

CAVEATS¹

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1. Caveats are an important practical topic for both litigators and property lawyers. In this seminar I will use a hypothetical scenario.

Scenario

2. Your client is John. He resides on a family farming property, which is Torrens title. He has had a falling out with his parents and his brothers Tim and Fred. The farm comprises a number of separate titles, all held in the name of John's father, Patrick. John has worked for 20 years on the farm – since he was 16 - for a pittance. He left the farm briefly when he was 18 but was lured back by his father, who said that, if he returned and worked on the farm, he could build a house on one part of the property, and eventually another part of the property would be his.
3. John did return to the property. He did build a house, and used money he inherited from Aunty June for this. He worked with his father and brothers to develop the land into a successful olive plantation before a falling out over the identity of his proposed wife. Since the falling out John has left the property.
4. John has prepared his own caveat, which he proposes to lodge against the title to the house lot, and the farming lots that were promised to him.

¹ The contents of this paper are in part derived from the book: Finnane, Newton and Wood, *Equity Practice and Precedents*, Thomson Lawbook Co, Sydney, 2008, of which Edmund Finnane is co-author. The contribution of his co-authors Nicholas Newton and Christopher Wood is hereby acknowledged.

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He has researched this on the internet and thinks he has enough information, but as a precaution he comes to you first for advice. Schedule 1 (estate or interest claimed) of his draft states:

“Equitable interest”.

5. Below that, in the section headed “By virtue of the facts stated below”, John has inserted:

“The fact that I built a house on the land and I worked there for 20 years for nothing.”

Questions arising from Scenario

- (i) Does John have a caveatable interest?*
- (ii) Is John’s draft caveat valid?*
- (iii) What are the requirements for drafting a caveat?*
- (iv) If the caveat is lodged in this form, can it be saved by the operation of s 74L?*
- (v) If the caveat has no foundation, would you advise John lodge it anyway to gain some protection while he considers his legal options?*
- (vi) If John lodges a caveat but later receives a request to remove it, how should he approach a decision as to whether to comply with the request?*
- (vii) What should John do if he receives a lapsing notice?*
- (viii) What principles apply in an application to extend a caveat after a lapsing notice?*
- (ix) If John lets the caveat lapse, can he lodge another one in respect of the same interest?*

Supplementary question

- (x) Who said the following, and in what case?*

“[52] It used to be the practice of careful conveyancers, acting for persons acquiring registrable estates or interests in Torrens title land, to lodge with the officials in charge of the Register, a caveat as soon as the agreement for the relevant dealing was

made, in pre-emptive protection of their clients' prospective legal estates or interests pending completion of their agreements and registration of the instruments perfecting them. It was a further practice of those conveyancers to effect the actual settlement of the agreement by the exchange of all relevant instruments and funds at that office, simultaneously with a search of the Register, to verify that no other such caveat or record of dealing had been lodged as might obstruct, delay or detract from the registration of their clients' instruments to perfect their estates or interests.

[53] The questions raised in this case would be unlikely to have arisen had those salutary practices not fallen into disuse, whether by reason of electronic recording of dealings or otherwise, although it is difficult to understand why some comparable prudent practice could not equally, and perhaps more easily, have been adopted here to accommodate electronic lodgment, searching and recording....”

Answers

(i) Does John have a caveatable interest?

6. There are, essentially, two aspects to the validity of a caveat: namely, the existence of a caveatable interest, and compliance with the content requirements.

7. As regards caveatable interest, Real Property Act 1900 (**RPA**), s 74F(1), provides:

“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.”

(emphasis added)

8. Without prejudging all of the issues that might arise if John were to bring proceedings against his father, it appears that he has an arguable claim for a constructive trust over part of the land, arising out of the principles of proprietary, or equitable, estoppel. Those principles will be discussed in tomorrow’s seminar.

