

THE 2011 NORTH QUEENSLAND LAW ASSOCIATION
CONFERENCE

**LAPSING & REMOVAL OF CAVEATS &
RISKS FOR CAVEATORS**

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Lapsing & Removal of Caveats & Risks For Caveators

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Introduction

1. The focus of this paper is the lapsing and removal of caveats, and some of the risks faced by caveators.
2. It is helpful at the outset to briefly identify the purpose of a caveat and some of the requirements that apply to caveats.

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Purpose

3. A caveat is a form of statutory injunction provided for under the *Land Title Act 1994 (Act)*.
4. In *J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546, Barwick CJ explained, at 552, the purpose of a caveat:

“Its purpose is to act as an injunction to the Registrar-General to prevent registration of dealings with the land until notice has been given to the caveator. This enables the caveator to pursue such remedies as he may have against the person lodging the dealing for registration. The purpose of the caveat is not to give notice to the world or to persons who may consider dealing with the registered proprietor of the caveator's estate or interest though if noted on the certificate of title, it may operate to give such notice.”
5. The effect of a caveat is provided for in s. 125 of the Act.
6. A caveat is to be distinguished from a settlement notice². A settlement notice is available to a “transferee”³ of land. It has similar, but sufficiently different, functions to a caveat.
7. A settlement notice once deposited preserves the priority enjoyed by the transferee of an interest capable of registration⁴, for a period of 2 months or until all instruments relating to the settlement notice are registered, unless the settlement notice is removed or withdrawn. It does not restrain dealings with the land generally like a caveat. A settlement notice lapses after 2

² Part 7A of the Act.

³ Defined in s. 138 of the Act.

⁴ See ss. 141 and 150 of the Act.

months and may not be continued⁵. In contrast, a caveat, provided steps are taken, survives until the determination of a dispute or mutual agreement. A settlement notice is used in respect of interests which can be registered⁶; whereas a caveat is used when the interest is unable to be registered whether due to its nature or the circumstances.

8. However, like caveats:

- (a) an application may be made to remove a settlement notice (by an affected person)⁷;
- (b) a further settlement notice may not be lodged without leave⁸; and
- (c) any person who deposits or continues a settlement notice without reasonable cause must compensate anyone else who suffers loss or damage as a result⁹.

Power to lodge a caveat

9. Section 122 of the Act identifies who may lodge a caveat. The most frequent party is a person who claims to have an “interest” in land.

⁵ s. 143 of the Act.

⁶ c.f. *A & T Promotions Pty Ltd v Ikin & AG (CQ) Pty Ltd* [2009] QSC 119 (overturned in *AG(CQ) P/L v A&T Promotions P/L & Anor* [2010] QCA 083) where a party entitled to receive an interest in a proposed allotment promised a first registered mortgage of the proposed allotment to multiple parties. A settlement notice was not available as the survey plan creating the new allotment was not certified when the equitable mortgages were created.

⁷ s. 144 of the Act.

⁸ s. 146 of the Act.

⁹ s. 147 of the Act. See the commentary under “Compensation” heading below.

10. The requirements of caveats are set out in s. 121 of the Act. With the exception of a caveat lodged by the Registrar under s. 17 of the Act, a caveat must:

- (a) be signed by or for the caveator¹⁰; and
- (b) state:
 - (i) the name of the caveator;
 - (ii) address for service of the caveator;
 - (iii) unless dispensed with by the Registrar, the name and address of the registered owner and any other person affected by the caveat (that is to say the caveatees);
 - (iv) the registered interest affected by the caveat;
 - (v) if the caveat only relates to part of a lot, a description of the affected part¹¹;
 - (vi) the interest claimed¹²; and
 - (vii) the grounds on which the interest is claimed¹³.

¹⁰ s. 130 of the Act.

¹¹ In some instances, a sketch plan may be required.

¹² See s. 36 of the *Acts Interpretation Act 1954* (Qld) for the definition of “interest”. Note, the interest must be sufficient to sustain a caveat. This topic is comprehensively covered *Land Titles Law and Practice Qld* at [7.1070]. Two examples are: (1) “interest as lessee”; (2) “an equitable estate in fee simple”.

¹³ This means all grounds upon which the interest claimed is based. Here are but two examples:

11. A caveat which does not comply with the mandatory requirements may be requisitioned by the Registrar¹⁴. If the requisition is not addressed to the satisfaction of the Registrar within the time specified, the caveat may be rejected and returned to the person who lodged it¹⁵.
12. Given the technical nature of caveats and the risks associated with legal representatives acting for clients with actual or prospective caveatable interests¹⁶, practitioners considering lodging a caveat at the very least should consult the Land Title Practice Manual¹⁷ and any conveyancing protocol¹⁸ that applies.
13. It is extremely important that practitioners acting for caveators and caveatees remain cognisant of the ways in which a caveat may be removed

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- (a) Pursuant to a contract of sale dated 1 January 2011 between the registered proprietor and the caveator pursuant to which registered proprietor agreed to sell and the caveator agree to purchase the land for \$500,000.
 - (b) For a joint endeavour or relationship:
 - (i) An agreement entered into on or about 1 January 2007 between the caveator and registered proprietor whereby the registered proprietor agreed to hold the property identified at item 2 ("the Property") on trust for the caveator and himself as tenants in common in shares proportional to their respective financial and non-financial contributions to the Property, and subsequently, financial and non-financial contributions made by the caveator towards the Property.
 - (ii) Further or in the alternative, a constructive trust derived during the course of a joint endeavour whereby the caveator made financial and non-financial contributions to the land.

¹⁴ s. 156(1) of the Act.

¹⁵ s. 157 of the Act.

¹⁶ A solicitor responsible for lodging a defective caveat may be liable to a client in negligence where the caveator suffers loss as a result. Further, a solicitor who lodges or continues a caveat without reasonable grounds may be liable for compensation suffered as a result of the caveat (s. 130 of the Act).

¹⁷ Available at no cost at <http://www.derm.qld.gov.au/property/titles/ltpm.html>

¹⁸ Such as the Queensland Conveyancing Protocol published by Lexon Insurance.

and remain particularly attuned to the risks attached to lodging a caveat. Particularly attention should be given as to whether the caveator has standing to lodge a caveat, the interest claimed is sufficient to support the caveat¹⁹ and the grounds support the interest claimed.

Removing a caveat

14. There are four ways that a caveat can be removed:-

- (a) it can lapse under s 126 of the Act;
- (b) the caveator can withdraw it (by lodging Form 14, General Request);
- (c) by order of the Supreme Court;
- (d) by cancellation by Registrar under s 128 of the Act or rejection by Registrar.

15. The first three options will be addressed.

Lapsing

16. Caveats are categorised as being either lapsing or non-lapsing.

17. If a caveat is non-lapsing, it continues to prevent registration of any instrument affecting the lot from the time the caveat is lodged until it is withdrawn or removed by order of the Supreme Court.

¹⁹ See *Re Ocean Downs Pty Ltd (in liq) caveat* [1989] 1 Qd R 648 where a liquidator of a company who did not obtain an order vesting the company property in him was held not to benefit from a non-lapsing caveat as he was not the registered proprietor.

