



GREENWAY CHAMBERS

## CAVEATS, LAPSING NOTICES AND EXTENSIONS

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### Seminar Notes<sup>1</sup>

#### **What is a caveat?**

- 1 A caveat is a statutory injunction with automatic effect preventing registration of inconsistent dealings on title to land: *Barry v Heider* (1914) 19 CLR 197, 221 (Isaacs J). A caveat is not, itself, a “*dealing*” in land: *Real Property Act* 1900 (NSW), s 3(1); *J & H Just Holdings v Bank of NSW* (1971) 125 CLR 546, 558 (Windeyer J); *Coplin v Al Maha Pty Ltd* [2016] NSWSC 1745 at [265] (Lindsay J)
- 2 The primary function of a caveat is protective; that is, it is designed to protect interests in land from being adversely affected by the registration of a dealing. It is not the primary function of a caveat to give notice to the world of a claimed interest in land, although it can also have this effect and, in some circumstances, failure to lodge a caveat can constitute postponing conduct: *Avco Financial Services v Fishman* [1993] 1 VR 90, 94 (Tadgell J); *Person-to-Person Financial Services v Sharari* [1984] 1 NSWLR 745, 747 (McLelland J).

#### **Governing regime**

- 3 Like the Torrens land system itself, caveats are a statutory creature. In New South Wales, provision for the lodgement, effect, continuation and removal of caveats is

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contained in Part 7A of the Real Property Act.<sup>2</sup> However, there is also a considerable body of applicable case law that has built upon these, and predecessor, provisions.

### **Lodgement and effect of caveats**

4 Caveats are lodged with the Registrar-General.

5 Section 74F of the Real Property Act prescribes the persons who are permitted to lodge a caveat in respect of land. It relevantly provides:

*“(1) Any person who, by virtue of any unregistered dealing or by devolution of law or otherwise, claims to be entitled to a legal or equitable estate or interest in land under the provisions of this Act may lodge with the Registrar-General a caveat prohibiting the recording of any dealing affecting the estate or interest to which the person claims to be entitled.*

*(2) Any registered proprietor of an estate or interest who, because of the loss of a relevant certificate of title or some other instrument relating to the estate or interest or for some other reason, fears an improper dealing with the estate or interest by another person may lodge with the Registrar-General a caveat prohibiting the recording of any dealing affecting the estate or interest.*

*(3) Any person who claims to be entitled to a legal or equitable estate or interest in land that is or may become the subject of a possessory application may, at any time before such an application is granted, lodge with the Registrar-General a caveat prohibiting the Registrar-General from granting such an application...”*

6 The same section also prescribes certain procedural requirements which must be satisfied before the Registrar-General will accept the lodgement of a caveat. In particular, subsection (5) provides that a caveat must:

*“(a) be in the approved form,*

*(b) specify:*

*(i) the name of the caveator,*

*(ii) where the caveator is not a body corporate-the residential address of the caveator,*

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<sup>2</sup> The Act also provides a mechanism for the payment of compensation in circumstances where a caveat has been lodged “without reasonable cause”: s 74P of the *Real Property Act*.

*(iii) where the caveator is a body corporate-the address of the registered office of the body corporate,*

*(iv) unless the Registrar-General dispenses with those particulars-the name and address of the registered proprietor concerned,*

*(v) the prescribed particulars of the legal or equitable estate or interest, or the right arising out of a restrictive covenant, to which the caveator claims to be entitled,*

*(vi) the current reference allocated by the Registrar-General to the folio of the Register, or, as the case may be, the lease, mortgage or charge, to which the caveat relates,*

*(vii) where the caveat relates only to part of the land described in a folio of the Register or a current lease-a description of that part in the form or manner prescribed, and*

*(viii) an address in Australia at which notices may be served on the caveator (and, if that address is a box at a document exchange, an alternative address in Australia that is not such a box),*

*(c) be verified by statutory declaration or, in the case of a caveat lodged by means of an Electronic Lodgment Network, be verified in a way approved by the Registrar-General, and*

*(d) be signed by the caveator or by a solicitor or other agent of the caveator."*

7 Despite these requirements, section 74L of the Real Property Act makes clear that technical defects may be excused.

8 The "*prescribed particulars*" referred to in subsection 74F(5)(b)(v) (extracted above) are the subject of Reg 7 and Sch 3 to the *Real Property Regulation 2014* (NSW). The matters that must be specified include:

8.1 particulars of the nature of the estate or interest in land that is claimed;

8.2 the facts upon which the claim is founded;

8.3 if relevant, the particulars of any written agreement giving rise to the claim;

8.4 if relevant, a statement of the amount owing to the caveator that is secured by the interest claimed.