9. It seems to be accepted that a claim to a constructive trust affecting land is sufficient to support a caveat. See *Natuna Pty Ltd v Cook* [2007] NSWSC 121 at [201] – [202]; *Deabel v V'Landys* [2002] NSWSC 438 at [5].

(ii) Is John's draft caveat valid?

(iii) What are the requirements for drafting a caveat?

10. The requirements as to form and content of caveats are set out in subsection 74F(5) of the RPA and in clause 7 and schedule 3 of the Real Property Regulation 2003 (**RPR**).

11. Subsection 74F(5) of the RPA provides:

“A caveat lodged under this section 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,
 - (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 New South Wales at which notices may be served on the caveator (and, if that address is a box at a document exchange, an alternative address in New South Wales that is not such a box),
- (c) be verified by statutory declaration, and

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

(emphasis added)

12. Noting that s 74F(5)(b)(v) (above) requires a caveat to specify the prescribed particulars of the legal or equitable estate or interest claimed, one then goes to the RPR.

13. Clause 7 of the RPR provides:

“(1) This clause applies to the following caveats:

(a) a caveat lodged under section 74B of the Act against a primary application,

(b) a caveat lodged under section 74F of the Act against a dealing, possessory application or delimitation plan, or against an application for cancellation of an easement or extinguishment of a restrictive covenant.

(2) A caveat to which this clause applies must specify the particulars set out in Schedule 3 in relation to the estate or interest to which a caveator claims to be entitled.”

14. Schedule 3 to the RPR provides:

1 Particulars of the nature of the estate or interest in land claimed by the caveator.

2 The facts on which the claim is founded, including (if appropriate) a statement as to the manner in which the estate or interest claimed is derived from the registered proprietor of the estate or interest or the primary or possessory applicant against which the caveat is to operate.

3 If the caveator’s claim is based (wholly or in part) on the terms of a written agreement or other instrument, particulars of the nature and date of that agreement or instrument and the parties to it.

4 If the caveator claims as mortgagee, chargee or covenant chargee, a statement of the amount (if readily ascertainable) of the debt or other sum of money charged on the land (or, if the amount is not readily ascertainable, the nature of the debt, annuity, rent-charge or other charge secured on the land).

5 If the caveator claims as lessee for a term or for a renewal or extension of a term, particulars of the duration of the term or renewed or extended term and its commencing date (and, if the agreement for the term, renewal or extension includes an option for the renewal or extension of the term or to purchase the reversion, a statement to the appropriate effect).

6 If the caveator claims an easement, particulars of the land or authority that has or is intended to have the benefit of the easement.

7 If the caveator claims a profit à prendre, particulars of the land or authority intended to have the benefit of the profit à prendre.

8 If the caveator claims a right to the benefit of a restriction on the use of land, particulars of the land or authority intended to have the benefit of the restriction.

9 If the caveator claims a right to the benefit of a positive covenant, particulars of the land or authority intended to have the benefit of the covenant.

10 It is not necessary to specify:

- (a) whether the estate or interest claimed is legal or equitable, or
- (b) the quantum of the estate or interest claimed (except as provided in paragraphs 4 and 5), or
- (c) how the estate or interest claimed ranks in priority with other estates and interests in the land.”

(emphasis added)

15. Here, the caveat literally claims an “equitable interest”.³ However, it is not sufficient for a caveat to express the claimed interest in that form. Items 1 and 2 of schedule 3 require more detail. In *Hanson Construction Materials Pty Ltd v Vimwise Civil Engineering Pty Ltd*⁴ the interest claimed in two caveats was described as an “equitable interest”. In each caveat this was elucidated to some extent by the “Facts stated below” where, in each case, a written instrument was specified. However, this did not save the caveats. Campbell J said:

