

Professional Services Alert

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Witnessing Execution of a Document Transferring Interests in Property.

Graham v Hall & 1 Or [2006] NSWCA 208

Solicitors, Justices of the Peace and Commissioners for Oaths/Affidavits who improperly witness the execution of a document transferring interests in property can be potentially found negligent and accountable for damages to a disappointed beneficiary.

Graham v Hall is a landmark case and one of which practitioners (including a lay person) should be aware when witnessing and attesting to any document, such as mortgages or wills.

The NSW Court of Appeal unanimously upheld the trial judge's finding that a person who witnesses to the execution of a mortgage, or any document relating to a property, owes a duty of care and can be liable to the owner of such property for any breach of that duty of care.

FACTS

The plaintiff, Mrs Hall, and her late husband, Mr Hall, owned a family home together near Bathurst, NSW. Mr Hall conducted a business. He was a poor businessman and was in financial difficulty. Mr Hall decided to mortgage the family home and pay his debts.

In April 2001, Mr Hall engaged a solicitor to act on behalf of his wife and himself in relation to the mortgage refinance of the family home. Mr Hall advised his solicitor that Mrs Hall was dying of cancer and was unable to attend his offices to sign the necessary paperwork. Mr Hall himself took the relevant documents home to be signed.

Mr Hall signed the mortgage document in the presence of the solicitor, who witnessed his signature wherever it appeared. Mr Graham a justice of the peace (JP), witnessed the purported signature of Mrs Hall on the mortgage and other documents in Mr Hall's presence, but did not see Mrs Hall sign the document.

In fact, Mrs Hall did not have cancer, nor did she know that her husband was in financial difficulties, or know of the loan and at all times was entirely ignorant of her husband's visit to his solicitor. She was never asked to sign anything.

It was not until Mr Hall's death a few years later that Mrs Hall discovered that her husband had arranged a mortgage over the family home, the discovery being made when the mortgagee attempted to exercise a right of sale over the property.

Mrs Hall sued both the solicitor and the JP for damages for negligence. Each instituted a cross-claim against the other and asserted that the other was principally to blame for Mrs Hall's loss.

The trial judge at first instance held that the prime responsibility lay with the solicitor. His Honour found that the JP's conduct was *morally blameworthy* whereas the solicitor's conduct was not. However, His Honour held that no matter how morally blameworthy the JP's conduct was, *the solicitor could have obviated it by carrying out some basic, inexpensive, investigations as to the agreeableness of [Mrs Hall] to enter into this mortgage.* His Honour apportioned liability 60% against the solicitor and 40% against the JP.

ARGUMENT ON APPEAL

The JP appealed the decision at first instance on the basis that:-

1. he did not owe Mrs Hall a duty of care;
2. if he did, he did not breach that duty;
3. he did not cause Mrs Hall's loss;
4. he was entitled to immunity from action under s.135 of the *Justices Act* 1902 (NSW);
5. he was not responsible to the extent of 40% for Mrs Hall's loss.

The solicitor did not contest the finding he was negligent, however appealed against the finding he was 60% responsible for the plaintiff's loss.

1. Duty of care

Ipp JA noted that the negligence alleged against the JP did not fall within the established categories of negligence recognised by common law. In this regard, His Honour stated that the first step was to identify the interests for which the plaintiff seeks protection.

It was found the interest of Mrs Hall for which she sought protection was her interest as joint owner of the family home. Ipp JA commented that Mrs Hall's interest must have been obvious to the JP when he attested her purported signature, as mortgagor, on the mortgage document. The risk, His Honour observed, was a foreseeable one.