18. If the caveat is a lapsing caveat, steps must be taken to prevent the caveat from automatically lapsing. Once a caveat has lapsed, the caveat cannot be revived (or withdrawn) and the caveatee is entitled to file a Form 14, General Request, for the caveat to be removed.
19. Non-lapsing caveats are set out in s 126(1) of the Act. By operation of that subsection, a caveat will not lapse if it is lodged:
- by the **registered owner**²⁰;
 - with the **consent** of the **registered owner** (by execution of a Form 18, General Consent)²¹;
 - accompanying a **court order**²² made within s. 122(1)(d) or (e);
 - by the **registrar** under s 17 of the Act (protective caveats)²³; or
 - otherwise than under **Division 2 of the Act**²⁴. This includes caveats lodged in respect of an interest for adverse possession or under the *Body Corporate and Community Management Act 1997*²⁵.
20. All other caveats automatically lapse unless certain steps are taken.
21. The term non-lapsing may mislead some. It does not mean, as it may suggest, that the caveat remains in force indefinitely. Rather, a non lapsing

²⁰ s 126(1)(a) of the Act.

²¹ s 126(1)(b) of the Act.

²² s 126(1)(c) of the Act.

²³ s 126(1)(d) of the Act.

²⁴ s 126(1)(e) of the Act.

²⁵ See Christensen, Dixon & Wallace, *Land Title Law and Practice*, LBC, Looseleaf at [7.3090].

caveat merely relieves the caveator from having to take steps to continue the currency of the caveat. A non-lapsing caveat is as susceptible as a lapsing caveat to an application for removal. However, given the positive conditions imposed on lapsing caveats, it is not uncommon for a caveator to attempt to dress the caveat up to have it appear as a non-lapsing caveat.

22. *Circuit Finance Australia Ltd v Registrar of Titles*²⁶ is an example. In *Circuit Finance Australia* a lender granted finance subject to a chattel lease facility. The facility agreement contained a generic charging clause in respect of any interest in property that the lessee had now or at any time in the future. It was of the kind which one readily sees in trade credit applications.
23. The lender did not hold a registered mortgage over any of the borrower's property. To guard against the possibility of default, the lender lodged a number of caveats over land to which the lessee had an interest claiming an interest as equitable mortgagee, accompanied by the lessee's consent lodged pursuant to the charging clause. The borrower however was not in default so the lender had no desire to bring proceedings of any kind.
24. The Registrar treated the caveat as a lapsing caveat. The lender sought a declaration that the caveat was non-lapsing because it was lodged with the registered owner's consent. The difficulty was that the interest claimed by the lender in the caveat was that of an "equitable mortgagee"²⁷. This had the effect of double-dipping, by saying that on the one hand, that the caveat was one to which s 126 applied (as required by s 122(2) in respect of an

²⁶ [2006] 1 Qd R 204.

²⁷ s. 122(2) of the Act.

equitable mortgagee), but the effect of the lessee's consent was to uplift it to s 126(1).

25. McMurdo J regarded this as circular logic, and found that the reference in s 122 (2) to s 126 ought not to be read literally so as to encompass s 126(1). His Honour held that the reference to s 126 should be construed as meaning s 126 (2)-(7), and as a result, any caveat lodged by a caveator claiming to be an equitable mortgagee was susceptible to automatic lapse, and subsequent removal by the registrar. Accordingly, a caveat lodged by an equitable mortgagee will lapse, whether or not it is deposited with the consent of the registered proprietor.
26. It remains the case that the vast majority of caveats are of the lapsing variety.
27. A lapsing caveat will automatically cease to be of effect as a consequence of:
 - (1) Lapsing by Notice; and
 - (2) Lapsing by Effluxion of Time.
28. Lapsing by Notice is covered by s 126 (2)-(5) of the Act. Those subsections provide a machinery whereby the caveatee can, by delivery of notice on the caveator, require the caveator to commence proceedings in a court of competent jurisdiction²⁸ to establish the interest claimed under the caveat²⁹.

²⁸ Not necessarily the Supreme Court.

²⁹ s 126(2) of the Act.

29. Schedule 2 of the Act defines “caveatee” so as to include the registered proprietor of the lot or any party who has “an interest in the lot”. The second limb picks up on the definition of caveator and the wider import of “interest in a lot” provided by s 36 of the *Acts Interpretation Act 1954*. Accordingly, by operation of that definition, any party with a legal or equitable estate in the lot, or a right, power or privilege over or in relation to the lot, may serve on the caveator a notice to commence proceedings.
30. Upon receipt of such a notice, the caveator must initiate proceedings in a competent court within 14 days³⁰, and notify the Registrar. If both steps are not taken, the caveat will lapse and enable the caveatee to request that it be removed by the Registrar³¹.
31. Practitioners should take care to ensure that any proceedings commenced are appropriate so as to avoid the automatic lapsing provisions. This necessarily requires that the proceedings seek to establish the interest claimed in the caveat. That does not necessarily mean that the wording on the caveat must be matched verbatim in the relief claimed in the proceedings. A liberal approach is taken to assess whether the proceedings in fact seek to establish the requisite interest claimed³². Even so, the caveator should invariably seek *inter alia* a declaration that the caveator has the interest claim under the caveat so as to satisfy the conditions of s 126(4).

³⁰ s 126(4)(a)(i) of the Act.

³¹ s 126(4)(b) of the Act.

³² *Cousins Securities Pty Ltd & Ors v CEC Group Ltd & Anor* [2007] 2 Qd R 520 at 532 per Holmes JA.

32. It is important that practitioners remain alive to notifying the Registrar both of the commencement and identity of the proceedings within the specified statutory period. Such notification, also termed a notice of action, is given as an annexure to a Form 14, General Request, together with a copy of the proceedings. Failure to notify the Registrar within the timeframe may leave the caveator without any means of protecting their interest³³ and the practitioner with reason to notify their indemnity insurer.
33. It is also important to emphasise that there is no obligation on the caveatee to serve a notice under s 126(2). Irrespective of whether a notice has been served, at all times the caveatee is permitted to apply to the Supreme Court for the caveat to be removed. This procedure is considered below.
34. Depending on the circumstances of the case, it is not always advisable to serve a notice on the caveator. The unwarranted effect of such a notice may be to significantly draw out the dispute and unnecessarily continue to restraint on the title pending determination at trial. It is not uncommon for a caveat to lapse on account of no or no proper proceedings being commenced. It is often helpful to write to the caveator requesting particulars of the nature and basis of the caveatable interest, and matters as to convenience, such as requesting a valuable undertaking. This is particularly so when it is doubtful that the caveator has a caveatable interest. Upon receipt of such information, the caveatee may consider

³³ See *Ferguson v Mackee* [1999] QSC 371, where the caveator commenced proceedings but failed to serve a notice on the Registrar. As a result the caveat lapsed.

whether it is preferable to issue a notice to commence proceedings or file an application to remove the caveat.

35. The third way a lapsing caveat will expire is by the effluxion of time. In Queensland, absent any notice to commence proceedings, a lapsing caveat expires three (3) months of lodgement³⁴ unless proceedings to establish the interest claimed under the caveat are commenced and notice of the commencement and nature of the proceedings is given to the Registrar³⁵.
36. It is this notion of lapse by effluxion that is, in a technical sense, the truest form of 'automatic lapse' as it requires no action by either the caveatee or caveator (other than the lodgement of the caveat itself) for the lapse to occur. Simply lodging a caveat and taking no action will see it lapse at the expiration of the three month period³⁶, and allow the Registrar to remove it from the register upon request³⁷.
37. Until relatively recently, there was a question as to whether a caveat lapses if proceedings are commenced in time and notice given to the Registrar, but the proceedings are subsequently struck out. In *Allen's Asphalt P/L v SPM Group P/L* (2009) 255 ALR 588, the Court of Appeal answered this question in the negative; that is to say that the caveat does not automatically lapse if the subject proceedings are struck out. In *Allen's Asphalt* the caveator

³⁴ s 126(4)(a)(ii) of the Act.

