

THE 2011 NORTH QUEENSLAND LAW ASSOCIATION CONFERENCE

LAPSING & REMOVAL OF CAVEATS & RISKS FOR CAVEATORS

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Agenda

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- Leave for second or subsequent caveats
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Purpose

- Statutory injunction provided for under the *Land Title Act 1994 (Act)*.
- 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.”

Power to lodge

- Section 122
 - Person claiming an “interest” in land
 - Registrar (s. 17);
 - Registered owner;
 - Beneficiary of a court order for transfer;
 - Beneficiary of an injunction restraining dealings with land granted in an Australian Court.
- Requirements set out in s. 121 of the Act
 - Signed “by or for” the caveator;
 - Must state *inter alia* (1) interest affected; (2) part of the land affected; (3) interest claimed; and (4) grounds on which the interest is claim.

(“interest” is defined in s. 36 of the *Acts Interpretation Act 1954* to include a “legal or equitable estate” or a “right, power or privilege over or in relation to land”)

Ways to remove a caveat

- Lapse
- Withdrawn
- Order of the Supreme Court
- Cancellation or rejection by Registrar

Types of caveats

- Lapsing or non-lapsing
- Non lapsing caveats are lodged (see s. 126(1):
 - By the **registered owner**;
 - with the **consent** of the **registered owner** (by execution of a Form 18, General Consent);
 - accompanying a **court order** made within s. 122(1)(d) or (e);
 - by the **Registrar** under s 17 of the Act (protective caveats); or
 - otherwise than under **Division 2 of the Act**. Includes claims of adverse possession or made under the *Body Corporate and Community Management Act 1997*.
- All other caveats lapse

Non lapsing

- Non-lapsing does not mean, as it may suggest, that the caveat remains in force indefinitely. A non lapsing caveat is equally susceptible as a lapsing caveat to an application for removal.
- Benefit is that steps do not need to be taken to ensure the continuation of the caveat.
- Note, *Circuit Finance Australia Ltd v Registrar of Titles* [2006] 1 Qd R 204. A lender cannot convert a lapsing caveat (claiming to be “equitable mortgagee” on account of a generic charging clause) into a non lapsing caveat merely by lodging the consent of the registered owner.

Lapsing

- Set out in s. 126.
- Susceptible to:
 - Notice from a “caveatee” (s. 126(2)); or
 - Effluxion of time (3 months).
- To prevent lapsing, the caveator must:
 - Start a proceeding in a court of competent jurisdiction to establish the interest claimed under the caveat; **and**
 - Notify the Registrar.
- Notice must be given to the Registrar:
 - If a caveatee delivers notice under s. 126(2) – within 14 days;
 - Otherwise, within 3 months (calendar months).

(“caveatee” is defined in Sch. 2 of the Act to include the registered owner or any party who has an “interest” in the lot)
- Lapsing does not automatically occur if the proceedings are subsequently struck out (see *Allen’s Asphalt P/L v SPM Group P/L* (2009) 255 ALR 588 – deposition to commence fresh proceedings was held sufficient).

Withdrawal

- Lapsing and non lapsing caveats may be withdrawn (General Request)
- Only if caveat is still current (see *Zanee Pty Ltd v CG Maloney Pty Ltd* [1995] 1 Qd R 105)
- Ceases to have effect once Request is recorded on Register.
- Leave is not required to lodge a second or subsequent caveat on the same or substantially the same grounds (*Re Leighton Properties (Qld) Pty Ltd* [1990] 2 Qd R 230).

Second or subsequent caveat

- s. 129 imposes a requirement for leave if the caveat is a “further caveat” lodged on “the same, or substantially the same, grounds as the grounds stated in the original caveat”.
- Relevant considerations for leave:
 - whether the caveator shows a serious question to be tried;
 - whether the balance of convenience favours the maintenance of the status quo;
 - whether there is a satisfactory explanation for the lapse of the first caveat;
 - whether there is a satisfactory explanation for any delay in making the application for leave;
 - whether any caveatees would be unduly prejudiced by the lodging of the second caveat.
- Prejudice suffered as a result of the further caveat – not the original caveat – is the paramount consideration: see *Oversea-Chinese Banking Corporation Ltd v Becker* [2004] 1 Qd R 409 and *Bank of Qld Ltd v Khourey & Anor* [2010] QSC 114.

