



Précis Paper

Varcity Solutions Pty Ltd v Gulliver; Varcity Solutions Pty Ltd v Jagbo Pty Ltd [2020] NSWSC 1517 – Real Property

Abstract – The issues surrounding debt recovery and equitable interests in real property are discussed in the context of the decision of the superior courts in *Varcity Solutions Pty Ltd v Gulliver; Varcity Solutions Pty Ltd v Jagbo Pty Ltd* [2020] NSWSC 1517.

Discussion Includes

- Background
- The Claims
- Orders Sought
- The Evidence
- Findings
- The Caveat
- Closing Statements

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Varcity Solutions Pty Ltd v Gulliver; Varcity Solutions Pty Ltd v Jagbo Pty Ltd [2020] NSWSC 1517 – Real Property

1. In this edition of BenchTV, Greg Bateman, barrister, and Michael Fitzgerald, solicitor, discuss issues arising with debt recovery and equitable interest in real property, in the context of the recent case *Varcity Solutions Pty Ltd v Gulliver; Varcity Solutions Pty Ltd v Jagbo Pty Ltd* [2020] NSWSC 1517.

Background

2. Jennifer Gulliver, the defendant, owns a house in Riverview and lives there with her two children and her husband. At an early stage in her marriage, Ms Gulliver had decided that she wanted to keep her and her husband's finances separate.
3. Ms Gulliver successfully managed her finances, which allowed her to secure a valuable property in Riverview on the Lower North Shore in NSW. She personally paid for all the expenses and mortgage repayments relating to the property.
4. Varcity Solutions ('Varcity'), a finance company, lent her husband, Mr Gulliver, a substantial amount of money, to which he secured against all his assets, and a suggested interest in Ms Gulliver's house. The husband defaulted on his loan, and Varcity lodged a caveat against the Riverview property to protect its interest in it. Ms Gulliver wanted the caveat to be removed.

The Claims

5. Varcity suggested that Mr Gulliver had made payments towards the maintenance and mortgage of Ms Gulliver's house, which gave him a proprietary interest in the property. Varcity claimed a constructive trust in favour of Varcity, which was covered by the loan agreement.
6. Notice was given to Varcity under the *Real Property Act* 1900 (NSW), requiring them to remove the caveat within twenty-one days or apply to the Supreme Court of New South Wales ('NSWSC') for an order to maintain the caveat.
7. Varcity applied to the NSWSC, and the proceeding commenced. The plaintiffs in these proceedings are Varcity Solutions Pty Ltd and Paidonexchange Pty Ltd, two finance companies.

Orders Sought

8. In the first proceedings against Ms Gulliver, labelled 'the caveat proceedings,' the plaintiffs sought interlocutory orders to extend the operation of the caveat.

9. The second proceedings were commenced by a statement of claim, Robb J referring to it as 'the debt proceedings.' Varsity sought a declaration that they were entitled to an equitable interest in the property and the repayment of the outstanding money owed by the husband and his company, Jagbo Pty Ltd. The plaintiffs also sought an injunction against Ms Gulliver, preventing her from dealing with the property until the final rights were adjudicated.
10. In the caveat proceedings, heard on 16 October 2020, it was acknowledged that the finance companies which had placed the caveat on the property had the onus of proof. They first had to prove that the borrower, Mr Gulliver, did in fact have an equitable interest in the Riverview property, which he had purported to charge with the finance companies.
11. The finance companies had to prove that the equitable interest was assigned to them effectively, meaning they had to prove that the balance of convenience produced a result that the caveat should stay on.

The Evidence

12. There was a significant shortfall in the evidence that the plaintiffs could produce. The plaintiffs filed affidavits referring to conversations between them and Mr Gulliver wherein it was alleged that Mr Gulliver said that he had made contributions to the mortgage. He also said that he paid for maintenance and other expenses in connection with the property.
13. The plaintiffs alleged that Mr Gulliver even asserted that the property was more his than it was his wife's, and the plaintiffs were able to produce a notice that showed Mr Gulliver had paid one of the quarterly rate notices.
14. The plaintiffs produced a HCF (Hospitals Contribution Fund of Australia Limited) card showing that it was in the name of husband and wife, and family. They also produced some documentation that Mr Gulliver or his company, Jagbo Pty Ltd, had paid certain expenses regarding the property.
15. However, the evidence produced by the plaintiffs regarding a conversation that they purported to have with Mr Gulliver was not admissible to prove the facts asserted. His Honour only admitted parts of the conversation for a limited purpose under s 136 of the *Evidence Act* 1995 (NSW),
16. Nevertheless, the plaintiffs could not provide evidence that Mr Gulliver had made mortgage payments as he allegedly claimed, nor could they provide any evidence that he had made any other maintenance payments.
17. On the other hand, the evidence provided by Jennifer Gulliver included an affidavit documenting twenty-four years of employment with a large national company and her finances relating to the property. She also detailed the property purchase in 2012, that she had used her redundancy payment, her superannuation, and an arranged bank mortgage. Ms Gulliver had made all repayments to the mortgage.