³⁵ s 126(4)(b) of the Act.

³⁶ s 126(5) of the Act.

³⁷ s 126(7) of the Act.

deposed as to an intention to commence fresh proceedings to support the interest claimed – that was held to be sufficient³⁸.

Withdrawal

38. Section 125 of the Act allows a caveator to withdraw the caveat. This is undertaken by lodging a Form 14 (General Request) requesting that the caveat be withdrawn.
39. A caveat may only be withdrawn whilst it is current³⁹. So a caveat which has lapsed may not be withdrawn⁴⁰. And a non lapsing caveat may be withdrawn at any time prior to the Court ordering its removal.
40. Once a withdrawal is lodged, the caveat will only cease to be of effect when the General Request (for withdrawal) is recorded on the register⁴¹.
41. Special considerations apply if the withdrawal is only in respect of part of the caveat. This situation most commonly arises when the caveat is lodged over more than one title, such as a subdivision development. While the Act does not distinguish between partial and complete withdrawal, it is permissible to partially withdraw a caveat providing that the partial withdrawal is absolute in form⁴².
42. Having regard to the serious consequences which may follow from a caveat that is found to have been lodged or continued without reasonable cause,

³⁸ at 594-595 per Muir JA (with whom Daubney J concurred at 599).

³⁹ *Zanee Pty Ltd v CG Maloney Pty Ltd* [1995] 1 Qd R 105.

⁴⁰ Above.

⁴¹ *Carwood v Infracworth* [1990] 2 Qd R 114.

⁴² Christensen, Dixon & Wallace, *Land Title Law and Practice*, LBC, Looseleaf at [7.2570].

withdrawal is a course which should be strongly considered in any case which has questionable prospects.

43. Withdrawal is also utilised when there is a negotiated outcome between the parties.

Leave under s. 129

44. Where a caveat has lapsed or been ordered to be removed, leave is required to lodge a second caveat on the same or substantially the same grounds. A party who allows a caveat to lapse may therefore apply for leave⁴³. Leave is not required if the caveat was withdrawn⁴⁴.

45. Section 129(2) of the Act provides that a “further caveat with the same caveator can never be lodged in relation to the interest on the same, or substantially the same, grounds as the grounds stated in the original caveat unless the leave of a court of competent jurisdiction to lodge the further caveat has been granted.”

46. Section 129 of the Act provides the Court with a wide and unfettered discretion to grant leave to lodge a caveat on the same or substantially the same grounds as a lapsed caveat. There are no express criteria for application by the court when considering an application for leave. The discretion is unconfined except as the matter and scope of the statutory provisions will dictate what it is that must be kept in mind⁴⁵. An object of

⁴³ *Bank of Qld Ltd v Houry & Anor* [2010] QSC 114.

⁴⁴ *Re Leighton Properties (Qld) Pty Ltd* [1990] 2 Qd R 230

⁴⁵ *Minister for Aboriginal Affairs v. Peko-Wallsend* (1985-1986) 162 CLR 24 at 39-42 per Mason J, Gibbs CJ and Dawson J agreeing

the Act is “to define the rights of persons with an interest in registered freehold land” (s 3(a)).

47. A person has an “interest” in land if there exists *inter alia* a legal or equitable estate in the land⁴⁶.
48. In *Landlush P/L v Rutherford* [2003] 1 Qd R 236 Wilson J said, at [18], that the following considerations were relevant to the exercise of the discretion to grant leave:
- (a) whether the caveator shows a serious question to be tried;
 - (b) whether the balance of convenience favours the maintenance of the status quo;
 - (c) whether there is a satisfactory explanation for the lapse of the first caveat;
 - (d) whether there is a satisfactory explanation for any delay in making the application for leave;
 - (e) whether any caveatees would be unduly prejudiced by the lodging of the second caveat.
49. The applicable principles were recently affirmed by Mullins J in *Bank of Qld Ltd v Khoury & Anor* [2010] QSC 114⁴⁷.
50. Where the caveator's interest in the land is clearly established and can be defeated in the absence of a caveat, an application under s. 129 should

⁴⁶ Refer to s. 36 *Acts Interpretation Act* 1954.

⁴⁷ at T1-7, applying *Oversea-Chinese Banking Corporation Ltd v Becker* [2004] 1 Qd R 409.

ordinarily be granted notwithstanding delay, and even in the absence of some reasonable explanation for allowing the first caveat to lapse, unless the grant of leave would cause relevant prejudice to the caveatee⁴⁸.

51. Relevant prejudice is that which is suffered by the respondents by reason of the fresh caveat – not the original caveat⁴⁹. It is not the prejudice caused by the restraint on dealing with property imposed by the caveat because that is a detriment contemplated by the Act as that is a prejudice which the respondents suffer when the first caveat was lodged⁵⁰. The inquiry is about any prejudice suffered during the period between lapse of the first caveat and the application to lodge the second caveat⁵¹.
52. In *Oversea-Chinese Banking Corporation Ltd v Becker*⁵² an equitable chargee sought leave to lodge further caveats some two years after the caveats lapsed. The reason for the chargee's failure to commence proceedings was that its Victorian solicitor was unaware of s126 of the Act and did not realise that the caveat would lapse within three months if an action was not commenced. Chesterman J (as he then was) held that this was not a reasonable explanation for allowing the caveat to lapse but granted leave nonetheless⁵³.

⁴⁸ *Oversea-Chinese Banking Corporation Ltd v Becker* [2004] 1 Qd R 409

⁴⁹ Above.

⁵⁰ Above.

⁵¹ Above.

⁵² Above.

⁵³ At 412

53. In *Bank of Qld Ltd v Houry & Anor*⁵⁴, the Bank had no real explanation for allowing the caveat to lapse – the evidence demonstrated mere inaction on the part of the Bank after initially misplacing the duplicate certificate of title and some further delay after the caveat has lapsed. Even so, as the respondent, subsequent unregistered mortgagee, was unable to point to any prejudice that accrued between the lapsing of the caveat and the application to lodge a caveat on the same or similar grounds, Mullins J granted leave. Any issue as to priorities between the Bank and subsequent mortgagee did not fall to be resolved on the application for leave.

Removal by court

54. Section 127 of the Act permits a caveatee to apply to the Supreme Court for an order to remove a caveat. That right exists whether or not notice has been served upon the caveator and subject to such terms (or orders) as the Supreme Court thinks appropriate. That means that the court can order the removal of a caveat upon conditions: such as payment of a disputed sum into court or to be held on trust pending the determination of the dispute, or upon an undertaking from a caveatee; or the dismissal of the application on conditions: such as an undertaking to pay compensation to anyone who suffers loss on account of the caveat⁵⁵. The width of the power conferred by s 127 also means that the court can order a caveat to be amended so as to

⁵⁴ Above.

⁵⁵ In *Buranda Properties Pty Ltd v Buranda Properties Pty Ltd as t'ee* [2010] QSC 357 Margaret Wilson J dismissed an application to remove a caveat upon an undertaking by the caveator to compensate anyone who suffered loss as a result of the caveat being found to be lodged or maintained without reasonable cause.

protect the rights actually claimed by the caveator⁵⁶. Thus, an application to remove a caveat is by no means all or nothing.

55. Relevantly, s 127(1) permits an application to be made “at any time”. Hence, a party who has previously been unsuccessful in seeking the removal of a caveat may bring a second or subsequent application in the event of a material change in circumstances⁵⁷.

