat impeding settlement of sale- Whether removal should be ordered. CORPORATIONS [230]- Winding up order- Pronounced at 11 am- Effective from first moment of day order made- Judicial act- Only to be pronouced by Supreme or Chapter III Court. TIME [4]- Fractions of a day- Judicial act deemed to occur at first moment of the day.

ACTS CITED:
Corporations Act 2001 ss 588FA, 588FE, 588FG
Real Property Act 1900, ss 74MA, 74P

DECISION:
See paras 23 and 24.

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION
CORPORATIONS LIST

5743 of 2001

YOUNG CJ in EQ

Tuesday 11 December 2001

DUNECAR PTY LTD (IN LIQ) v COLBRON

Judgment

1 His Honour: The plaintiff's originating process, filed on 20 November 2001, seeks orders under ss 588FA and 588FE(2) of the Corporations Act 2001, that a mortgage executed by the plaintiff, now in liquidation, is void against the plaintiff.

2 The plaintiff was wound up on 9 November 2001 by orders of Master Macready and Mr James Shaw was appointed liquidator. The order was pronounced at about 11am. Before that time on the same day, 9 November 2001, the company executed a contract to sell a piece of its real estate for $2.79 million.

3 Although the parties tended to treat the contract as being made before the operation of the winding up order, it does not seem to me that that is correct.

4 The making of a winding up order is a judicial act. That is why it can only be pronounced by a State Supreme Court or a Chapter III Court invested with the judicial power of the Commonwealth. A judicial order takes effect from the first moment on the day on which it is pronounced; **Miller v Teale** (1954) 92 CLR 406; **Schwartz v Schwartz** (1961) 78 WN (NSW) 545; 2 FLR 41. Thus, the liquidator became the only authorised agent of the company to make a contract for the whole of 9 November 2001.

5 However, as it is apparently common ground that the purchase price was an appropriate one, and the liquidator wishes to complete the contract, I need say nothing more about the matter.

6 For the purpose of s 513A of the Corporations Act, the date that the winding up commences appears to be 6 June 2001. This means that transactions that took place between 7 December 2000 and 6 June 2001 are particularly at risk; see section 588FE of the Corporations Act. However, as Mr Aitken for the defendant, says, one may well find that a defence will still succeed because of s 588FG, notwithstanding that the transaction happened within the relation-back period.

7 The application that was before me yesterday and today was an application made by the plaintiff by its liquidator to remove a caveat that had been placed on the title of the property under contract for sale by the defendant, Mr Colbron, a solicitor. The caveat protects an interest Mr Colbron says that he has in the land by virtue of a mortgage, bearing date 27 April 2001, to secure the payment of legal costs, together with a deed which also gives him authority to lodge a caveat in respect of the subject land, and which the authorities indicate would ordinarily confer on Mr Colbron an equitable mortgage or charge which could be the subject of a valid caveat; see **Troncone v Aliperti** (1994) 6 BPR 13,291.

8 I should note that Messrs Shaw and Colbron are no strangers to each other. In various roles they have been adversaries in and out of court. The chances of compromise between them are slight and it is likely that any problem or technicality will see those gentlemen in court.

9 The liquidator has presented a draft settlement sheet, PX03, which shows that, if his figures are correct, there will be a surplus, after paying out the costs of sale and the first mortgagee, and other allegedly secured creditors, just under $74,000. Mr Colbron makes it clear that whilst he considers he is owed something like $110,000 he would be content if he were paid $80,000. He is not prepared to accept the liquidator's offer that the surplus, ie the $74,000, would be placed in some separate account pending the determination of the present proceedings as to whether the mortgages were valid.

10 Mr Aitken challenged the liquidator's figures. He said there were two major qualifications. First, the liquidator's figures contained an item "legal costs of sale $10,000". The liquidator was cross-examined and gave a completely unsatisfactory account as to how these figures were put together. Indeed, he just did not know.

11 It would seem, however, from the material, that the probabilities are that they cover part of the conveyancing costs (the major part may well have been incurred by the directors before the liquidator came into the matter), plus part of the costs and expenses of the winding up in having counsel and solicitors appearing on the present motion. Mr Aitken says that it is not right; that if his client is a

secured creditor, that the unsecured or quasi-secured debt to the liquidator for costs and expenses of the winding up should be given priority by this back-door method.

12 The second problem is whether the company owes the full amount of gaming duty to the Liquor Administration Board. There is some dispute about this, the full implications of which I am not completely aware. It would seem that the plaintiff was the landlord of a hotel; that it ejected the tenant, and that then the tenant was given a form of relief against forfeiture, which deemed the landlord never to have taken possession.