Removal by Court

- **Standing:** a “caveatee” has the right to apply “at any time”.
 - More than one application may be brought on account of a material change on circumstances (see *Ross Cook and Brett Cook Pty Ltd v Bli Bli #1 & Anor* [2009] QSC 300).
- **Power:** Section 127(2) confers a wide and unfettered discretion on the Supreme Court to decide whether or not to remove a caveat, with or without conditions.
- Caveat can therefore be:
 - removed; or
 - Continued, on conditions.
- Examples of conditions include:
 - When allowing the application and ordering the caveat be removed - payment of a disputed sum into court or held on trust;
 - Dismissing the application on the undertaking of the caveator to pay compensation to anyone who suffers loss as a result of the caveat

Principles

- Principles are well settled (see *Re Burman's Caveat* [1994] 1 Qd R 123).
- Analogous to interlocutory injunction (principles as affirmed by the High Court in *Australian Broadcasting Corporation v O'Neill*).
- Caveator has the onus of demonstrating:
 - Prima facie case of sufficient strength to warrant the continuation of the caveat; and
 - Convenience favours the continuation of the caveat

Prima facie case

- Means in practice that if there are disputed factual issues or credibility issues it is unlikely that an application for removal of a caveat will be successful.
- If the case raised is “shadowy” the Court will be more inclined to dismiss the application on conditions.
- Grounds upon which to challenge the caveat include:
 - interest is not a caveatable interest;
 - the caveator does not possess the interest claimed;
 - unacceptable delay – provided prejudice is occasioned;
 - caveat has lapsed;
 - caveat goes beyond what is necessary to protect the caveator;
 - caveat relies on unenforceable agreement;
 - caveat is unnecessary to protect the interest claimed (i.e. lessee under 3 years – indefeasible in any case);
 - improper, collateral or ulterior purpose;
 - further caveat (without leave).

- The criterion nonetheless requires the court to undertake some assessment of the case mounted – if only to see whether it is an arguable one.
- The Court is not bound to accept every deposition or legal proposition made by or on behalf of a caveator.
- Evidence which is equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, may have the effect that the case raised is not sufficiently strong to warrant the continuation of the caveat (see *In Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785 at 787).
- The same applies in respect of “a patently feeble legal argument or an assertion of facts unsupported by evidence”.
- In *Re Divoca Caveat* [1991] 2 Qd R 121, at 127, ordered that a caveat be removed upon finding that the deposition in support of the caveat was “simply incredible”.
- Preparation and an attention to detail is therefore critical.

Balance of convenience

- Independent criterion - Question is whether the prejudice to the caveator upon the removal outweighs the prejudice to the caveatee if the caveat is continued.
- May justify removal on its own
- Each case turns on its own facts however factors taken into account to date include:
 - the amount claimed as a proportion of value of land the subject of caveat;
 - whether alternative security is offered or where the caveator's rights may be protected by a substitute or alternative security;
 - width of the caveat –whether it goes beyond what is necessary to protect the interest claimed;
 - 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 property. Commonly it is ordered that the caveat be removed on condition that an amount covering the claimed security is paid into court;
 - 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 mortgagee;
 - where the caveatee will suffer particular loss or hardship if the caveat is not removed;
 - delay;
 - undertaking from the caveator.

Procedure for removal by Court

- **Originating application**
 - Form 5
 - “Pursuant to s. 127 of the *Land Title Act* 1994, caveat no. 710123584 be removed”
 - In an appropriate case, “Pursuant to s. 130 of the *Land Title Act* 1994, the respondent pay to the applicant compensation to be assessed”
- Must be accompanied by a supporting affidavit.
- Must name as a respondent, any party who may be affected by the relief.
- Must be served personally on all respondent 3 clear business days before unless irreparable injury/prejudice.

- Supporting affidavit
 - Given the onus, it need only exhibit material establishing standing (as caveatee) and demonstrate why the balance of convenience favours the removal of the caveat.
 - Generally will 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

- Caveator: material demonstrating the interest claimed, why the convenience favours the retention of the caveat and, if appropriate, matters going to the offering of the undertaking and demonstrating it has some value.
- By caveatee in reply: only if required. There is little point deposing to matters which support the existence of a controversy.
- Application for final relief - hearsay not admissible

Affidavit formality

- Must be in the approved form (ie Form 46);
- Must be in first person. 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.”
- Must be confined to evidence the person making the affidavit could give if giving evidence orally;
- Documents to be used with and mentioned in the affidavit are exhibits and must comply with the requirements of r. 435 UCPR.

Drafting Tips

- Set out conversations in direct speech rather than as conclusions:

On or about 2 March 2001, I had a conversation with Mr Jones the effect of which was:

Me I can supply prilled urea at \$95 per kilo, at minimum 1500 kilo order.
The shipment arrives 31 March. 5% deposit. Balance on delivery.