Standing

56. A caveatee may apply for the removal of the caveat. That means that any person with an “interest” in the subject land may apply to remove a caveat.
57. Generally, the caveatee will be the registered proprietor of the land and thus be the party who applies to the court for an order to remove the caveat under s 127 of the Act. Sometimes a bank is a moving party; sometimes both.
58. Generally, courts are not terribly strict when it comes to who may apply for removal of a caveat. Even in cases when the existence of a proprietary interest has been doubtful at best, some courts have declined to remove caveats for a short period of time to enable proper proceedings to be commenced, to enable more substantive consideration of the issue⁵⁸. In the

⁵⁶ *Queensland Estates Pty Ltd v Co-Ownership Land Development Pty Ltd* [1969] Qd R 150

⁵⁷ See *Ross Cook and Brett Cook Pty Ltd v Bli Bli #1 & Anor* [2009] QSC 300.

⁵⁸ See *Beneficial Finance Corp. Ltd. v Multiplex Constructions Pty Ltd* (1995) 26 NSWLR 510 at 532 per Young J.; see also *Ipandco (Aus) Pty Ltd v Australian Technology Park Precinct Management Ltd* [2003] FCA 1322.

case of multiple registered proprietors of land over which a caveat has been lodged, any one of those may apply to have the caveat removed without the consent or concurrence of the remaining registered proprietors⁵⁹.

Legal principles

59. Section 127(2) confers a discretion on the Supreme Court to remove a caveat, whether or not the caveator has been served. Although the section permits an application to proceed ex parte, good reason (such as an irreparable injury) needs to be shown.
60. Section 127 does not prescribe the process which the court should follow when determining an application of this kind, nor does it identify the factors or considerations which should or should not be taken into account. Accordingly, guidance must be obtained from the case law.
61. In Queensland, the line of authority which establishes the procedure for such an application effectively begins with the seminal case of *Re Jorss' Caveat*⁶⁰. In essence, an application for removal of a caveat is regarded as being analogous to an application for an interlocutory injunction⁶¹.
62. *Re Jorss Caveat* was a case argued on two bases, one of which pertained to caveats (and thus to which we are attuned), and the other to undue influence. The issue of undue influence may be put to one side. Mrs Jorss was the owner of land in Brisbane, over which existed a triumvirate of

⁵⁹ *Lewenberg v Direct Acceptance Corp Ltd* [1981] VR 344

⁶⁰ [1982] Qd R 458

⁶¹ *Heritage Properties (No 3) Pty Ltd v Coles Supermarket Australia Pty Ltd* (1993) Q Conv R 54-448.

mortgages, both registered and unregistered. For reasons solely relevant to proclaimed undue influence, Mrs Jorss 'lodged a caveat forbidding the registration of "any memorandum of sale, or other instrument affecting any Bill of Mortgage registered against the said land until this caveat be withdrawn, or by order of the Supreme Court, or some Judge thereof, removed"⁶²." Thus, in effect, Mrs Jorss was trying to prevent the mortgagee from exercising power of sale.

63. Following obiter comments from the then recent English Privy Council case of *Eng Mee Young v Letchumanan*⁶³, Andrews J drew parallels between the application for the removal of a caveat, and the proceedings for an interlocutory injunction⁶⁴. A relevant summation can be gleaned from the following passage from Lord Diplock in *Eng Mee Young*⁶⁵:

"The caveat under the Torrens system has often been likened to a statutory injunction of an interlocutory nature restraining the caveatee from dealing with the land pending the determination by the court of the caveator's claim to title to the land, in an ordinary action brought by the caveator against the caveatee for that purpose. Their Lordships accept this as an apt analogy with its corollary that caveats are available, in appropriate cases, for the interim protection of rights to title to land or registrable interest in land that are alleged by the caveator but not yet proved."

64. Lord Diplock went on to state that the court's power to grant such an injunction, and similarly the order for removal of a caveat is discretionary

⁶² [1982] Qd R 458 at 458 Per Andrews J

⁶³ [1980] A.C. 331

⁶⁴ [1982] Qd R 458 at 464 Per Andrews J

⁶⁵ [1980] A.C. 331 at 335.

and that the guiding principle is the 'balance of convenience.' In this regard his Lordship said⁶⁶:

"there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the court that there is a 'probability', a 'prima facie case' or a 'strong prima facie case' that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the court that his claim is neither frivolous nor vexatious; in other words that the evidence before the court discloses that there is a serious question to be tried."

65. Lord Diplock cited the case of *American Cyanamid Co. v Ethicon Ltd*⁶⁷ as authority for that proposition.
66. Following *Re Jorss'*, there was some attempt to distinguish it and the two-stage test on the basis that what the Privy Council said in *Eng Mee Yong* was nothing more than non-binding obiter⁶⁸. However, any such doubt was put to bed by the Court of Appeal in *Re Burman's Caveat*⁶⁹ when Pincus, Davies and McPherson JJA held that there was no sufficient reason to depart from *Re Jorss' Caveat* as its principles were "well entrenched" in Queensland law. As a consequence, the two-stage test in *Re Jorss' Caveat* continues to be applied⁷⁰.
67. Accordingly, to resist an application to remove a caveat, the caveator must show on the evidence:-

⁶⁶ [1980] A.C. 331 at 336-7.

⁶⁷ [1975] A.C. 396

⁶⁸ *Porter v McDonald* [1984] WAR 271. See also *Re Burman's Caveat* [1994] 1 Qd R 123 at 127.

⁶⁹ [1994] 1 Qd R 123

⁷⁰ *Tendiris Pty Ltd v Ogle* [2004] QSC 355 per Atkinson J at [37].

- (a) a serious question to be tried in the “interest” claimed; and
- (b) that the balance of convenience favours the continuation of the caveat⁷¹.

[As is customary with all interlocutory applications, consideration should also be given to whether damages is an adequate remedy⁷²]

68. Unless the caveator can show a serious question to be tried as to whether the caveator has a caveatable interest, it is unnecessary (but not all of the time undesirable) to consider where the balance of convenience lies⁷³.

Prima facie case

69. Grounds upon which to challenge the caveat include:
- (a) interest is not a caveatable interest;
 - (b) the caveator does not possess the interest claimed⁷⁴;
 - (c) unacceptable delay – provided prejudice is occasioned;
 - (d) caveat has lapsed;
 - (e) caveat goes beyond what is necessary to protect the caveator;

⁷¹ See Jackson, S, ‘Removal of a Valid Caveat’, (1994) 4 *Australian Property Law Journal* at p.28

⁷² *Buranda Properties Pty Ltd v Buranda Properties Pty Ltd as t’ee* [2010] QSC 357 at [6]

⁷³ *Zen Ridgeway Pty Ltd v Adams & Anor* [2009] QSC 117.

⁷⁴ See, for example, *Re Rosemac Pty Ltd’s Caveat* [1994] 1 Qd R 137 where it was held that there was held no interest to support a purchaser’s caveat because an application for exemption in respect of a conditional contract was not made within the time allowed by s 19 of the *Land Sales Act*, notwithstanding the purported granting of an exemption applied for out of time.