9 However, the Regulation makes clear that it is not necessary to specify matters of priority or whether the estate claimed is legal or equitable in nature.

- 10 The Registrar-General will not inquire as to whether or not there is any substance in the claimed interest: s 74Q of the Real Property Act. As long as the caveat is in registrable form and has complied with the relevant procedural requirements noted above, the Registrar-General will accept it for lodgement and record it on title: s 74G of the Real Property Act. Upon lodgement, the Registrar-General must also notify the registered proprietor of the land and any other interested parties claiming an estate which may be affected by the caveat: s 74F(6) of the Real Property Act.
- 11 Once the caveat has been lodged, the Registrar-General must not register any other dealing on title that is prohibited by the caveat: 74H(1) of the Real Property Act. This prohibition is subject to various exceptions, including:
  - 11.1 where the caveator has consented;
  - 11.2 where a legal personal representative has applied for registration following the death of the registered proprietor; and
  - 11.3 where it is necessary to make a change in, or correction to, the name of a proprietor: s 74H(1) and (5) of the Real Property Act.

### **Lapsing notices**

- 12 A lapsing notice is a statutory form which, following a specified period after issue, will cause a caveat to lapse (i.e. be removed from title) unless action is taken by the caveator.
- 13 Lapsing notices may be applied for by two classes of persons: a registered proprietor of an estate or interest in the land, and a person claiming an interest or estate in the land. A registered proprietor may apply for a lapsing notice at any time: s 74J of the Real Property Act. Conversely, a person merely claiming an interest or estate in the land may only apply for a lapsing notice if that application is also accompanied by an application to register a dealing in respect of that claimed interest or estate: s 74I of the Real Property Act.
- 14 Assuming the application complies with these requirements, the Registrar-General will issue a lapsing notice. A lapsing notice will cause the caveat to lapse automatically 21 days after the service of the notice, unless an order extending the caveat has been made by the Supreme Court and notified to the Registrar-General in proper form: ss 74I(1) and 74J(1) of the Real Property Act.

- 15 Service of a lapsing notice is to be effected in one of the ways prescribed by section 74N of the Real Property Act, which includes personal service or registered post. If served by post, unless sufficient evidence is adduced to the contrary, the lapsing notice will be deemed to have been served on the fourth working day after it was posted: s 76 of the *Interpretation Act 1987* (NSW) and s 160 of the *Evidence Act 1995* (NSW).

### **Extension applications**

- 16 As foreshadowed above, the Supreme Court has the power to extend a caveat upon application by the caveator: s 74K(1) of the Real Property Act. Such applications are to be made by way of Summons supported by affidavit evidence.
- 17 Applications are usually made to the Real Property List Judge: Practice Note SC Eq 12, [2]. Because of the strict terms of the legislation, the application (and any order extending the caveat) must be made within the prescribed 21-day period. It is notable that Practice Note SC Eq 8 provides that applications for extensions of caveats made to the Duty Judge must be made more than 5 days before the expiration of the lapsing notice: Practice Note SC Eq 8, [4]. It is unclear the extent to which this requirement applies to applications made to the Real Property List Judge; however, prudence would dictate that the earlier an application is made, the better.
- 18 The power in section 74K(1) is discretionary, and is only enlivened where the Supreme Court is "*satisfied that the caveator's claim has or may have substance*": s 74K(2) of the Real Property Act. The discretion is informed by the "*balance of convenience*" in the same way as that factor informs the Court in its consideration of applications for interlocutory injunctions. Accordingly, in order for an application to be successful, the affidavit evidence supporting the Summons must address these two elements.
- 19 It is also necessary to provide the usual undertaking as to damages: r 25.8 of the *Uniform Civil Procedure Rules*.