“28 The requirement that the caveat "specify the prescribed particulars" of the nature of estate or interest claimed is not adequately met in the present case. Whether a caveat adequately describes the estate or interest claimed is to be decided from the point of view of "a person examining the caveat" -- who need not necessarily be the registered proprietor: *Leros Pty Ltd v Terara Pty Ltd* (1992) 174 CLR 407 at 422-3. In this context "specify" is understood in the sense of "mention definitely or explicitly": *ibid*

³ *Hanson Construction Materials Pty Ltd v Vimwise Civil Engineering Pty Ltd* [2005] NSWSC 880; (2006) NSW ConvR ¶56-137; *Circuit Finance Pty Ltd v Crown & Gleeson Securities Pty Ltd* [2005] NSWSC 997; (2006) NSW ConvR ¶56-143; *Sutherland v Vale* [2008] NSWSC 759.

⁴ [2005] NSWSC 880; (2006) NSW ConvR ¶56-137.

29 A claim to be entitled to an "equitable interest" in land is a claim which could relate to a multiplicity of types of interest, from an equitable easement, to the benefit of an option to purchase, to a right to have an agreement for lease specifically performed to the benefit of a restrictive covenant under a common building scheme. As well, it could relate to an equitable mortgage or charge.

30 I would not regard the identification of the interest claimed by a caveator as being nothing more than an "equitable interest" as specifying the interest to which a caveator claims to be entitled. One of the functions of a caveat is to notify someone who searches the register of what interest the caveator claims. A claim to an "equitable interest" does not do that.

31 Lindsay, *Caveats against Dealings in Australia and New Zealand* 1995, page 149 says that "... it is insufficient to claim an interest pursuant to an agreement dated "X" without specifying the nature of the interest". The same author at page 157, refers to it being a "fundamental requirement" that a caveator "fully and properly describe its interest, which requires disclosure of both the nature of the claim and the grounds for making it". I agree with those statements of the law.

32 The estate or interest in the land which is claimed need not state in precise legal language the nature of the estate or interest which is claimed, if a reader is able, with legal advice, to work it out from what is stated in the caveat: *Ultra Marine Pty Ltd v Misson* [1981], ANZ ConvR 229. However, the reader of these caveats could not work anything out about the nature of the interest claimed."

(iv) If the caveat is lodged in this form, can it be saved by the operation of s 74L?

16. Austin J said in *Deabel v V'Landys*⁵:

8 It is arguable that an amendment is unnecessary having regard to s 74L, which requires the Court to disregard any failure of the caveator to comply strictly with the statutory requirements with respect to the form of the caveat. As Young CJ in Eq said in *Jones v Baker* [2002] NSWSC 89 (12 February 2002) at paragraph 32, the Court usually exercises its

⁵ [2002] NSWSC 438 at [8].

power in light of s 74L so as to give effect to the caveat if the caveator has a caveatable interest , despite "even gross defects such as the failure to state the interest being protected or even the failure to state the maximum amount secured by the charge".

(emphasis added)

17. On the other hand, in *Hanson Construction Materials Pty Ltd v Vimwise Civil Engineering Pty Ltd*⁶, Campbell J said:

"34 The dispensing power which is contained in section 74L is one which merely excuses defects of form. The failure to specify the nature of the interest, in as fundamental a way as has happened in the present case, is more than a defect of form.

35 In *In the Marriage of Stevens* (1991) 15 Fam LR 51 at 53 Cohen J expressed the view that:

"... it is no longer the case that a caveat will be struck down for technical fault if the caveator has any caveatable interest. The Court has power to extend the operation of any caveat lodged, and this extension can be in relation to both time and substance."

36 If by that view, his Honour intended to hold that the existence of a caveatable interest which is not disclosed on the face of the document can support the validity of the caveat, that view is not one with which I agree.

37 In *Multi-Span Constructions No 1 Pty Ltd v 14 Portland Street Pty Ltd* [2001] NSWSC 696 at [130] Barrett J came to a similar view. His Honour went on to say:

"It is true that, in proceedings for the extension of a caveat's operation, any defect in the form of the caveat will be disregarded under s 74L. But that does not mean that some wholly new substratum can be substituted by reference to some estate or interest simply not contemplated by the caveat, whatever its deficiency of form may be."