- (f) caveat relies on unenforceable agreement;
 - (g) caveat is unnecessary to protect the interest claimed (i.e. lessee under 3 years – indefeasible in any case);
 - (h) improper, collateral or ulterior purpose⁷⁵;
 - (i) further caveat (without leave).
70. Following the decision of the High Court in *Australian Broadcasting Corporation v O'Neill*⁷⁶, the test in *Re Jorss' Caveat* may be slightly modified to now require a prima facie case with “a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial.”⁷⁷ The strength of the probability of ultimate success will invariably depend upon “the nature of the rights asserted” as against continuing to restrain the caveatee from dealing with the land⁷⁸. In practice, this means, generally, if there are disputed factual issues or credibility issues the prima facie threshold is met – and unlikely that an application for removal of a caveat will be successful.
71. The court must nonetheless undertake some assessment of the case mounted – if only to see whether it is an arguable one. Accordingly, when determining the prima facie question, the evidence from a caveator will not always be untested or accepted uncritically. When examining the strength

⁷⁵ *Love v Kempton & Anor* [2010] VSC 254 – a caveat may not be used as a commercial lever (referring with approval to *Goldstraw v Goldstraw* [2002] VSC 491 at [42])

⁷⁶ (2006) 227 CLR 57 at 82.

⁷⁷ at [65].

⁷⁸ at [71].

of the dispute, the Court must consider all of the evidence. In *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785, McLelland CJ in eq said, at 787, in the context of assessing a “genuine dispute”:

In my opinion [genuine dispute] connotes a plausible contention requiring investigation, and raises much the same sort of considerations as the “serious question to be tried” criterion which arises on an application for an interlocutory injunction or for the extension or removal of a caveat. This does not mean that the court must accept uncritically as giving rise to a genuine dispute, every statement in an affidavit “however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, it may be” not having “sufficient prima facie plausibility to merit further investigation as to [its] truth” (cf *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341), or “a patently feeble legal argument or an assertion of facts unsupported by evidence”: cf *South Australia v Wall* (1980) 24 SASR 189 at 194.

72. In the present context, Connolly J applied the reasoning of Lord Diplock in *Eng Mee Yong v Letchumanan* [1980] AC 331 in *Re Divoca Caveat* [1991] 2 Qd R 121, at 127, to assess a statement made to found a serious question in caveat proceedings. After assessing the evidence, his Honour described the sworn contention as “simply incredible” and thereupon held it to be insufficient to raise a serious triable issue.
73. It is therefore important to get the full story from the deponents, including all relevant documents (in particular emails). It is particularly disheartening to have a caveat removed solely on the grounds that the caveator is so inherently unreliable that there is no prima facie case.

Balance of Convenience

74. The balance of convenience is an independent criterion in assessing an application for removal of a caveat. As such, the balance of convenience may justify a court order to remove a caveat notwithstanding the existence of a “serious question”. The onus lies on the caveator to justify the continuation of the caveat⁷⁹.
75. It is not possible to exhaustively define factors which may be taken into account in determining the balance of convenience. Factors which have been identified as relevant in determining the balance of convenience include:
- (a) the amount claimed as a proportion of value of land the subject of caveat: *Re Burman’s Caveat* [1993] 1 Qd R 123;
 - (b) whether alternative security is offered or where the caveator’s rights may be protected by a substitute or alternative security: *Re Burman’s Caveat* ⁸⁰. Accordingly, a caveatee may stifle a caveat by offering an alternative security;
 - (c) whether the caveat is too wide – that is, whether it goes beyond what is necessary to protect the caveator’s interest: *Queensland Estates Pty Ltd v Co-Ownership Land Development Pty Ltd* [1969] Qd R 150 at 155-156;

⁷⁹ *Burman’s Caveat* [1994] 1 Qd R 123, reaffirming the decision of the Full Court in *Re Jorss’ Caveat* [1982] Qd R 458 at 465

⁸⁰ See for instance *Ferguson v Mackee* [1999] QSC 371.

- (d) whether the party applying for removal of the caveat has an interest in the land superior to that of the caveator, and in particular, whether that party is being prevented by the caveat from a legitimate exercise of its rights: *Buchanan and Anor v Crown and Gleeson Business Finance Pty Ltd* [2006] NSWSC 1465;
- (e) whether the removal of the caveat will derogate from the caveator's claim: *Buchanan*. This consideration commonly arises in respect of security claims, such as liens or charges, over relatively small amounts when compared to the value of the property⁸¹. Commonly it is ordered that the caveat be removed on condition that an amount covering the claimed security is paid into court;
- (f) where the caveatee has clearly superior rights. An example of this is a prior registered mortgagee as against a subsequent unregistered lessee, who entered into the alleged lease without notice to the mortgagee⁸²;
- (g) where the caveatee will suffer particular loss or hardship if the caveat is not removed. Cases such as *Sindoro Pty Ltd v Koen*⁸³ and *Re Clement's Caveat*⁸⁴ show that unsurprisingly the onus is on the caveatee to show that continuing the caveat would give rise to an actual, not merely theoretical, inconvenience or hardship;

⁸¹ *Business Acquisitions Australia Pty Ltd v Renshall* [2006] NSWSC 1238; *Pacific homes Ltd v Consolidated Joineries Ltd* [1996] 2 NZLR 652 at 656.

⁸² *Commonwealth Bank v Baranay* [1993] 1 VR 589 which ordered the removal of a caveat lodged by an unregistered lessee who entered into a lease without the consent of the registered mortgagee.

⁸³ (SC(NSW), Holland J, ED 1088/1982, 11 June 1982, unreported)

⁸⁴ [1981] Qd R 341

- (h) delay by the caveator: *Tendiris Pty Ltd v Ogle* [2004] QSC 355 at [41];
 - (i) whether the caveator gives the usual undertaking as to damages:
Martyn v Glennan [1979] 2 NSWLR 234; *Buranda Properties Pty Ltd v Buranda Properties Pty Ltd ast'ee* [2010] QSC 357 at [28].
76. Despite the semblance of a list, the considerations in each case will depend entirely on its own unique facts. To do it any other way would introduce rigidity and pose a serious risk to the ability of the courts to do equity in what is, according to the analogies of Lord Diplock, an equitable remedy at its heart.
77. Some attention should be given to the caveator's ability to provide an undertaking as to damages⁸⁵. As with all interlocutory applications, the continuation of a caveat will invariably require the caveator to give the usual undertaking as to damages⁸⁶. The absence of such an assurance, or the inability to provide one, will strongly warrant the removal of the caveat. The undertaking should be shown to have some value⁸⁷.
78. As the decision in *Thomson v White*⁸⁸ illustrates, a ready and willing caveator is not always enough. In order to provide anything of substance, the

⁸⁵ *Re South Brisbane Motors Pty Ltd's Caveat* [1981] Qd R 416; *Re Silverstine's Caveat* [1993] Q Conv R 54-445.

⁸⁶ *Cousins Security Pty Ltd v CEC Group Ltd* [2007] 2 Qd R 520 at [53] whereby Holmes JA referred to the judge's failure to record an undertaking as a condition of the continuance of a caveat as an "error".

⁸⁷ *Buranda Properties Pty Ltd v Buranda Properties Pty Ltd as t'ee* [2010] QSC 357 at [28].

⁸⁸ [226] NSWSC 110.

caveator must have sufficient assets to meet the undertaking⁸⁹. In this regard, if the caveator is impecunious, that is a matter which should be disclosed to the Court⁹⁰.

