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There is Rarely Compensation for the Wrongful Filing of Caveats

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Cases Considered:

Singh v. 862500 Alberta Ltd., 2010 ABCA 117

This case may be of interest to some because judgments considering claims for compensation for wrongly filed or maintained caveats under section 144 of the *Land Titles Act*, R.S.A. 2000, c. L-4, are not common in Alberta — only a handful seem to have been reported over the years. This case would have been more interesting had the claim succeeded, as successful lawsuits for compensation for wrongly filed or maintained caveats appear to be even rarer. The reason for the rarity of success appears to be the test for compensation in the *Land Titles Act* and the courts' interpretation of that test. Section 144 requires that, in order for compensation to be awarded for the wrongful filing or maintaining of a caveat, the caveat must be filed or continued "without reasonable cause." In *Singh v. 862500 Alberta Ltd*., the Court of Appeal determined that, because the appellant's position regarding the interpretation of his purchase agreement was not "entirely unreasonable," no compensation should be awarded for what did turn out to be a wrongful filing of a caveat. Granted, the test in section 144 is not whether the caveat is upheld but whether the caveator had reasonable cause to file a caveat. Nevertheless, in *Singh v. 862500 Alberta Ltd*., the bar seems to be set quite low, with "no reasonable cause" being equated to "not entirely unreasonable."

In the spring of 2006, the Respondent, 862500 Alberta Ltd., carrying on business as Super-Tec Homes, agreed to build a home for the Appellant, Paramjit Singh. Clause 5(g) of the purchase agreement stated that the purchase price was payable "on the completion and [sic] possession of the Residential Unit and Land, whichever occurs first." "Completion" was not defined in the agreement but Clause 9 dealt with the completion date and stated that Super-Tec agreed to have the residential unit completed "on or about April 30, 2006." Singh did not tender the purchase price until May 19, 2006 and Super-Tec refused to close. On June 5, 2006, Singh filed a caveat against the title to the home, claiming an interest by virtue of a purchaser's lien. Singh then sued for specific performance or damages in lieu and for punitive damages.

Super-Tec argued that Singh's caveat was wrongfully filed. Super-Tec counterclaimed for damages because their subsequent agreement for sale with a different buyer was frustrated by the caveat and certificate of *lis pendens* filed by Singh. The subsequent buyer had sued Super-Tec because their purchase and sale could not close and Super-Tec had settled that lawsuit.

The trial judge, Justice Sterling Sanderman, dismissed the Singh's claim and granted judgment to Super-Tec on their counterclaim: see *Singh v. 862500 Alberta Ltd.*, 2009 ABQB 293.

Singh's main ground of appeal was that the trial judge erred in interpreting Clauses 5(g) and 9 to hold that the purchase price had to be tendered on April 30, 2006. Singh argued that Clause 5(g)

meant there were two options to determine the time for payment, possession or completion, and that possession was the option chosen in this case. Because Clause 7 allowed Singh a walk through and inspection prior to possession, and Super-Tec did not follow the procedure outlined in Clause 7, Singh argued that possession did not occur and the purchase price was not due. Sanderman had found as facts that the home was ready to be occupied on April 28, 2006 and that Singh was not ready, willing and able to complete the transaction until May 19, 2006 at the earliest. The Court of Appeal was satisfied (at para. 7) that the finding that the home was ready for occupancy was tantamount to a finding of completion and, being the earlier date, this was the date for payment of the purchase price. Justice Sanderman's dismissal of Singh's action was therefore upheld.

Justice Sanderman had dealt with Super-Tec's counterclaim for damages for Singh's wrongful filing of his caveat very quickly (at para. 49), saying only:

> He [Singh] lost any interest he had in this land and the Caveat that he placed on the property must be discharged. Mr. Deol is entitled to damages in relation to this failed transaction, but they cannot be ascertained with certainty at this time.....

In the Court of Appeal, Justice Patricia Rowbotham (on behalf of herself, Mr. Justice Ronald Berger and Mr. Justice Keith Ritter) notes (at para. 12) that Sanderman's reasons do not discuss or analyze whether Singh's filing and continuing his caveat were reasonable actions. However, in allowing the appeal on the counterclaim and setting aside Super-Tec's judgment on the counterclaim, the Court of Appeal does not discuss or analyze whether Singh's filing and continuing his caveat were reasonable actions either. Justice Rowbotham merely concludes (at para. 12) that, although the Court of Appeal found against Singh on the substantive contract interpretation issue, "we cannot say that the appellant's position regarding the interpretation of the contract was entirely unreasonable." Why they cannot say is not specified. Perhaps we are to infer the appellant's position was not entirely unreasonable because the Court of Appeal discussed the Singh's "two options: possession or completion" theory in paragraphs two to eight of the judgment and an entirely unreasonable position would not have been discussed. Perhaps there was enough ambiguity in Clause 5(g) of the contract to make Singh's argument, and hence filing and maintenance of the caveat, plausible.