38 I respectfully agree with that view, and would add that I would not regard an expression of enormous generality, like "equitable interest" as one which "contemplates" some specific type of interest, such as an equitable charge, which is claimed."

18. Therefore, one cannot safely assume that the s 74L will be an available remedy for a caveator who fails adequately to state the nature of his or her interest.

⁶ [2005] NSWSC 880.

(v) If the caveat were without foundation, would you advise John lodge it anyway to gain some protection while he considers his legal options?

19. There is a professional conduct aspect to this question. It is submitted that a solicitor simply cannot play any part in the lodgement of a caveat without reasonable cause.

20. Further, a client should be warned of the effect of s 74P of the RPA, which provides:

“(1) Any person who, without reasonable cause:

(a) lodges a caveat with the Registrar-General under a provision of this Part,

(b) procures the lapsing of such a caveat, or

(c) being the caveator, refuses or fails to withdraw such a caveat after being requested to do so,

is liable to pay to any person who sustains pecuniary loss that is attributable to an act, refusal or failure referred to in paragraph (a), (b) or (c) compensation with respect to that loss.

(2) Compensation referred to in subsection (1) is recoverable in proceedings taken in a court of competent jurisdiction by the person who claims to have sustained the pecuniary loss.

(3) A person who is a caveator is not entitled to bring proceedings under subsection (1) (b) if that person, having had an opportunity to do so, has failed to take all reasonable steps to prevent the caveat from lapsing.”

21. Liability is based on the lodgement of a caveat “without reasonable cause”.

The “without reasonable cause” formula appeared in the predecessor provision, the now repealed s 98 of the RPA. Section 74P, introduced in 1986, originally used the formula “wrongfully and without reasonable cause”, and this formula was interpreted as requiring proof that the caveat was lodged deliberately by a person knowing that he or she had no

interest in the land,⁷ although proof of an intention to cause harm was not necessary.⁸

22. However, the word “wrongfully” was deleted with effect from February 1997. Accordingly, caution is needed when making use of the older case law under s 74P.

23. Since that amendment, the Supreme Court has said that the approach under the old s 98 is appropriate.⁹ That approach is that described by Wootten J in *Bedford Properties Pty Ltd v Surgo Pty Ltd*¹⁰, as follows:

“[T]he foundation for reasonable cause must be, not the actual possession of a caveatable interest, but an honest belief based on reasonable grounds that the caveator has such an interest.”¹¹

(vi) If John lodges a caveat but later receives a request to remove it, how should he approach a decision as to whether to comply with the request?

24. Refusal to remove a caveat without reasonable cause, is also a basis for compensation under s 74P. A caveator receiving a request to remove it may have a little more to consider than whether he or she has a caveatable interest.

25. This was considered by Campbell J said in *Marinkovic v Pat McGrath Engineering Pty Ltd*¹².

26. His Honour said that s 74P needs to be construed in the context of other provisions concerning caveats, including s 74MA, which gives the Court power to order the removal of a caveat. Section 74MA provides:

“(1) Any person who is or claims to be entitled to an estate or interest in

⁷ *Beca Developments Pty Ltd v Idameneo (No 92) Pty Ltd* (1990) 21 NSWLR 459 at 462 and 471.

⁸ *Dykstra v Dykstra* (1991) 22 NSWLR 556

⁹ *Lee v Ross (No 2)* [2003] NSWSC 507; *Source & Resources Pty Ltd v Porada* [2007] NSWSC 883.

¹⁰ (1981) 1 NSWLR 106 at 108.

¹¹ *Source & Resources Pty Ltd v Porada* [2007] NSWSC 883 per Gzell J at [38],

¹² [2004] 61 NSWLR 150; [2004] NSWSC 571.

the land described in a caveat lodged under section 74B or 74F may apply to the Supreme Court for an order that the caveat be withdrawn by the caveator or another person who by virtue of section 74M is authorised to withdraw the caveat.

