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Short Term Financing: A ‘timely’ reminder to include within letters of offer time requirements for the acceptance of the terms of loan agreements

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Interim Finance Pty Ltd v Bright Beginnings Learning Centre Glendenning Pty Ltd [2018] NSWSC 36

On Friday 2 February 2018, the New South Wales Supreme Court released its decision on the interpretation of the terms of a letter of offer for short term financial accommodation, specifying when fees for preparing loan documentation become payable by the borrower to the lender, in circumstances where the loan did not proceed.



Background

Interim Finance Pty Ltd (“**Interim Finance**”) provides short term finance accommodation to customers. Bright Beginnings Learning Centre Glendenning Pty Ltd (“**Bright Beginnings**”) is a childcare provider who was in need of short term finance.

Interim Finance sent Bright Beginnings a letter of offer dated 22 June 2016 (“**letter of offer**”) for an apparent urgent loan for \$450,000, which was duly executed by Bright Beginnings in order for Interim Finance to then go to the expense of drawing up the loan agreement (“**loan agreement**”).

Letter of Offer

The letter of offer contained Parts A to I. Part I, pertaining to the terms and conditions of the acceptance of the offer, was the subject of dispute. Part I set out Interim Finance’s liberty to withdraw from the loan at any point if, among other things, Interim Finance became aware of certain circumstances which changed its decision to provide the loan amount without providing reasons for such a withdrawal. Part I also set out Bright Beginnings’ financial obligations in the

event the letter of offer was signed and Interim Finance prepared loan documents, but the loan failed to succeed due to one of the following occurrences (“**occurrences**”):

1. Bright Beginnings did not elect to continue with the loan;
2. Bright Beginnings was unable to satisfy Interim Finance’s requirements for whatever reason; or
3. Interim Finance discovered or was made aware of any item or issue which changed its mind about providing the loan amount.

If any of the above occurred, then Bright Beginnings would be liable for the following fees:

- Loan application fee as in the letter of offer;
- Legal costs and disbursements for preparation of loan documents; and
- Administration fee of \$1,650.00 incl GST.
(“**fees**”).

Part I stipulated fees became due and payable within 5 days of Interim Finance producing an invoice. If payment wasn’t made, then the Part included a charging clause allowing Interim Finance to take an equitable interest over the security property held by Bright Beginnings, being a property in Guildford (“**the property**”), by registering a caveat. The Part also provided for fees associated with preparation of such a caveat to be charged to Bright Beginnings.

Loan Agreement

The loan agreement was subsequently drawn up and sent to Bright Beginnings on 28 June 2016. A series of communications pertinent to the dispute then followed:

- A representation was made to Interim Finance that Bright Beginnings’ solicitor had been engaged to review the loan agreement to make amendments. Bright Beginnings says several steps were taken from 4 July 2016 to progress the loan.
- Interim Finance alleges receiving a telephone call on 5 July 2016 from a broker seeking a larger amount than the offer made to Bright Beginnings. During the same telephone call Interim Finance became concerned Bright Beginnings was ‘shopping around’ for finance despite the fees having been incurred to draw up the loan agreement.
- During a telephone call on 8 July 2016 between Bright Beginnings and Interim Finance, Interim Finance raised their concerns Bright Beginnings was ‘shopping around.’ Bright Beginnings alleges its solicitor was merely waiting on amendments to the loan agreement from Interim Finance’s solicitor. Bright Beginnings also asked if Interim Finance was willing to substitute securities in the loan documents for another property, which Interim Finance rejected.
- On the same day Interim Finance sent Bright Beginnings an email detailing their attempted contact with Bright Beginnings for the signed loan agreement to which they received no response, therefore assuming Bright Beginnings did not wish to proceed with the loan and reinforcing Bright Beginnings’ liability for fees incurred in the amount of \$8,100 incl GST with an invoice attached. The invoice demanded payment no later than by 15 July 2016. Instructions were also given on 8 July 2016 to lodge a caveat over the property.

- On 8 July 2016 Bright Beginnings' solicitor requested the loan documents for signing which was subsequently rejected by Interim Finance via email shortly thereafter on the same day.
- On 8 July 2016 Bright Beginnings' solicitor again requested a copy of the loan documentation to sign as Bright Beginnings had misplaced the original.
- On 12 July 2016 Bright Beginnings in a telephone conversation with Interim Finance requested to proceed with the loan and noted Interim Finance's rejection on the basis Interim Finance was uncomfortable proceeding due to inconsistencies in communication.
- A lapsing notice on the caveat over the property was filed by Bright Beginnings on 9 September 2016.

