



## How to protect your investment in a joint venture

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April 2018

Often a land owner or developer will need capital or funding of a development and they will look for an investor to come on board as a joint venture partner to fund the development and share any profits.

This was the case in the New South Wales Supreme Court decision of *Coleman v Hart-Hughes* [2017] NSWSC 656.

Hart-Hughes (the land owner) had no funds or borrowing capacity to carry out the subdivision of her land into 3 lots. Coleman (the investor) agreed to invest funds to clear her loan arrears and develop the property.

The parties signed a Joint Venture Deed for the development and Coleman registered a caveat over the land to secure his interest.

Relations between Hart-Hughes and Coleman soured and Coleman looked to enforce his security over the property through the caveat. Hart-Hughes alleged that the joint venture was illegal because only the profits and not the losses were shared and also that the Joint Venture Deed had been terminated by frustration. Coleman argued that he had been granted a valid "equitable charge" over the land.

The NSW Supreme Court held that:

- i. It is not illegal to share profits without sharing losses in a joint venture;

- ii. The Joint Venture Deed was not terminated by frustration - delays in the project from 2012 until 2016 were not unexpected and did not prevent the parties from performing their obligations under the deed; and
- iii. While not expressly providing for any charge in favour of the investor, the terms of the Joint Venture Deed gave Coleman an implied "equitable charge" over the land.

This case highlights that a failure to include express terms in a joint venture agreement (such as the grant of an "proprietary interest" rather than just a right to lodge a caveat over the land) can leave investors at the mercy of the Courts and potentially without means to recover their costs should the land owner default.

While in this case the Court held that an acknowledgement that a party had a caveatable interest was sufficient to create an implied charge (and in other cases it has been held that a right of a party to lodge a caveat has created an implied charge), it is always on the basis that there is no contrary intention expressed elsewhere in the relevant document. As a matter of practice relying on such terms is therefore problematic and it is always best to include express terms creating a charge over land to protect a party's interest. A caveat is a form of statutory injunction and indicates that a party holds an interest in the land. It does not give the caveator the right to repossess or sell the land to recoup any losses.

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When looking to enter into joint venture agreement, the transfer of the land to a shared entity is generally encouraged, provided there is no adverse capital gains tax or stamp duty consequences, to ensure that all parties to the joint venture have a registered interest in the land. Alternatively if there is not to be a transfer of an interest in the land then the investor's interest under the joint venture agreement should be secured by a mortgage which is usually subrogated behind any existing bank mortgage or finance.

If you are thinking of entering into a joint venture agreement, get in touch with the ClarkeKann Property & Projects team. We can ensure that your rights and interests are protected.

**For more information, please contact:**



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