(2) After being satisfied that a copy of the application has been served on the person who would be required to withdraw the caveat if the order sought were made or after having made an order dispensing with service, the Supreme Court may:

(a) order the caveator or another person, who by virtue of section 74M is authorised to withdraw the caveat to which the proceedings relate, to withdraw the caveat within a specified time, and

(b) make such other or further orders as it thinks fit.

(3) If an order for the withdrawal of a caveat is made under subsection (2) and a withdrawal of the caveat is not, within the time limited by the order, lodged with the Registrar-General, the caveat lapses when an office copy of the order is lodged with the Registrar-General after that time expires.”

27. This provision is an alternative to the lapsing notice procedure (below), and is normally used when there is some urgency.

28. As his Honour pointed out, the Court can order removal of a caveat under s 74MA even if the caveat was, at the time of lodgement, properly lodged.

The test is:

“[W]hether or not, in the circumstances which exist at the time that the application comes before the Court, the Court would protect the interests claimed in the caveat by the issue of an interim injunction. If no such injunction would be issued, then the caveat will be removed.”¹³

29. Two examples of this approach were referred to by Campbell J in his judgment. First, where land which subject to a mortgage is sold for a price which will not fully discharge the first mortgage, a subsequent mortgagor

¹³ *Marinkovic v Pat McGrath Engineering Pty Ltd* (2004) 61 NSWLR 150; [2004] NSWSC 571 at [54], citing *Kerrabee Park Pty Ltd v Daley* [1978] 2 NSWLR 222; *Martyn and Another v Glennan and Another* [1979] 2 NSWLR 234; *Gay v Gooden* (1989) NSW ConvR ¶55-445.

will not be able to maintain a caveat which will prevent completion of the sale.¹⁴

30. Secondly, if the interest in land is in the nature of security for payment of money, the court will order removal of a caveat if the registered proprietor is prepared to put up adequate alternative security.¹⁵

31. His Honour concluded:

“It seems to me that similar principles ought apply to the construction of section 74P. After all, section 74MA sets out what is to happen if a person who wishes to have a caveat removed is able to get to Court and have the Court decide whether it should or should not be removed. Section 74P deals with the situation where a person who wishes to have a caveat removed has requested that it be removed, but for one reason or another has not actually gone to Court to seek enforcement of that request. I see no reason why the test for whether or not the caveat should be removed ought be different under section 74P to that applied under section 74MA.”¹⁶

(vii) What should John do if he receives a lapsing notice?

32. Section 74J provides for the lapse of a caveat on the application of the registered proprietor of an estate or interest in the land. Subsection (1) provides:

“(1) Where a caveat lodged under section 74F remains in force, the Registrar-General shall, on an application being made in the approved form by the registered proprietor of an estate or interest in the land described in the caveat, prepare for service on the caveator a notice to the effect that, unless the caveator has, before the expiry of 21 days after the date of service of the notice:

(a) obtained from the Supreme Court an order extending the operation of the caveat for such further period as is specified in the order or until the further order of that Court, and

¹⁴ *Marinkovic v Pat McGrath Engineering Pty Ltd* (2004) 61 NSWLR 150; [2004] NSWSC 571 at [55], citing : *Wildschut v Borg Warner Acceptance Corporation (Aust) Ltd* (1987) 4 BPR 9453; *Dunecar Pty Ltd (in Liq) v Colbron* [2001] NSWSC 1181 at [18]-[19].

¹⁵ *Marinkovic v Pat McGrath Engineering Pty Ltd* (2004) 61 NSWLR 150; [2004] NSWSC 571 at [56], citing *Wildschut v Borg Warner Acceptance Corporation (Aust) Ltd* (1987) 4 BPR 9453; *Dunecar Pty Ltd (in Liq) v Colbron* [2001] NSWSC 1181 at [18]-[19].