Ipp JA held there were significant similarities between the duty recognised in *Hill v Van Erp* (1997) 188 CLR 159 and the duty which Mrs Hall contended for. His Honour submitted the following were *powerful factors* supporting the recognition of a duty of care owed by the JP to Mrs Hall:

1. A mortgagee may have a claim for negligent misstatement against a person attesting a mortgage. The conduct of the attester and which gives rise to that duty is the same conduct said to give rise to a duty owed by the attester to the true owner of the property, Mrs Hall.
2. There is no question of indeterminate liability. The only possible plaintiffs would be, the mortgagee, Mrs Hall and perhaps, the Registrar-General.
3. The recognition of the duty of care would facilitate the operation of those elements of the law of property which enable the transmission of ownership, would assist in preventing owners of property and mortgagees being defrauded, and would promote appropriate conduct on the part of those who attest commercial documents such as mortgages.

The Court of Appeal held the JP owed Mrs Hall a duty of care in attesting the signature on the mortgage and representing that the signature purporting to be of Mrs Hall was placed on the mortgage in his presence and that Mrs Hall was personally known to him.

It was held the duty arises irrespective of whether the JP acted as a justice of the peace or as an ordinary witness.

2. Breach of the Duty of Care

The Court of Appeal held on the evidence the JP breached the duty of care he owed to Mrs Hall.

3. Immunity

In relation to the immunity under s.135 of the *Justices Act*, that section states, in brief, an action shall not lie against a Justice for any such act in the execution of his or her duty as a Justice within his or her jurisdiction, unless the act was done *maliciously and without reasonable and probable cause*.

Ipp JA held that the JP's act in attesting the mortgage was an act done maliciously and without reasonable and probable cause within the meaning of the Act. His Honour considered the following:

1. The JP represented that the person who as Mrs Hall appended her signature to the mortgage did so in his presence;
2. The JP represented that Mrs Hall was personally known to him.

Ipp JA held both the JP's representations were dishonest. In this regard, His Honour stated the immunity in the Act did not apply where a Justice of the Peace had acted maliciously. Ipp JA stated:

"Such an act strikes at the heart of the system that they are charged to protect. It constitutes a dishonest misrepresentation and, in my view, is an act done maliciously within the meaning of that word in s.135(2)."

4. Apportionment of damages

As to apportionment, Ipp JA concurred with the trial judge that the prime responsibility for Mrs Hall's damages was that of the solicitor because he expressly took upon himself the duty of taking reasonable steps to protect Mrs Hall's interest. Further, His Honour agreed the JP should also bear a significant proportion of the responsibility, as he was morally blameworthy. Ipp JA said the *JP's conduct had material causal potency*.

His Honour was therefore not persuaded the trial judge erred in his discretion in apportioning liability on the basis that he did.

CONCLUSION – SOME PRACTICAL CONSIDERATIONS

This case is a salutary warning highlighting some important practical considerations every legal practitioner and justice of the peace should follow when attesting to the execution of a document transferring interests in property. As the trial judge stated, the solicitor in this case *could have obviated [his conduct] by carrying out some basic, inexpensive, investigations as to the agreeableness of [Mrs Hall] to enter into this mortgage*. A simple quick telephone call to Mrs Hall would have sufficed.

It is important to take every precaution to satisfy yourself as to the identity of any person purporting to be the owner and to ensure that the document is executed by that person in your presence. Taking the precautions highlighted in this case will ensure practitioners sufficiently discharge their duty of care to clients. As Ipp JA indicated, the question of the convenience to a client is very much a secondary consideration to ensuring the validity of the execution of any documents.

Some other precautions to take into consideration are:

1. Undertake identity checks by requiring production of photo I.D ie drivers license or passport;
2. Require personal attendances upon the JP's offices to sign documents;

3. Require signatures to be personally signed in the JP's presence;
4. Ensure the signatory identified as the person in the document by reference to a passport or driving license;
5. Identify the interest/s that are affected by the transaction and determine whether further investigations are required;
6. If you have more than one client giving instructions ie husband and wife, make sure you obtain instructions from both;
7. If necessary, a telephone call to that person to determine whether they are a willing signatory, that they understand what they are signing and whether they are who they say they are.

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