### **Interests that may validly be protected by caveat**

- 20 The statutory requirement that the caveat "*has or may have substance*" is a reference to the fundamental necessity for the claimed interest or estate to have a proprietary element (whether it be legal or equitable in nature). Caveats are not capable of protecting interests that are not proprietary.

- 21 Examples of proprietary interests that are capable of being protected by caveat include:
- 21.1 the interest of a purchaser under a contract for the sale of land: *Fernandez v Houstein* (1963) 4 FLR 355;
  - 21.2 the interest of a beneficiary of an express, resulting or constructive trust in respect of land;
  - 21.3 the interest of a mortgagee under a mortgage;
  - 21.4 an interest in the proceeds of sale of a property, where that interest is combined with a contractual power to compel its sale: *Davies v Uratoriou* (1995) 6 BPR 97,526; *Thompson v White* [2006] NSWSC 110;
  - 21.5 in some circumstances, a contractual right to lodge a caveat, such as where it has been granted in conjunction with an obligation on the part of the land owner to pay money to the grantee, thereby giving rise to an implication that an equitable charge has been granted to secure the payment of that money: *Troncone v Aliperti* (1994) 6 BPR 13,291; *Bellisimo v JCL Investments Pty Ltd* [2006] NSWSC 1260; *Taleb v National Australia Bank* (2011) 82 NSWLR 489 at [60]; *Application of Commonwealth Bank of Australia* [2014] NSWSC 279 and *Aged Care Services Pty Ltd v Kanning Services Pty Ltd* (2013) 86 NSWLR 174.
- 22 There are many other examples of proprietary interests. An example of an interest that is not proprietary in nature is the interest of a judgment creditor against a judgment debtor in respect of an unsecured money judgment. Another example is a contingent interest in a unit trust, even where the unit trust is the beneficial owner of property: see *Maxiwealth Holdings Pty Ltd v The Mill Goulburn Pty Ltd* [2018] NSWSC 115. Of course, such interests can be potentially protected in other ways, such as by obtaining a freezing order pursuant to Part 25 of the *Uniform Civil Procedure Rules* or an injunction; however, that does not convert such interests into proprietary interests.

### **Balance of convenience**

- 23 Under this element, the Court will essentially perform a weighing exercise in order to determine whether or not a better/fairer outcome will result from extending a caveat or alternatively allowing it to lapse.
- 24 The Court will take into account any relevant factor that may rationally impact upon this weighing exercise. Such factors will usually include:

- 24.1 the prospects/ strength of the underlying proprietary claim;
  - 24.2 whether granting relief would maintain or alter the status quo (with a preference towards maintaining the status quo);
  - 24.3 any relevant contractual provisions, such as an agreement not to lodge a caveat: *Australian Property and Management v Devefi* (1997) 7 BPR 15,255; *Lintel Pines v Nixon* [1990] 1 VR 287; *Betlehem v Keytown Constructions* [2007] WASC 38;
  - 24.4 the prejudice that would be suffered by each party if the relief was granted or alternatively withheld; and
  - 24.5 whether or not damages would be an adequate remedy (although this is usually assumed when it comes to interests in real property).
- 25 As noted above, if an order extending a caveat is granted, it is necessary to lodge it with the Registrar-General in proper form in order for it to take effect.

### **Effect of lapse**

- 26 If an extension application is dismissed, then the caveat will lapse at the end of the prescribed 21-day period. Similarly, if no extension application is made, the same outcome will occur.
- 27 In either of those circumstances, any pending dealing that would otherwise be prevented from being registered by the caveat may be registered.
- 28 In addition, a caveator whose caveat has lapsed is prohibited from lodging another caveat that is essentially the same as that which has lapsed, although the Supreme Court may grant leave to do so in appropriate circumstances: s 74O of the Real Property Act.

### **Other ways of removing caveats**

- 29 Caveats may also be removed in two other ways.
- 30 *First*, the caveator (or some other prescribed person) may withdraw the caveat: s 74M of the Real Property Act.

- 31 Alternatively, an application may be made to the Supreme Court by a person claiming an interest in the estate protected by the caveat for an order requiring the caveat to be withdrawn: s 74MA of the Real Property Act.
- 32 Such an application will be governed by inverse principles to those governing extension applications (that is, the need to demonstrate that the caveat does not have substance and/ or that the balance of convenience does not favour the continuation of the caveat).

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