¹⁶ *Marinkovic v Pat McGrath Engineering Pty Ltd* (2004) 61 NSWLR 150; [2004] NSWSC 571 at [57].

(b) lodged with the Registrar-General the order or an office copy of the order,

the caveat will (subject to evidence of due service of the notice on the caveator) lapse in accordance with subsection (4)."

(2) The applicant must, within 4 weeks after the issue of the notice, lodge with the Registrar-General, in the form of a statutory declaration or such other form as the Registrar-General may accept, evidence of the due service of the notice on the caveator.

(3) If the applicant does not comply with subsection (2), the Registrar-General:

(a) may refuse to take any further action in connection with the notice prepared under subsection (1), or

(b) may serve on the applicant a notice allowing a further 4 weeks from the date of issue of that notice for lodgment of the evidence and, if the evidence is not lodged within the further period, may refuse to take any further action in connection with the notice prepared under subsection (1).

(4) If:

(a) the evidence required by subsection (2) is lodged within the time permitted by this section, and

(b) the caveator has not lodged with the Registrar-General the order or office copy of the order referred to in subsection (1) in accordance with that subsection,

the Registrar-General is to make a recording in the Register to the effect that the caveat has lapsed, and the caveat so lapses on the making of that recording."

(emphasis added)

33. An application for extension of a caveat is necessary if a caveator wishes to retain the caveat. The relevant provision is s 74K, which states:

"(1) Where a caveator is served with a notice prepared under section 74I (1) or (2), 74J (1) or 74JA (3), the caveator may prepare, in the manner prescribed by rules of Court, an application to the Supreme Court for an order extending the operation of the caveat.

(2) Subject to subsection (3), on the hearing of an application made under subsection (1), the Supreme Court may, if satisfied that the caveator's claim has or may have substance, make an order extending the operation of the caveat concerned for such period as is specified in the order or until the further order of that Court, or may make such other orders as it thinks fit, but, if that Court is not so satisfied, it shall dismiss the application.

(3) Unless the Supreme Court has made an order dispensing with service, it may not hear an application made under subsection (1) unless it is satisfied that all interested parties disclosed by the notice which gave rise to the application have been served with copies of the application before the hearing.

(4) An order under subsection (2) may be made ex parte or otherwise.

(5) When making an order under subsection (2), the Supreme Court may make such ancillary orders as it thinks fit.

(6) For the purposes of this section, a caveator served with a notice under section 74JA (3) (in relation to a restrictive covenant) is taken to have a claim that has substance if the caveator:

(a) has a registered interest, or has or may have an equitable estate or interest, in land to which the benefit of the restrictive covenant is appurtenant, or

(b) is recorded in the Register as having the right to release, vary or modify the restrictive covenant, or as being a person whose consent is required to a release, variation or modification of the restrictive covenant, and should have been so recorded.”

(emphasis added)

34. The most important thing for John to do, having received a lapsing notice, is to act quickly. Within the 21 days, John will need to obtain advice as to whether the caveat is likely to be extended, which advice will involve a consideration of the substance of the underlying claim and whether it has merit. Assuming that the advice is that there is a claim, and John wants to keep the caveat, he will need to bring an application under s 74K. In addition, he will need to be in a position to commence the substantive proceedings. If those proceedings are in the Supreme Court, the application to extend the caveat will be made in those proceedings, and can be included in the summons.