79. For this reason, if there are reasonable grounds for bringing an application to remove a caveat, it is advisable even if it extracts nothing more than an undertaking as to damages. If there is any doubt as to the caveator's ability to provide an undertaking, the caveator should be put on notice that others, such as directors of a caveator company, will be required to provide an undertaking.
80. In the presence of an undertaking as to damages, normally the balance of convenience will favour the continuation of the caveat but serious consideration should always be given to alternative forms of security. Sometime though, the balance of convenience will favour the removal of a caveat even though the caveator has clearly established a caveatable interest.
81. *Perpetual Pty Ltd v National Australia Bank Ltd*⁹¹ provides a good illustration of the operation of this criterion. In *Perpetual* the caveator lodged a caveat in support of an unregistered mortgage to prevent a prior registered mortgagee exercising power of sale. Even though the caveator clearly had a caveatable interest, the court ordered the caveat be removed because as second or subsequent mortgagee, the caveator could not prevent the sale.

⁸⁹ Note the decision of *Frigo v Calhaci* [1998] NSWSC 393 and the consequences of inadequate disclosure in respect of impecunious clients.

⁹⁰ *Frigo v Calhaci*, above.

⁹¹ [2003] WASC 13.

82. Another example is *Aircon Heating and Air Conditioning Pty Ltd v Crane Distribution Ltd*⁹². In this case, the caveator held an equitable mortgage or charge over a company's property. The company went into administration. In an attempt to prevent the Administrator from selling the property and extinguishing the security held by the caveator, the caveator lodged a caveat claiming an interest as a chargee.
83. Hansen J held however that the proposed sale would not defeat the charge held by the caveator, and instead would convert from an equitable charge over land into an equitable charge of the proceeds of sale. In the circumstances, his Honour ordered the removal of the caveat.
84. Where the undertaking does tilt the convenience in favour of the caveat continuing, the order should be dismissed upon an appropriate undertaking⁹³. The applicant (caveatee) should be careful to ensure that the undertaking is appropriately framed, if it is to protect the statutory right to compensation. The undertaking accordingly needs to pay not only loss or damage by reason of the caveat continuing – but also loss or damage from when the caveat was lodged⁹⁴.

Originating process

85. Given that the Act permits a caveatee to apply to court for removal, but does not state what type of originating process must be used, such

⁹² [2006] VSC 76.

⁹³ *Cousins Security Pty Ltd v CEC Group Ltd* [2007] 2 Qd R 520 at [53].

⁹⁴ *Holmes v Australasian Holdings Pty Ltd* [1988] 2 NZLR 303.

proceeding must be started by originating application (From 5)⁹⁵.

Depending upon the issues and facts in contention, whether or not the application is dismissed, the court may deem the proceeding to have been commenced by claim and direct that it continue by statement of claim⁹⁶.

86. To remove a caveat, the applicant must prepare and file an originating application naming as respondents all persons directly affected by the relief. Depending on the interests registered on the title, that may be more than the registered proprietor. The application must specify the orders sought. This invariably will be an order that “caveat no. [as recorded on the title] be removed”. In an appropriate case (which I will discuss below), a caveatee may also seek a declaration that the caveat was lodged or maintained without reasonable cause and an order under s 130 of the Act that the caveator pay compensation to be assessed⁹⁷. That relief may however be sought in a counterclaim to the proceedings commenced to establish the interest claimed in the caveat.
87. The application and supporting affidavits must be served three clear business days before the return date⁹⁸. Time may be abridged on the grounds of urgency and irreparable prejudice to the applicant (and the absence of any significant prejudice to the respondent)⁹⁹. And, leave may be

⁹⁵ r. 10 *Uniform Civil Procedure Rules 1999 (UCPR)*.

⁹⁶ r 14 UCPR.

⁹⁷ Even so, there is a prospect that the compensation claim will be adjourned, with directions: see *Schouten v Govard Pty Ltd; Govard Pty Ltd v Schouten and Anor* [2003] QSC 259.

⁹⁸ rr. 27(1) and 28(1) UCPR

⁹⁹ rr. 7 and 27(3) UCPR.

granted for an affidavit served less than three business days prior to the hearing¹⁰⁰.

88. Service of the application must be personal service¹⁰¹.
89. A respondent who is served and wishes to be heard, should file a notice of appearance (Form 8)¹⁰².

Supporting affidavit

90. Relevantly, the application to remove the caveat must be supported by an affidavit. Given the onus stipulated in s. 127(3) of the Act, the supporting affidavit need not exhibit any documents, such as sale contracts. The applicant need only to exhibit material establishing their standing (as caveatee) and demonstrate why the balance of convenience favours the removal of the caveat. Thus, a supporting affidavit will generally exhibit a copy of title search, the caveat, any relevant correspondence (such as between a financier or purchaser refusing any extension of time), and matters showing any injury which the applicant would likely suffer if the caveat is allowed to continue.

Evidence in general and desired approach

91. When acting for a caveator the approach to evidence requires a little more consideration. Naturally, evidence must be adduced to demonstrate a prima facie case on the interest claimed. Material as to convenience, where

¹⁰⁰ r. 28(2) UCPR.

¹⁰¹ r. 105 UCPR

¹⁰² r. 29 UCPR

available, should also be adduced, including offering, to the extent necessary, the usual undertaking as to damages¹⁰³.

92. Proceedings for the removal of a caveat are analogous to interlocutory injunctions. This means that evidence is by affidavit and that the court will not embark on a mini trial to resolve factual controversies. Cross examination is generally not encouraged¹⁰⁴, but is sometimes desirable in examining where the convenience lies. If cross-examination is desired, it should be the subject of proper notice to the deponent¹⁰⁵.
93. The vast majority of applications to remove a caveat are determined on the convenience ground. It is far less common for the proceedings to turn on the prima facie criterion¹⁰⁶.
94. The position in Queensland appears to still be that an application to remove a caveat is one for final relief¹⁰⁷ and as such that hearsay material in respect of facts which are seriously in issue¹⁰⁸ is not admissible¹⁰⁹. It is therefore

¹⁰³ The caveator may be required to give an undertaking as a condition of the continuance of the caveat: see *Re South Brisbane Motors Pty Ltd's Caveat* [1981] Qd R 416.

¹⁰⁴ Note, *Mibor Investments Pty Ltd v CBA* [1994] 2 VR 290 in which it was held that upon an application to set aside a statutory demand, cross examination would not be permitted to demonstrate "recent invention" . Further, cross examination also has a tendency to persuade the judge that there are matters in dispute and therefore a prima facie case to answer.

¹⁰⁵ See r. 439 UCPR.

¹⁰⁶ *HZD Pty Ltd v McInnes & Ors* (2007) Q Conv R 54-675; [2007] QSC 213 where the court held that there was no serious question to be tried with a sufficient likelihood of success to justify the continuation of a caveat.

¹⁰⁷ See r. 430(2) UCPR.

¹⁰⁸ See r. 394 UCPR.

¹⁰⁹ *Ex parte Kojak Constructions Pty Ltd* [1981] 1 Qd R 339. See further *Tendiris Pty Ltd v Ogle* [2004] QSC 355 at [27] per Atkinson J.

prudent to draw up affidavits in admissible form in any event. I will briefly provide some additional guidance on affidavits.

95. The requirements of an affidavit filed in the Supreme, District or Magistrates Court are proscribed by Part 7 of the UCPR. In summary the requirements in relation to the affidavit are as follows:-

- (a) An affidavit must be in the approved form (ie Form 46);¹¹⁰
- (b) The affidavit must be made in the first person¹¹¹. It is the deponents version of events that must be recounted, for example:

"I then said to Bill Smith words to the following effect:

The deal sounds terrific. Sign me up for a 5 year lease."