18. She then detailed her refinancing with another mortgagee and swore that she did not intermingle her assets or her financial affairs with her husband. She firmly asserted that she did not hold the property on trust for herself and her husband.
19. Ms Gulliver affirmed that she was the registered proprietor of the property in question and that she was the only person who had a proprietary interest in the property.

Findings

20. His Honour found that the allegation in the statement of claim about either a resulting trust, or a constructive trust was vague. This meant that the extent of the so-called beneficial interest claimed had not been quantified, failing the first threshold.
21. Because of the lack of evidence, the plaintiffs did not even get over the prima facie threshold they needed to continue their operation of the caveat.
22. His Honour noted that prior to the financial transaction occurring no one bothered to contact the registered proprietor to verify whether the information they had relied on from Mr Gulliver was accurate.
23. A resulting trust can be imposed by implied agreement by parties in circumstances when both the husband and wife have contributed towards the purchase price of a property. However, in this case, there was no admissible evidence to suggest that fact.
24. What the plaintiffs claimed in the caveat is a constructive trust, which is an equitable remedy imposed on the parties when, in this case, it would be unconscionable for Ms Gulliver to retain the entire beneficial interest in the property, excluding her husband.
25. The plaintiffs did not prove that the husband obtained any beneficial interest in the property. Therefore, they could not establish that a beneficial interest had been assigned to them.

The Caveat

26. The caveat itself purported to affect or cover all of the interest of Ms Gulliver in the property. The estate or interest outlined in schedule one of the caveat asserted that the property is held on trust by the registered proprietor, Ms Gulliver, for the chargor, Mr Gulliver, who has a beneficial and or equitable interest in the property. The facts stated that a constructive trust arose by reasons of the financial contributions made by the chargor to the subject property during the chargor's and the registered proprietor's relationship.
27. Similarly, in the authority *Andrews v Wilcox* [2008] NSWSC 280, it was pointed out that a claim that the caveator has an interest in the whole of the land cannot be sustained if the person purported to convey that interest has only a part interest in the land.
28. The caveat extended the alleged interest to a far greater extent than they were entitled to under the loan documents. For those reasons, the verdict was found in favour of Ms Gulliver.

Closing Statements

29. Robb J remarked on the lack of evidence that the plaintiffs had provided for the court. He commented that he saw no reason why Ms Gulliver should have to expend any money on her costs, which the plaintiffs were ordered to pay. He also stated that he wanted to bring to the attention of the legal profession that it is not fair for clients to be told by their legal advisers that they have reasonable prospects of success when the evidence does not add up.
30. In the mediation, the plaintiffs were advancing that it was available to them to argue that if Mr Gulliver separated from his wife and commenced proceedings to have a property settlement, he would be granted an interest in the property. Alternatively, as it was mentioned in the statement of claim, by virtue of the matrimonial relationship, an interest in the property had accrued to the husband.
31. In the twenty-first century, marital relationships by themselves do not permit the accrual of personal rights in property unless there are other factors. The family court would have jurisdiction to determine rights as to the property in a matrimonial situation. However, there was no family court application, meaning the family court has no jurisdiction.

BIOGRAPHY

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Mr Bateman practises in the following areas of law; commercial, equity, insurance, motor accidents, personal injury, professional negligence, and property.

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BIBLIOGRAPHY

Focus Case

Varcity Solutions Pty Ltd v Gulliver; Varcity Solutions Pty Ltd v Jagbo Pty Ltd [2020] NSWSC 1517

Benchmark Link

https://benchmarkinc.com.au/benchmark/banking/benchmark_03-11-2020_banking.pdf

Judgment Link

<https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2020/1517.html>

Cases

Andrews v Wilcox [2008] NSWSC 280

Varcity Solutions Pty Ltd v Gulliver; Varcity Solutions Pty Ltd v Jagbo Pty Ltd [2020] NSWSC 1517

Legislation

Evidence Act 1995 (NSW) s 136

Real Property Act 1900 (NSW)