35. Normally, it is necessary to make the application before the Duty Judge in Equity.

36. If the 21 days is almost up, it will be necessary to seek short service as part of the application.

37. John (or more realistically, his legal team) should approach the Duty Judge armed with, at least:

(a) A summons or statement of claim (but usually the summons), which summons may claim both the final relief and the interlocutory relief, including the extension of the caveat;

(b) A supporting affidavit which gives evidence of the claim for final relief, and annexes the caveat and states the date of service of the caveat;

(c) Short minutes of order dealing with the relief appropriate to the immediate appearance (which, on the first occasion, may be limited to short service orders);

(d) (On the occasion when the application to extend is to proceed) evidence of service of the application on all interested parties, if necessary due to the non-appearance of any party;

(e) Instructions to give the usual undertaking as to damages;

(f) The filing fee, as well as money to pay to keep the registry open, if necessary.

38. An application to extend a caveat will not, except in extraordinary circumstances, be made *ex parte*, because s 74K(3) requires all interested parties to be served unless the Court dispenses with service. The fact that the application is first brought before the court on the last day of the 21 day period will not be sufficient reason for the Court to dispense with service and extend the caveat, even for a short period.

39. It is convenient to set out the entire judgment of Young CJ (in Eq) in *Malouf v O'Donohoe* [2001] NSWSC 335:

“1 HIS HONOUR: This is an *ex parte* application made under section 74K of the Real Property Act 1900 to extend a caveat. The statute requires that no *ex parte* application to extend a caveat is to be entertained unless the Court has dispensed with service.

2 At least since the decision of the then Chief Judge in Equity in *Wonderland Business Park Pty Ltd v Hartford Lane Pty Ltd* [2001] NSWSC 86 noted in 75 ALJ 226, the Court almost never makes an order of this nature *ex parte*. It is extremely difficult to see any justification for dispensing with service in cases where lawyers have left their application for dispensing with service to the last day and no

other factor is present. Indeed it is difficult to see when the Court would ever be justified in dispensing with service in a case where there was an identifiable caveator in the jurisdiction.

3 However, as the practice may have been a little lax over the last few years I will on this occasion make an order under s 74 O allowing a fresh caveat to be lodged in identical terms to the current caveat, on condition that that caveat will be withdrawn next Wednesday, 2 May 2001, unless the Court extends the period.

4 I am doing this for two reasons; first, because there appears to have been genuine inadvertence in the instant case, rather than it being one where the application was deliberately left to the last day; secondly, there would not appear to be an impending contrary dealing and it is only fair that a short time be allowed for the profession to come to grips with the current practice.”

(viii) What principles apply in an application to extend a caveat after a lapsing notice?

40. The power to extend a caveat is discretionary.

41. The test for the court to apply under s 74K(2) is whether the caveator's claim "has or may have substance".

42. It has also been said in numerous cases that the court approaches caveat extension applications in a similar manner to applications for an interlocutory injunction.¹⁷ The court must consider:

- a. whether the caveat has or may have substance, which encompasses the concept of a seriously arguable case;
- b. the balance of convenience and prejudice; and
- c. other discretionary considerations.¹⁸

43. The caveator bears the onus to demonstrate that the caveat has or may have substance.¹⁹

¹⁷ *Kerabee Park Pty Limited v Daley* [1978] 2 NSWLR 222; *Martyn v Glennan* [1979] 2 NSWLR 234; *Gay v Gooden* [1989] NSWConvR 55-445; *70 Pitt Street Sydney v McGurck* [2004] NSWSC 413 at [15]; *Ruxan Pty Limited v Peachme Pty Limited* [2004] NSWSC 1221 at [9]; *CJ Redman Construction Pty Ltd v Tarnap Pty Ltd* [2005] NSWSC 1011 at 3.

¹⁸ *Sutherland v Vale* [2008] NSWSC 759 at 11.

¹⁹ *Sutherland v Vale* [2008] NSWSC 759 at 11

44. It has been pointed out that there is a limit to the analogy with an interlocutory injunction in equity because the jurisdiction here is statutory, and discretionary bars to relief in equity are not necessarily relevant.²⁰ Accordingly, in *Kingstone Constructions Pty Ltd v. Crispel Pty Ltd*²¹, Young J rejected evidence going to the defence of lack of clean hands.