13 If a landlord takes possession of property and then occupies that property itself for its own business interests, then the ordinary rule under **Marriott v The Anchor Reversionary Company** (1861) 3 De GF & J 177, 193; 45 ER 846, 852; **Bland v Ingrams Estates Ltd (No 2)** [2001] TLR 536 applies.

14 However, it is not clear at the moment just how far that principle affects the liability for gaming duty as between the plaintiff and some other person in respect of the subject premises, a hotel at Rutherford. If there is some other person liable, then it may be that it is inappropriate that the Liquor Administration Board be paid the full $75,653 by this company, as the liquidator proposes to do. Mr Aitken, accordingly, says that there is sufficient there to secure his client to the sum of $80,000 and the caveat should not go until, at least, the substitute security is given.

15 Essentially, Mr Aitken says that there is a serious question to be tried as to whether his client has a valid mortgage. His client does not give any undertaking as to damages. He says, however, there is a fairly arguable case under s 588FG of the Corporations Act that the liquidator, who was also the liquidator of the former tenant, has shown great partiality against Mr Colbron and is really not on top of the case, and that the figures in PX03 are very rubbery, that Mr Colbron is clearly good to repay any moneys that are found to be paid to him, if the mortgage is void and the balance of convenience favours the retention of the caveat.

16 Mr Thomson, for the liquidator, said that all that was froth and bubble. He points to the fact that Mr Colbron in various pieces of correspondence had indicated that the company would pay the whole of the gaming tax that the liquidator now intends to pay. He says that the figures are a fair estimate of what has to be paid in order to complete this contract. He further says that it follows from cases such as **Kerabee Park Pty Ltd v Daley** [1978] 2 NSWLR 222, especially at 229-230, that where one sees a transaction at arm's length, and that the amount to be received on the sale is only sufficient to pay out prior encumbrances, then it is almost always appropriate to remove the caveat and that that is the situation that appertains in the present case.

17 With respect, I think that the proposition put forward by Mr Thomson overstates the law that applies with respect to the court's discretion as to the removal of caveats. The **Kerabee Park case** was, of course, decided under the previous legislation and although the leading book, Woodman and Nettle **The Torrens System in NSW** 2nd ed (LBC, Sydney, 2001) at p 13,264 says that there is little difference between the old s 97 of the Real Property Act and the present section 74MA, there are, to my mind, some differences.

18 However, the treatise on caveats against dealing in Australia and New Zealand by Lindsay (Federation Press, Sydney, 1995) pp 193-197 seems to me to have more precisely and correctly analysed what Holland J did decide in **Kerabee Park** than the submissions made in the present case.

If it is more probable than not that even though the caveator has an interest in the land, that interest in the land is overridden by a superior interest in the land, then the caveat should almost always be removed.

19 So if the caveat protects a third mortgage, or the first two mortgages account for the whole of the value of the land, and there is no dispute as to what that value is, then almost always the caveat would be removed. However, that simple solution does not apply where there is a dispute as to how much is the surplus. There one has to determine whether it is appropriate and just and convenient that the caveat should remain.

20 The caveator has to show, in my view, that the balance of convenience favours leaving the caveat in place pending the hearing of the proceedings; see eg **Kingstone Constructions Pty Ltd v Crispel Pty Ltd** (1991) 5 BPR 11,987. In many cases if the caveator will not accept a substitute security then it is a case where the caveator has not demonstrated the balance of convenience and the caveat will go.

21 The decision of Master McLaughlin in **Maddrell v Masterton Homes Pty Ltd** (7 July 1994, unreported) would seem now not to be good law in view of later decisions of judges.

22 The question is really whether on these figures in PX03 there is insufficient for the claims of Mr Colbron. I would consider that the probabilities are, on the evidence that is before me at the moment, that the $10,000 figure for legal costs of sale is not something which can be wholly attributable to the secured debts and at least part, probably nearer three quarters, relates to the costs and expenses of the winding up in connection with reducing this property into cash.

23 Accordingly, it would seem more likely than not there is over $80,000 available for the interests of Mr Colbron. He has put on a valid caveat. There would appear to be sufficient to give him substituted security and it seems to me that the balance of convenience favours maintaining the caveat, on the evidence that I have at the moment.

24 I have taken into account that the undertaking as to damages has not been given and also that under s 74P of the Real Property Act 1900 probably no damages will flow, which could be obtained by the liquidator under that section. It may well be that when the figures are more precise or time gets closer to settlement (settlement at the moment is scheduled for tomorrow, but it has already been postponed once) the matter might be re-examined, especially if some acceptable substitute security can be arranged. So for the moment I will stand the case over to 9.50 am tomorrow for mention, but I am not prepared to remove the caveat at this stage.

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LAST UPDATED: 17/12/2001