

What is the effect of an invalid caveat? What is the effect of the lapse of an invalid caveat?

By Nigel Bankes

Cases commented on:

Humford Developments Ltd. v 1026451 Alberta Ltd., [2011 ABQB 655](#)

The decision of the Alberta Court of Appeal in *Holt Renfrew & Co. v Henry Singer Ltd.*, (1982), 20 Alta LR (2d) 97 (CA) tells us that an old caveat protecting an old lease cannot protect a new lease, and that an invalid caveat purporting to protect an agreement for sale cannot protect the priority of that interest as against a *subsequent* caveat filed to protect the new lease. In this case (*Humford*) Justice Clackson concludes that a caveat that was invalid *ab initio* can protect the assignee of a lease against a new registered owner and that the lapse of such a caveat is immaterial. I think that the first part of this conclusion is mistaken.

The facts

Imperial granted a 50 year lease of a portion of lot 37 to LSM Ltd in 1986 at a rent of \$1 per year to provide additional parking for LSM Ltd who owned the adjacent lot 36. We don't know very much more about this lease but it seems to have included a provision forbidding assignments except with the consent of the landlord - such consent not to be unreasonably withheld.

LSM Ltd assigned the lease to Humford with Imperial's consent. Three days *after* LSM Ltd had assigned the lease, LSM filed a caveat claiming an interest in lot 37

... by virtue of a lease agreement dated the 30th day of April, A.D. 1986 between the caveator as Tenant and Imperial Oil Ltd. as Landlord, particulars of which are: Term: 30th of April, 1986 to 29th of April, 2036. Rent: One Dollar per year.

LSM also sold lot 36 to Humford around the same time. Humford subsequently sold lot 36 to Daly Grove in 2007 but did not assign the lot 37 lease to Daly Grove.

In February 2010, Imperial sold lot 37 to 1026451 Alberta Ltd. We know nothing of the terms of sale; for example, we do not know if the sale was expressed to be subject to encumbrances. 1026451 Alberta Ltd apparently inquired about the lease "but learned nothing." In May 2010, 1026451 Alberta Ltd caused the caveat to lapse when it served notice to take proceedings on LSM Ltd and no action was taken.

At this point Humford sought to assign the lease to Daly Grove and sought the consent of 1026451 Alberta Ltd. 1026451 Alberta Ltd declined to provide that consent.

The case came before Justice Clackson on an application for a declaration that the landlord had unreasonably withheld consent to the assignment. In the course of that application, 1026451 Alberta Ltd argued that it was not bound by the lease because the caveat protecting it was invalid.

The decision

Justice Clackson concluded that, while the caveat was invalid, 1026451 Alberta Ltd. was still bound by the terms of the lease. Justice Clackson deferred consideration of the consent issue, directing counsel to file briefs of the relevant law. I will confine my comments to the caveat point.

Discussion

Justice Clackson is correct to conclude that LSM's caveat was invalid. When LSM assigned the lease to Humford LSM became a stranger to the land and had no interest in the land: *Milmo v Carreras*, [1946] KB 306. While Justice Clackson goes too far (at para 12) in suggesting that the assignment extinguished LSM's contractual obligations (see *Domgroup Ltd v Chrystalline Investments Ltd*, 2004 SCC 3), it is still the case that LSM, at the relevant time, had no interest in land capable of supporting a caveat. The relevant authority here is *Holt Renfrew & Co. v Henry Singer Ltd.*, (1982), 20 Alta LR (2d) 97 (CA) (as the case pertains to the Pekarsky caveat).

That should have been enough to decide this case, absent fraud on the part of 1026451 Alberta Ltd. After all, if a lease protected by an invalid caveat is vulnerable to a purchaser who gets on title, why should the lessee be in a stronger position if the invalid caveat on which it is relying is caused to lapse?

Justice Clackson gets to the conclusion he does by referring to *White Resource Management Ltd. v Durish*, [1995] 1 SCR 633 for the extraordinarily broad proposition (at para 14) that “the interest underlying the caveat, in this case the lease, is not undone or diminished by the lack of a valid caveat”. I don't think that *Durish* (which dealt with the competing priority claims of encumbrancers) supports such a broad proposition.

Durish, *Passburg Petroleum v Landstrom Developments Ltd*, [1984] 4 WWR 14 (Alta CA) and *Bensette v Reece*, [1973] 2 WWR 497 (Sask CA) all support the proposition that a registered owner (as broadly understood, see *Durish* at para 21 and now section 203 of the *Land Titles Act*, RSA 2000 c L-4 as am. by SA 1994, c 23) who takes subject to a *valid* caveat on title at the time the registered owner acquired its interest is not entitled to take free and clear of that interest if the caveat is withdrawn or otherwise lapses. This is because the legal relationship between the parties is already established before the caveat lapses. But it is important to note that the caveat may be a crucial element in establishing the existence of that legal relationship. Thus *Passburg* would have been decided differently if there were no caveat on title at the time that the assignor of the reversion obtained a registered title. The caveat was crucial to establishing the existence of privity of estate at the outset. I think that *Passburg* is authority for the proposition that absent fraud, privity of estate can only be created as between a lessee and an assignee of the landlord's reversion where there is a valid caveat (or registered lease) on title at the time that the assignee takes its registered interest. Thus, in *Passburg*, Justice Moir (at 21), discussing *Bensette v Reece*, noted as follows:

Hall J.A. [in *Bensette*] holds that privity of estate is preserved by registration of the caveat and continues to be preserved through the transfer to the new registered owner. Once such privity of estate established the connection between the new registered owner and the lessee (giving the lessee a cause of action against the owner in the event of breach), a withdrawal or lapse of the caveat will not destroy the connection.

Durish, Passburg Petroleum and *Bensette* say nothing about caveats which are invalid at the time the registered owner acquired its interest.

Having drawn upon *Durish* for the general claim that the loss of a [valid] caveat can impair priority but not the existence of an underlying interest, Justice Clackson then went on to say:

[15] In this case, while invalid, the caveat filed by Leigh Simpson plainly notified all subsequent potential purchasers of the limit to the title of lot 37. 1026451 was admittedly warned by the caveat. Therefore, having knowledge or a result of registration, 1026451 was bound to accept the prior claim of the lawful tenant of its vendor.

In my view this completely inconsistent with three propositions that we can derive from decision of the Alberta Court of Appeal in *Holt Renfrew* to the effect that: (1) a new registered owner is entitled to take free and clear of an unregistered interest absent fraud; (2) an interest protected by an invalid caveat is no better than an unregistered interest (in *Holt Renfrew* the early Holt Renfrew caveat protecting the earlier lease was acknowledged to be ineffective and the Pekarsky caveat was held to be invalid); and (3) fraud requires something more than knowledge of an unregistered interest and registration with the intention of defeating that unregistered interest.

Justice Clackson does not refer to any evidence of fraud. Therefore, 1026451 Alberta Ltd, as a purchaser of a property encumbered only by an invalid caveat filed by LSM Ltd, does not have to accept the claim of LSM Ltd. 1026451 Alberta Ltd's knowledge of the invalid caveat or of the claim underlying that caveat is irrelevant under section 203 of the *Land Titles Act* and the Alberta Court of Appeal's decision in *Holt Renfrew*.

Thanks to my colleague Jonnette Watson Hamilton for her comments on a draft of this post.