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Caveator Beware: Damages for Wrongfully Filing a Caveat Can Be Substantial

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Cases Considered:

Frisgo Development Inc. v. Brower, 2009 ABQB 463

There are very few cases dealing with damages for wrongfully filing a caveat under Alberta's land titles system. While the facts of this case are peculiar, the award of $140,000 sends a clear message. All caveators should ensure that their caveat protects a valid interest in land when it is filed and at all times thereafter. This is particularly so when parties are engaged in negotiations which may have the effect of altering the nature of the initial property interest.

The dispute in *Frisgo Development Inc. v. Brower* arose out of a complex corporate real estate transaction which began with Rivnell Projects Inc. (Rivnell) entering into a purchase and sale agreement for lands valued at $1,203.000. Pursuant to a Declaration of Trust executed by Rivnell, the lands were held in trust for the benefit of three beneficiaries including Rivnell and Brower, the defendant in the case. Brower thus held a one-third undivided beneficial interest in the lands at the time the purchase and sale agreement was completed in 1999. Subsequently, in order to offset overdue child support payments, Brower transferred his interest in the lands to his ex-wife in April 2000. The purchase of the lands closed effective July 2000 with title to the lands being registered in the name of Frisgo Development Inc. (Frisgo), a corporation with the same president and director as Rivnell. In March 2001, Brower's ex-wife filed a caveat against the lands claiming a one-third interest in their beneficial ownership. In May 2001, Brower's ex-wife transferred a one-third equitable interest in the lands back to Brower. In October 2001, Brower filed a caveat claiming a one-third equitable interest in the lands.

Frisgo started this action in September 2001 to discharge the caveat filed on behalf of Brower's ex-wife. Section 141(1) of Alberta's *Land Titles Act*, R.S.A. 1980, c. L-4 (*LTA*) allows an owner of land to apply to the court and call upon the caveator to show cause why the caveat should not be discharged. Brower's ex-wife agreed to discharge her caveat and the action against her was discontinued. Frisgo then applied to discharge Brower's caveat. The application was before Madam Justice S.M. Bensler who, pending a full determination of the matter, discharged the caveat in exchange for $400,000 being paid into court by Frisgo as security.

Back before Justice Bensler, Frisgo claimed damages for the costs of posting the $400,000 security (in the amount of $140,000 plus interest) and for losses suffered as a result of the continuation by Brower of his caveat. Section 144 of Alberta's *LTA* provides for compensation where someone has filed or continued a caveat "without reasonable cause".

Frisgo argued that there was no legal justification for Brower to register or continue his caveat against the lands. Although not explicit in the case, the underlying rationale must have been that the caveat was invalid because it failed to protect an interest in land as required by section 130 of the *LTA*. Frisgo led evidence, including documentary evidence, which it said indicated that an agreement had been reached with Brower whereby Brower's one-third equitable interest in the lands would be converted to shares of a new company to be incorporated (*i.e.*, Frisgo) which would hold title to the lands upon the deal closing. In his defence, Brower denied ever entering into any such agreement and argued that any correspondence between the parties had not effectively changed the terms of the original trust agreement. Moreover, he pled section 4 of the *Statute of Frauds*, U.K., 1677, 29 Ch. 2 (*SOF*) as a defence to the action on the basis that any alleged alteration, amendment or disposition of the trust arrangement had not been made in writing.

Brower also counterclaimed, seeking damages for breach of trust. He alleged that Frisgo, Rivnell and their president and director had purported to convert Brower's one-third beneficial interest in the lands to approximately eight percent of the shareholdings of Frisgo, without any agreement or authority to do so. Brower said he never agreed to convert his interest in the lands to shares of a corporation which would own the lands.

Not surprisingly the case ultimately turned on the trial judge's view of the evidence as to whether an agreement had been reached between the parties to transfer or exchange Brower's equitable interest in the lands for shares in Frisgo, thereby altering the original trust agreement. As there was no formal agreement between the parties, Frisgo pointed to several letters, memos and meetings as evidence of the agreement. Moreover, it led evidence that the change in the transaction's structure had been required in order to secure the necessary financing for the purchase of the lands.

Justice Bensler concluded that the evidence sufficiently disclosed the existence of an agreement to convert Brower's interest in the lands to shares in Frisgo. Where the evidence between the parties differed, she expressly stated that she preferred the evidence of Frisgo's president and director over that of Brower. In her view, the evidence adequately demonstrated that the original trust agreement had been revised and that this revision had been accepted by Brower. Moreover, she found that Brower's actions "ran contrary to his testimony as there were some positive acts on his behalf to indicate he agreed with the revised agreement" (at para 104). Perhaps most critically, she also concluded that if Brower had not agreed to this change in the arrangement, the deal would not have closed because of a lack of financing and Brower would not have received any money from the transaction.