The Court of Appeal seems to be giving section 144 a very subjective and fact-specific interpretation. Previous decisions have done the same. See, for example:

- *Caleron Properties Ltd. v ESA Holdings Ltd.*, 2003 ABQB 36 (Q.B.), affirmed 2003 ABCA 375, leave to appeal to SCC denied, [2004] S.C.C.A. No. 82: Caleron provided services to ESA Holdings Ltd. in relation to the development of subdivided lots for sale from land in what is now the Scenic Acres area of Calgary. A letter agreement was signed by ESA but it contemplated the execution of a further contract on certain conditions. When Caleron was not paid, it filed a builders' lien and caveats to protect its entitlement. Madam Justice Nation determined (at para. 127) that there were no concluded contracts that granted the ability to charge the land with Caleron's fees that could be the basis of a caveat and, as a result, there was no basis for Caleron to file caveats against the land. Nevertheless, ESA was not successful in its counterclaim for compensation for wrongful filing of the caveat. On the question of whether Caleron's caveats were filed or maintained with or without reasonable cause, Justice Nation held (at para. 135) that it was relevant that Caleron knew ESA had signed a form of the development management and marketing contracts that Caleron had drafted and knew they included a clause charging the ESA lands. In those circumstances, it

What Caleron actually knew was determinative, a subjective and fact-specific standard.

- *Nickol v. M.P. Crushing Ltd.,* 2003 ABQB 572: Nickol and MP entered into a contract to allow MP the exclusive right to remove gravel, sand and rock from Nickol's land. The contract was for five years, with an option to renew for a further five years on the same terms except price. MP exercised its option to renew, but there were no negotiations or agreement as to the price. When Nickol applied to have MP's caveat removed, the court held that the caveat was invalid because the contract was unenforceable for its second five year term due to a lack of an agreement as to price. However, when Nickol sued for compensation for MP's wrongful filing of the caveat, Justice Burrows held that MP had reasonable cause to file its caveat. Why? As Justice Burrows explained (at para. 11):

  > Clearly neither party appreciated that when the handwritten words "except price" were inserted in the agreement, it had the result of rendering the contract invalid so far as the renewal term was concerned. MP reasonably believed it had the right to renew the contract for a second term. It reasonably believed it had validly exercised that right. It was therefore reasonable for MP to believe the contract gave it an interest in land during the renewal period.

  A reasonable but mistaken view of the legal consequences of a contract term was enough to say that MP did have reasonable cause to file its caveat and therefore Nickol was not entitled to compensation. (Nickol did not prove that he suffered damages as a result of the caveat being on his title either.)

However, in one successful lawsuit for compensation under section 144 of the *Land Titles Act*, the reason for success appears to be more related to law than fact.

- *Re/Max Real Estate Ltd. v. Dachlter* (1984), 53 A.R. 383 (Q.B.): The plaintiff real estate brokerage company sued Dachlter for its real estate commission payable, it claimed, under the terms of the listing agreement. It had also filed a caveat against Dachlter's home because the listing agreement said, "And I hereby charge the aforesaid listed property with any commission earned in accordance with this Agreement, ...". Dachlter made a number of arguments, including one that the listing agreement was null and void for lack of compliance with the *Dower Act*, R.S.A. 2000, c. D-15. Because the listing agreement charged land it was a "disposition" under the *Dower Act*. Under section 2(1) of that Act, the spouse had to consent in writing to the disposition and had not. Mr. Justice Shannon was persuaded that the caveat was filed and continued without reasonable cause. He held (at para. 45) that the experienced real estate agent must have known about the requirements of the *Dower Act* and did know that Mr. Dachlter was married because his wife was present at the time that the listing agreement was prepared and executed. He awarded them compensation in the amount of their actual loss caused by the filing of the caveat, i.e., their solicitor and client costs for the efforts to remove the caveat.

Note that Justice Shannon appears to have been prepared to decide on the basis of what the real estate agent *ought* to have known, a more objective standard. Unlike the

caveators in *Caleron Properties* or *Nikol*, it seems that the real estate agent in *Dachlter* had to be correct in law.

Successful lawsuits for wrongfully filed or maintained caveats will probably continue to be rare. Certainly the Court of Appeal decision in *Singh v. 862500 Alberta Ltd*. does not encourage such lawsuits. It is true that this Court of Appeal decision is only a Memorandum of Judgment delivered from the bench and its precedential value is therefore limited. Nevertheless, a subjective and mistaken belief on the part of the caveator appears to be all that is required for the caveator to escape liability for the wrongful filing or maintaining of a caveat.