Mr Jones I will take 3000kg.

- where possible, the affidavit should proceed in some type of order. Usually this is chronological, but not always.
- use headings to guide the reader, especially when the affidavit is long;
- avoid legalese. The document must remain the deponent's and not the lawyer's. Remember it is a sworn deposition. The practitioner should remove inadmissible content and, where possible, recast the evidence in an admission way. 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 practitioner to criticism. Equally though, a deponent's poor grasp of English will not assist the court; a balance must be struck;
- correctly and accurately identify and refer to the exhibits (including by page reference);
- do not exhibit documents that are already in evidence or form part of the court file;
- the affidavit is not a pleading. It should only contain evidence – that is factual material. It should not contain any formal non-admissions, submissions or legal argument.

Compensation

- 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.”
- Section 130(1) provides that:

“Compensation for improper caveat”.

“(1) A person who lodges or continues a caveat without reasonable cause must compensate anyone else who suffers loss or damage as a result.”
- Taker close look at the matters underlined.
- Subsection (3) presumes the caveat was lodged and continued without reasonable cause. The onus therefore rests on the caveator to prove to the contrary. Further, a claimant need focus on causation.
- **Exemplary** damages can be awarded.

- In *Favet Pty Ltd v Frost & Ors* [1997] 2 Qd R 39, Demack J considered compensation claimed in respect of a caveat lodged and maintained to delay a land development.
- 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 purpose.
- The 'improper' criterion was imported by ss 14(2)(a) and 35C(1) of the *Acts Interpretation Act* 1954. It was held to form part of the section.

- *Johnston v Parchert & Anor* [2004] QDC 179 Forde DCJ held that extra costs (being the gap on legal fees) was not recoverable as “compensation” under s. 130. No consideration was given to whether the purpose of lodgment was an improper one. There was no evidence to show reasonable cause.
- *Von Risefer & Ors v Permanent Trustee Company Pty Ltd & Ors* [2004] QSC 248 Atkinson J allowed a claim for extra costs as compensation. Presumption was not rebutted. Observed had a claim for exemplary damages been made it would have required “serious consideration”. Did not consider the principle to be found in *Eyre’s* case, which influenced Forde DCJ.
- 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) perhaps, the caveat was lodged for an improper purpose
 - (iii) The quantum of the loss or damage;
 - (b) The respondent must show the caveat was lodged with reasonable cause;- honest belief based on reasonable grounds; perhaps, the caveat was lodged for a proper purpose.

- Mere removal does not mean that it was lodged or continued without reasonable cause . Purely technical reason does not to give rise to an absence of reasonable cause (Bedford Properties Pty Ltd v Surgo Pty Ltd).
- Consideration of the circumstances before, and at the time, the caveat was lodged .
- Partly subjective, partly objective test .
- 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.
- Court of Appeal in New Zealand held, in respect of a similarly worded provision, “person” may include the solicitor who signs the caveat on behalf of the caveator and causes it to be lodged (Gordon v Treadwell Stacey Smith [1996] 3 NZLR 281 at 287-288).
- Legal advice is relevant (if adduced), but is not decisive on the question of reasonable cause.
- Not helpful if incompetently given (Lee v Ross (No 2) [2003] NSWSC 507). Properly understood, in my view, the cases 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.
- Question different when the solicitor is accused:
- *Gordon v Treadwell Stacey Smith* , 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 END

QUESTIONS?

Contract

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- The existence of a caveatable interest - the caveat is lodged for an improper cause if not lodged bona fide for the purpose of protecting the interest claimed i.e. as a commercial lever to extract payment.
- *Love v Kempton & Anor* [2010] VSC 254. Kempton was the highest bidder. Refused to sign in consequence of which the seller entered into a contract with an underbidder. Kempton lodged a caveat to protect an interest under the “contract for sale” (which he had refused to sign). Removed and found to be “high-handed”, “designed to intimidate” and a “misuse of the caveat procedure”. Ordered to pay costs on an indemnity basis.
- Obligation to mitigate loss or damage suffered. The claimant must take steps which a reasonable person in their position would take otherwise the award may be reduced accordingly.
- Awards :
 - (a) *Dykstra v Dykstra* (1991) 22 NSWLR 556 – delay of settlement by 4 days. Awarded interest on the mortgage to be discharged at settlement, less reinvestment of part of purchase price. 4 days interest earned by
 - (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 – stifled completion of two contracts of sale for apartments. Awarded the difference in sale price for each apartment, as agreed, in the contracts of sale and the price for each apartment when they were sold .