As to whether a breach of trust had occurred, the law of trusts says that a settlor (in this case Rivnell) cannot revoke his or her trust unless he or she has expressly reserved the power to do so (see D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984) at 291). Whether a power of revocation was reserved in the Declaration of Trust document was not, however, argued in this case. Rather, the issue was whether Rivnell had authority to alter the trust arrangement by converting the interest in lands to shares of Frisgo. On that point, the Declaration of Trust was clear. It prohibited Rivnell from taking any act without first obtaining the consent and authorization of the beneficiaries. Given the evidence submitted of letters, memos and meetings, the trial judge found that Frisgo had obtained Brower's consent and authorization to the new arrangement. In her view, Brower not only knew what was going on, he approved of what was going on through positive acts and words. There was no breach of trust in these circumstances.

A final issue that arose in the case concerned Brower's argument that, in reliance on section 4 of the *SOF*, the alteration of the trust agreement was ineffective because it was not made in writing. This old statute, which remains a key part of Alberta's real property law, is intended to protect against fraud by requiring transactions involving interests in land to be made by way of writing.

Section 4 of the *SOF* states that "no action shall be brought … upon any contract or sale of lands … or any interest in or concerning [lands] … unless the agreement upon which such action is to be brought or some memorandum or some note thereof shall be in writing and signed by the party to be charged therewith". Because the *SOF* could allow someone to renege easily on obligations by pleading an oral agreement, early on the courts of equity developed the doctrine of part performance to protect someone who had performed under an oral agreement. The test for establishing part performance in the context of section 4 in Alberta is whether the acts relied upon as evidence of performance are "unequivocally, and in their own nature, referable to the agreement that is being alleged" (*Maddison v. Alderson* (1883), 8 App. Cas. 467). In other words, do the acts of performance necessarily imply the existence of the agreement which the person advances? In *Booth v. Knibb Developments Ltd*., 2002 ABCA 180, the Alberta Court of Appeal unequivocally stated that *Maddison* is the law in Alberta.

Without citing this test, Madam Justice Bensler concluded that there were sufficient acts to make out the doctrine. To her mind, the doctrine of part performance "operates where acts have been done that are related to the alleged agreement and such acts are sufficient to exclude the operation of the *Statute of Frauds*" (at para. 151). This is a much more relaxed test than the test set out in *Maddison v. Alderson* and it is not surprising that Madam Justice Bensler therefore found her rather vague and circuitous definition to have been met on the evidence here. The particular acts she pointed to as qualifying included the fact that Brower had been sent memos and letters evidencing the new agreement, that he had spoken to another prospective investor and advised that investor to get a unanimous shareholders agreement, and that he cashed a cheque that Frisgo had sent to him pursuant to the revised share arrangement. Having found sufficient acts of part performance, Justice Bensler did not need to consider whether there was sufficient written evidence to satisfy section 4 of the statute.

One issue not addressed by the trial judge was whether section 4 of the *SOF* really had any application to the facts in this case at all. Frisgo raised the issue of its relevance, but Madam Justice Bensler ignored it. According to Frisgo, this was not, as the language of section 4 contemplates, an action brought to enforce an agreement. Rather, it was a claim by Frisgo respecting Brower's caveat. In an earlier post, my colleague Jonnette Watson Hamilton argues convincingly that in order for a caveator to "show cause why the caveat should not be discharged" in response to an application to discharge a caveat brought under section 141 of the *LTA*, the caveator will be trying to prove the existence of an enforceable agreement evidencing the interest in land being protected. This could, in effect, be viewed as an "action" caught by section 4 of the *SOF*: see Jonnette Watson Hamilton, The Doctrine of Part Performance: Still Strict After All These Years.

In this case, however, the critical document that Brower needed to rely upon as proof of his interest in response to Frisgo's section 141 application was the Declaration of Trust, and that document was in writing. The agreement that was not in writing was the one Brower denied existence of, and he did not want to prove the existence of that agreement because that agreement negated his claim to an interest in land. In short, it is clear that the facts of this case are not an obvious fit for the application of section 4 of the *SOF*.

It may be that the more applicable section Brower could have relied upon was section 3 of the *SOF* which states that an interest in land cannot be surrendered unless there is some writing to this effect signed by the person surrendering the interest. But would this have made a difference for Brower? Given that courts have applied equitable principles broadly to get around the strictness of other sections of the *SOF* as well, it is unlikely. Working against Brower was all the evidence indicating that he had consented to a change in the financing arrangement for the purchase of these lands. He had agreed to exchange his fleeting one-third beneficial interest in the lands for shares in Frisgo. Consequently, when he filed his caveat, he no longer had an interest in land to be protected.

Justice Bensler awarded Frisgo $140,000 (*i.e.*, the cost, according to Frisgo, of borrowing the $400,000 paid into court) plus interest (in accordance with the *Judgment Interest Act*, R.S.A. 2000, c.J-1). Presumably most of this high cost was interest, but there is no information on how the $140,000 was calculated in the decision. Although Frisgo's claim for additional damages for costs and/or losses associated with developing the land was rejected for lack of evidence, the award of $140,000 is substantial enough to put all caveators on notice. Caveators must make sure that when they file their caveats, and at all times thereafter, their claims are with respect to valid and subsisting interests in land.