- (c) The affidavit must be confined to evidence the person making the affidavit could give if giving evidence orally¹¹²;
- (d) A note must be written on the affidavit stating the name of the person making it and the name of the party on whose behalf it is filed;¹¹³
- (e) An affidavit must state the person's occupation and the person's residential or business address or place of employment;¹¹⁴

¹¹⁰ r. 431(1) UCPR (unless it is one of the affidavits which has a specific form such as relating to Wills, or payments into Court).

¹¹¹ r. 431(3) UCPR

¹¹² r. 430(1).

¹¹³ r. 431(2) UCPR

¹¹⁴ r. 431(4) UCPR

- (f) The body of the affidavit must be divided into paragraphs, numbered consecutively, each paragraph being as far as possible confined to a distinct portion of the subject¹¹⁵;
- (g) Each page of the affidavit must be numbered;¹¹⁶
- (h) Documents to be used with and mentioned in the affidavit are exhibits and must comply with the requirements of r. 435 UCPR.

96. Some tips with respect of affidavits are:

- (a) Set out conversations in direct speech rather than as conclusions i.e on or about 2 March 2001, I had a conversation with Mr Jones the effect of which was:

Me I can supply 10 kilos for \$10 per kilo

Mr Jones Deal

- (b) the affidavit should proceed in some type of order. Usually this is chronological, but not always. Use headings to guide the reader;
- (c) because it is the deponent's recollection of events, practitioners should be careful not to use legalese. The document must remain the deponent's and not the lawyer's. Anything else can result the credit of a witness being attacked in cross-examination thereby undermining the force of the affidavit and exposing the legal

¹¹⁵ r. 431(4) UCPR

¹¹⁶ r. 431 (6) UCPR

practitioner to criticism. On the other hand, a deponent's poor grasp of English will not assist the court, so a balance must be struck;

- (d) remember to correctly and accurately identify and refer to the exhibits (including by page reference);
- (e) do not exhibit documents that are already in evidence or form part of the court file¹¹⁷;
- (f) because the affidavit is not a pleading, unlike a pleading it should only contain evidence – that is factual material;
- (g) because the affidavit is not a pleading, it should contain neither statement of non-admission nor submissions or legal argument.

Compensation

97. In *Love v Kempton & Anor* [2010] VSC 254 Justice Forrest remarked that:

“... the lodging of a caveat is a serious business. It has the potential to affect commercial transactions and the lives and financial interests of others.”

98. With those words ringing loudly, all caveators and practitioners signing and lodging caveats need to be aware of the consequences of s. 130 of the Act. It is headed “compensation for improper caveat”.

¹¹⁷ r. 435(12) UCPR.

99. Section 130(1) provides that:

“A person who lodges or continues a caveat without reasonable cause must compensate anyone else who suffers loss or damage as a result.”

100. A few points should be noted. First, the claim may be made by any person who suffers loss or damage as a result of the caveat. That necessarily means more than the registered owner. Mortgagees and other third parties such as purchasers, could foreseeably suffer loss or damage as a result of a caveat. The pool of candidates is thus wider than the registered owner.

101. Subsection (3) operates as a presumption that the caveat was lodged and continued without reasonable cause, unless the contrary is shown. So a claimant need only focus on causation.

102. Exemplary damages can be awarded¹¹⁸. That can equate to large awards.

103. So what must be shown?

104. In *Favet Pty Ltd v Frost & Ors*¹¹⁹, Demack J held that to succeed on an application for compensation, it was necessary to demonstrate that:-

- (a) the caveator did not have an honest belief based on reasonable grounds that it had a caveatable interest; and
- (b) the caveat was lodged and maintained the caveat for an improper purpose¹²⁰

¹¹⁸ s. 130(2).

¹¹⁹ [1997] 2 Qd R 39.

¹²⁰ Above, at 50 per Demack J

105. His Honour imported the notion of ‘improper’ purpose by application of ss 14(2)(a) and 35C(1) of the *Acts Interpretation Act 1954*. As a consequence part of the heading, “improper” was held to form part of the section such that the court was to be satisfied that the purpose the caveat was lodged for an improper purpose¹²¹. In *Favet*, Demack J found that a caveat lodged and maintained to delay a land development whilst a similar development proceeded elsewhere was improper.
106. Following *Favet*, s. 130(3) was amended to provide a reversal of the onus of proof, at the very least, as to whether the caveat was lodged or continued with reasonable cause. Parliament did not however clarify whether the improper purpose criterion must also be established.
107. Cases in this jurisdiction in more recent times have not considered the *Favet* criteria¹²². In *Johnston v Parchert & Anor* [2004] QDC 179 Forde DCJ considered whether extra costs (being the difference between scale and indemnity costs totalling \$4,818) were recoverable as “compensation” under s. 130. His Honour found the presumption had not been rebutted, nonetheless the extra costs were not recoverable; they were not damages for which any action lie. Justice Atkinson adopted a different position in *Von Risefer & Ors v Permanent Trustee Company Pty Ltd & Ors* [2004] QSC 248 allowing a claim for extra costs as compensation. Like Forde DCJ her Honour found the presumption was not rebutted, however observed that had a claim for exemplary damages been made it would have required

¹²¹ Above at 47 per Demack J

¹²² c.f. *Brogue Tableau Pty Ltd v Binningup Nominees Pty Ltd* (2007) 35 WAR 27 at [49].

“serious consideration”. Atkinson J then awarded \$2,170 in legal fees incurred by the caveatee removing caveats as compensation payable to the caveator. Her Honour did not consider the principle to be found in *Eyre’s* case, which influenced Forde DCJ to reach his opposing view. For that reason, the reasoning by Forde DCJ in *Parchert* is to be preferred.

108. So, in sum, in respect of a claim for compensation:

- (a) The claimant must show:
 - (i) The respondent was a “person” who lodged or continued the caveat;
 - (ii) Loss or damage was suffered “as a result” of the caveat;
 - (iii) The quantum of the loss or damage;
- (b) The respondent must show the caveat was lodged with reasonable cause; that is to say that the respondent had an honest belief based on reasonable grounds that it had a caveatable interest and, perhaps, that the caveat was lodged for a proper purpose.

109. The mere removal of a caveat does not mean that it was lodged or continued without reasonable cause¹²³. In *Bedford Properties Pty Ltd v Surgo Pty Ltd*¹²⁴ it was observed that invalidity due to a purely technical reason does not to give rise to an absence of reasonable cause.

¹²³ *Kuper v Key West Constructions* (1990) 3 WAR 419 at 433-436; *Bedford Properties Pty Ltd v Surgo Pty Ltd* [1981] 1 NSWLR 106 at 108 per Wootten J

¹²⁴ [1981] 1 NSWLR 106.

110. The determination of “reasonable cause” requires consideration of the circumstances before, and at the time, the caveat was lodged¹²⁵. It is a partly subjective, partly objective test¹²⁶.
111. While the strength of the heading is to be doubted, the reference to the “cause” warrants consideration of the purpose for which the caveat was lodged. It invites a potential for caveats lodged on reasonable grounds to potentially be found to be lodged without reasonable cause if, for instance, it was lodged as a blackmailing device. One may suggest that the presence of a caveatable interest may not be enough to sustain the caveat.
112. With or without the second criterion from *Favet*, I do not foresee claims to compensation becoming rudimentary under s 130 of the Act. In addition to the threshold criteria or criterion, the claimant will need to prove that the loss or damage claimed was suffered “as a result” of the caveat being lodged or continued. A causal nexus must therefore be established. In my view, something more would need to be shown that a property under a caveat being passed in at auction. It would be necessary to demonstrate that it was more likely than not, but for the caveat, the property would have sold. If that threshold were satisfied, the court would assess the probability of the chanced sale eventuating. In this example, it is difficult to see how the loss is anything other than a loss of a chance and should, therefore, be assessed accordingly. There is however other situations where the loss is special damage such as interest payable on account of bridging finance

¹²⁵ *Young v Rydalmere Credits Pty Ltd* (1963) 80 WN (NSW) 1463.