45. In *Lawrence v Appleby*²² Palmer J said that balance of convenience is approached in much the same way as in the case of injunction applications. However there is arguably some tension between this proposition and the statement of Young J in *Kingstone Constructions Pty Ltd v. Crispel Pty Ltd*²³, which Palmer J quoted:

“Normally, when a caveat is proper in form and substance it will be retained even though this will cause harm to the registered proprietor. After all, the whole purpose of a caveat is to enable a brake to be put on the registered proprietor's dealings with his property whilst the claim of the caveator is resolved.”

46. The balance of convenience does not always favour the caveator, however, although it did in *Kingstone*. Young J went on to say in that case:

“So far as balance of convenience generally is concerned, it is certainly the case that this court has ensured that caveats are not used as a blackmailing device so that a caveat can legitimately be lodged in respect of a relatively small claim and force the registered proprietor to pay out such a claim even though it is bitterly contested. The court has consistently taken the attitude that if the registered proprietor is prepared to put up an alternate [sic] security, then it will remove the caveat, even though, as I have said, the caveat may be completely valid. It may be that the discretion vested in the court under s 74K(2) is wider than what I have just indicated and indeed, some passages in *Martyn v Glennan* [1979] 2 NSWLR 234 and *Wildschut v Borg Warner Acceptance Corp (Aust) Ltd* (1987) NSW ConvR 55-344, indicate that this is so. However, whatever the extent of the discretion is, in my view it would not be an appropriate exercise of that discretion to remove the caveat in the instant case on the grounds of balance of convenience. In any event, one would have to balance the

²⁰ *Bethian Pty Ltd v Green* (1977) 3 Fam LR 11,579 at 11,582; *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181 at 185; *Town & Country Sport Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd* (1988) 97 ALR 315 at 319; *Lawrence v Appleby* [2002] NSW ConvR 55-993, [2001] NSWSC 649; *Rizky Management Pty Ltd v Billabong Hotel (St Marys) Pty Ltd* [2005] NSWSC 580.

²¹ (1991) 5 BPR 11,987

²² [2001] NSWSC 649.

²³ (1991) 5 BPR 11,987

'convenience' of the registered proprietor being able to deal with the land with the 'inconvenience', if a court should hold that the caveator has a valid equitable charge, of its interest losing priority to any interest which would be created by the registered proprietor if the transactions which that proprietor wishes to enter into proceeded."

(ix) If John lets the caveat lapse, can he lodge another one in respect of the same interest?

47. The answer is no, except by court order or consent of the registered proprietor. Section 74O of the RPA states:

“(1) This section applies if a caveat lodged under a provision of this Part in respect of any particular estate or interest in land or any particular right arising out of a restrictive covenant:

(a) subsequently lapses, or

(b) is, after an application is lodged with the Registrar-General for the preparation of a notice under section 74C (3), 74I (1) or (2), 74J (1) or 74JA (3), withdrawn under another provision of this Part, or

(c) is withdrawn or lapses under section 74MA,

and the same caveator lodges a further caveat with the Registrar-General in respect of the same estate, interest or right and purporting to be based on the same facts as the first caveat.

(2) A further caveat to which this section refers has no effect unless:

(a) the Supreme Court has made an order giving leave for the lodgment of the further caveat and the order or an office copy of the order accompanies the further caveat when it is lodged with the Registrar-General, or

(b) the further caveat is endorsed with the consent of the primary applicant or possessory applicant for, or the registered proprietor of, the estate or interest affected by the further caveat.”

(x) Who said

48. Callinan J, in *Black v Garnock* (2007) 230 CLR 438.

49. That case decided that a writ of execution lodged under the RPA could defeat the rights of a purchaser under a contract of sale of land entered

into prior to lodgement of the writ. The High Court was concerned with, essentially, the construction of s 105A of the RPA. Perhaps the real importance of the decision is in reminding practitioners of the “salutary practices” referred to by Callinan J.