Parties' positions and relief sought

Interim Finance maintained the failure of Bright Beginnings to return the signed Loan Agreement was an election not to proceed with the Loan Agreement, or alternatively, Bright Beginnings' inconsistent communication made Interim Finance change its mind about continuing with the loan. Therefore Bright Beginnings was liable for the fees pursuant to the letter of offer. Interim Finance sought orders stating the property was properly charged to secure payment by way of a caveat for the fees incurred pursuant to s100 of the *Civil Procedure Act 2005* (NSW) and for the property to be sold if the fees were not paid within 28 days.

Bright Beginnings maintained it was not liable for the fees as it never elected to discontinue the loan and in fact attempted to complete the loan. It alleged, rather, Interim Finance repudiated the Loan Agreement and therefore Bright Beginnings was not liable for the fees. Bright Beginnings sought a declaration stating the 8 July 2016 email was a repudiation of the loan agreement by Interim Finance and sought a declaration Interim Finance did not have a caveatable interest over the property.

Judgment

Was Bright Beginnings liable for fees? No.

Her Honour Ward CJ did not hold Bright Beginnings liable for fees, as none of the occurrences had transpired pursuant to the terms of the letter of offer. Her Honour's reasons were as follows:

1. Her Honour was not persuaded Bright Beginnings had elected to discontinue the loan [at 65]. He noted attempts to negotiate amendments to a loan agreement by way of proposing alternate security does not amount to an election to discontinue [at 86].
2. Nor was Her Honour persuaded Bright Beginnings did not comply with Interim's requirements, i.e. for the documents to be returned by a specific time, as there was no time specified.
3. As to whether Interim Finance discovered or was made otherwise aware of an item or issue changing its decision to provide the loan, Her Honour determined it wasn't made aware of anything which would have changed its decision. Her Honour determined the communications made prior to Interim Finance's email dated 8 July 2016 were not the basis on which the invoice for fees was predicated [at 88]. Rather, communications prior to the 8 July 2016 email were with the finance broker for a higher loan and with Bright Beginnings'

4. solicitor for alternate security. These did not amount to items or issues to which Interim Financing were made aware.

Timing to pay fees and the lodged Caveat - Does not arise

Whilst the issues did not arise as it was found Bright Beginnings was not liable for the fees, Her Honour rejected Interim Finance's argument it was entitled to immediately lodge a caveat over equitable interests held by debtors who were liable for fees in case the fees became due and owing. Rather, Her Honour determined the consent to lodge the caveat is not operative until the expiry of 5 days after the invoice for fees is produced [at 103] as stipulated by the letter of offer.

Was there repudiation by Interim Finance? Does not arise

The issue of repudiation did not arise because of Her Honour's findings as to the liability for fees. However Her Honour said he was not convinced the 8 July 2016 email was repudiation by Interim Finance of the loan agreement as the letter of offer stipulated Interim Finance's liberty to withdraw from the loan at any time.

As a useful reference, Her Honour sets out how the issues rise and fall at paragraph 65 of her judgment.

Lessons Learned

Despite the amount of \$8,100 being small and normally subject to the Local Court's jurisdiction, the caveat on the property caused the matter to be heard in the Supreme Court. Accordingly, it was a costly exercise to litigate and the following lessons can be learned from this matter:

1. Specify the time period for the return of loan documents, thereby protecting the fees expended in preparation of the loan documents;
2. If any amendments are proposed by the borrower, specify the time period during which the borrower can propose amendments;
3. Any correspondence as to a withdrawal from a loan in accordance with a letter of offer must be predicated by correspondence which gives rise to the withdrawal, in order to be eligible for the fees incurred. That is, if you withdraw due to other circumstances, you likely will not be eligible to charge the fees incurred in the preparation of loan documentation.
4. Do not prematurely register a caveat over an equitable interest in a property until the charging clause becomes operative.

A copy of the entire judgment, can be read here:

<https://www.caselaw.nsw.gov.au/decision/5a714dece4b074a7c6e1be91>

If you would like to engage in further discussion with us about issues within this case, please contact us on (02) 8239 9600.