¹²⁶ *RDN Developments Pty Ltd v Shtrambrandt & Ors* [2011] VSC 130 at [18] – [19].

covering the second home, the sale of which was postponed by the caveat, or general damage on account of a sale contract being lost and the property being re-sold at a lower price. Moneys payable by a vendor to obtain an extension of a contract entered into after a caveat was lodged, while litigation regarding the caveat was still on foot, was held not to be the cause of such loss as the second contract was expressly made subject to the removal of the caveat.

113. Where established, compensation orders can be considerable. In *Farvet*, the Court ordered compensation to the value of some \$200,000. So this case clearly shows that lodging a caveat is a serious matter and such attempts to “freeze” the register should not be undertaken lightly.
114. While the point has not been determined in Australia, the Court of Appeal in New Zealand have held, in respect of a similarly worded provision¹²⁷, that “person” may include the solicitor who signs the caveat on behalf of the caveator and causes it to be lodged¹²⁸.
115. The Court of Appeal in New Zealand were encouraged by the use of “person” instead of a reference to “caveator” – the reasoning being that by

¹²⁷ Section 140 of the *Land Transfers Act* provides:

- (1) Any person lodging any caveat without reasonable cause is liable to make to any person who may have sustained damage thereby such compensation as may be just.
- (2) Such compensation as aforesaid shall be recoverable in an action at law by the person who has sustained damage from the person who lodged the caveat.

¹²⁸ *Gordon v Treadwell Stacey Smith* [1996] 3 NZLR 281 at 287-288.

expressly adopting a wider term than caveator, Parliament must have intended to broaden the class of defendants beyond just the caveator.

116. Accordingly, it would only be prudent to proceed on the basis that a practitioner signing and lodging a caveat is potentially liable in the event that a caveat is later found to have been lodged or continued without reasonable cause.
117. When a claim is made against the caveator, the legal advice upon which the caveat was lodged or continued is relevant (if adduced), but is not decisive¹²⁹. In *Lee v Ross (No 2)* [2003] NSWSC 507, Palmer J observed at [37] that to hold that any advice which the solicitor might have given was reasonable because the solicitor did not have a copy of the clause in the contract which falsified the caveator's claim "*would be to reward neglect and to punish diligence*". Properly understood, in my view, the cases¹³⁰ indicate no more than that on the facts of that case legal advice was a relevant factor. They are not authority for the proposition that if a caveat is lodged on legal advice that it could never be proved that the caveat was lodged without reasonable cause.
118. Naturally, the question as to whether a solicitor lodged or continued a caveat with reasonable cause is approached differently from a situation where the caveator lodged or continued the caveat. On this question, in

¹²⁹ *RDN Developments Pty Ltd v Shtrambrandt & Ors* [2011] VSC 130 at [20] applying *Bolton v Excell*, below. See also *Kuper v Keywest Constructions Pty Ltd* (1990) 3 WAR 419 (**Kuper**).

¹³⁰ *Excell* and *Kuper*, above.

*Gordon v Treadwell Stacey Smith*¹³¹, the New Zealand Court of Appeal said, at 289:

“In examining the position of a solicitor called upon to advise whether a caveat should be lodged — and this will often occur in circumstances of some urgency — the Court will first look at the honesty of the solicitor's belief. When examining reasonableness it will be aware that it is not uncommon for solicitors to be sued for professional negligence where they fail to advise a client to lodge a caveat first and argue for its validity afterwards: for a recent example in this Court see *Simperingham v Martin* (Court of Appeal, Wellington, CA 5/95, 2 June 1995).

The matter will be judged by the standards of a reasonable conveyancing practitioner possessed of the factual material available to the solicitor whose action in lodging a caveat is under scrutiny and advising and acting in the same circumstances. Would such a practitioner have thought in those circumstances that there was a proper basis upon which a claim could be asserted by the client? We do not consider that the approach we have taken to s 146 will create a problem where a solicitor is instructed to lodge a caveat but has a concern about whether this can properly be done. The client can be advised of the doubt and, if still instructed to lodge a caveat, the solicitor can record the advice in writing and seek an indemnity. If that is not thought appropriate and the client wants to proceed, the solicitor can always prepare the document for personal signature and personal lodgment by the client. A solicitor who does so could not be described as a person lodging the caveat.”

119. Even if the respondent (whether that be caveator or some other party) demonstrates that the respondent had an honest belief based on reasonable

¹³¹ Above.

grounds that a caveatable interest existed, there is, as I touched upon above, a residual question as to whether that alone is sufficient to resist a claim for compensation. Moreover, there is authority that the existence of a caveatable interest, with an improper motive, is nonetheless a caveat lodged without proper cause if the caveat is not lodged bona fide for the purpose of protecting the interest claimed¹³².

120. *Love v Kempton & Anor* [2010] VSC 254 provides an example of an improper or ulterior motive¹³³. *Love* involved a sale by auction. Kempton was the highest bidder but, after attempting to negotiate terms of the contract, he refused to sign in consequence of which the seller entered into a contract with an underbidder. Kempton then lodged a caveat to protect an interest under the “contract for sale” (which he had refused to sign). The court ordered the caveat to be removed and found that lodging the caveat in the circumstances was “high-handed”, “designed to intimidate” and a “misuse of the caveat procedure”. Kempton was ordered to pay costs on an indemnity basis.

121. Caveatees are under an obligation to mitigate any loss or damage suffered as a result of a caveat¹³⁴. It is therefore open to the respondent to contend that the caveatee did not take steps which a reasonable person in the position of the caveatee would have taken and compensation ought to be reduced accordingly.

¹³² In addition to *Farvet*, above, see *Young v Rydalmere Credits Pty Ltd* (1963) 80 WN (NSW).

¹³³ Note, in the absence of a caveatable interest and no claim for compensation. Subject to proof as to loss, a claim for compensation would however have been irresistible.

¹³⁴ *National Australia Bank Ltd v Bridge Wholesale Acceptance Corporation (Aust) Ltd* (1990) 21 NSWLR 96 at 104-5.

122. Examples of awards of compensation include:

- (a) *Dykstra v Dykstra* (1991) 22 NSWLR 556 – delay of settlement by 4 days. Awarded 4 days interest on the mortgage to be discharged at settlement, less interest earned by reinvestment of part of purchase price.
- (b) *National Australia Bank Ltd v Bridge Wholesale Acceptance Corp (Aust) Ltd* (1990) 21 NSWLR 98 - delayed settlement of a mortgagee sale. Awarded interest on the balance purchase price at 17% for the period of delay. The quantum of the loss was accepted in the absence of evidence to the contrary;
- (c) *RDN Developments Pty Ltd v Shtrambrandt & Ors* [2011] VSC 130 – stified completion of two contracts of sale for apartments. Awarded the difference in sale price for each apartment, as agreed, in the contracts of sale¹³⁵ and the price for each apartment when they were sold¹³⁶.

GJP Handran
Chambers
25 May 2011

¹³⁵ \$1,150,000 each.

¹³⁶ \$905,000 and \$860,000, respectively.