ABKB confirms that lost or missing instruments registered on title are still enforceable

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In *Ferguson v. Tejpar*, 2022 ABKB 656, the Alberta Court of King's Bench (the ABKB) provided guidance on the enforceability of a caveat where the underlying document has been lost, mislaid or destroyed by the Alberta Land Titles Office (the LTO) and is therefore not available for review, and what steps need to be taken by interested parties in such circumstances.

What you need to know

In rare instances, the LTO will not have a copy of an instrument that is registered on title. In such circumstances, the owner of the property, subsequent purchasers and other interested parties may still be bound by the instrument. To confirm if the instrument will affect the interested party or their use of the property, reasonable efforts must be made to locate the missing instrument; simply reviewing the title will not be sufficient.

Discussion

Background

Ali and Zahra Tejpar, the respondents, purchased a property with the intention of subdividing it and constructing a home on each half. The certificate of title to the property listed a "Caveat re See Caveat" (the Caveat) in favour of the Canadian Pacific Railway Company (CP). While the purchase transaction was still conditional, the Tejpars ordered a copy of the Caveat for their review. However, the instrument stated that the original document underlying the Caveat had been lost, mislaid or destroyed and had not been microphotographed, and therefore they were unable to determine what the Caveat was regarding.

The Tejpars contacted the LTO, the vendor and CP to see if they could provide any information about the Caveat but none of them were able to do so. Subsequently, the Tejpars removed conditions and the transaction closed. The Tejpars later made inquiries with the local residents' association regarding the Caveat and searched the

titles of two neighbouring properties that appeared to be subdivided but still could not find any information on the Caveat.

The Tejpars eventually made an application to subdivide the property and requested a development permit to build a home on one half. At this time, Thomas Ferguson, the applicant who was a homeowner from across the street, became aware of what was happening and opposed the subdivision and development on the basis that the missing document that the Caveat related to was a restrictive covenant with respect to a building scheme, which prohibited such subdivision and development. Ferguson subsequently obtained a copy of the purported restrictive covenant from another neighbour and sought to have it enforced.

Court decision

To proceed with the subdivision and development, the Tejpars sought to discharge the Caveat and advanced several arguments:

1. Because the underlying restrictive covenant was not attached to the Caveat registered against title, they were bona fide purchasers for value without notice and, therefore, were not bound by the terms of the restrictive covenant.
2. They were not bound to look beyond the title itself, and because the instrument underlying the Caveat was not available (due to being lost, destroyed or misplaced) and there was not sufficient information on the title itself to permit them to ascertain the nature of the interest claimed, they had met or exceeded their obligations under the Torrens system and were not bound by the Caveat.
3. To require them to go beyond searching the title would frustrate the policy objective of the Torrens system, which is to provide a clear, definitive mechanism to evaluate the status of land.

The Court disagreed with these arguments, stating “the lost Instrument does not obviate the Tejpars’ notice of the Caveat. The Caveat registration on title was sufficient to forewarn the Tejpars that there was a potentially limiting condition on the property. By choosing to purchase the property without knowing what underlay the Caveat, the Tejpars accepted the risk of proceeding in the face of the unknown.”[1]

The Court further held that a purchaser faced with a caveat on title to property may have some obligation to investigate the underlying documents. The question in this case was whether, in the circumstances, the Tejpars’ efforts were sufficient to meet that obligation such that they may be considered not to have had notice of the restrictive covenant.[2]

The Court held that the Tejpars’ efforts to locate the missing instrument were not sufficient and that prudence required, at a minimum:[3]

- Searching the title of every lot in a circle surrounding the property, including across streets or where the only point of contact is at the corner of intersecting property lines.
- Depending on whether the initial search identified properties with similar registrations, searching additional neighbouring properties.
- Contacting the owners of other properties subject to the same Caveat to see if they could provide a copy of the instrument.

In these circumstances, the property was purchased with the specific intention of subdividing and developing it, and as such the Caveat was a serious red flag and the Tejpars' efforts to investigate it should have been more exhaustive.[4]

Lastly, regarding the policy objectives of the Torrens system, the Court commented that:

> If an instrument is destroyed, lost, or cannot be found, the underlying purpose and objectives of the Torrens system are still met without invalidating the registration. First, the registration provides the prospective purchasers a warning, informing them there is a risk in purchasing the land. Second, the current legislation provides a mechanism to remove such registrations provided the party seeking a discharge takes reasonable steps to ensure all affected parties are given notice of such application. What those reasonable steps are will be dependent on the facts of each case, but notice must be given to all parties claiming an interest of which the party seeking a discharge is aware.[5]

Accordingly, the Court found that the Tejpars were not bona fide purchasers for value without notice and declined to discharge the Caveat from title. The applicant was also successful in obtaining a permanent injunction to enforce the restrictive covenant, and to have the restrictive covenant that the neighbour provided deemed as the lost instrument and restored to the title.

Takeaways

This decision gives us the following takeaways:

- The fact that an instrument on title has been lost, mislaid or destroyed does not necessarily mean that it is invalid or unenforceable.
- Owners, purchasers and lenders should exercise caution when a missing instrument is registered on title and take reasonable steps to locate the instrument if they will be dealing with or developing the property.

If you have any questions regarding the ABKB's decision, please reach out to the key contacts listed below from our Commercial Real Estate Group in Calgary.

[1] Para 59.

[2] Para 62.

[3] Para 65.

[4] Para 65.

[5] Para 66.

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