

Caveats: Essential Step or Tactical Weapon

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Introduction

- 1 The title of this paper suggests a dichotomy. A more appropriate evaluation is to see the Caveat as both a vital (but not necessarily sufficient) step in protecting a client's interest, as well as an important tactical weapon, within limits. Failure to understand the limits on the protection which a caveat can provide is one danger. Abuse of the system is quite another. Caveats misused can and will blow up in your face. On the other hand, caveats have often supplied the vital thread protecting from extinction a somewhat informal but nevertheless valid proprietary interest in land.
- 2 Caveats provide frequent business for the Supreme Court of New South Wales, Equity Division, particularly in the duty lists. The purpose of this paper is not to provide an exhaustive analytic guide to the jurisprudence on caveats, but to give some practical comment relevant to practitioners as they find themselves 'in the fray'.
- 3 Whilst the discussion will be relevant across Torrens title jurisdictions, my discussion is designed by reference to the NSW provisions: *Real Property Act, 1900 (NSW)*, Pt 7A, ss. 74A to 74R; *Real Property Regulation, 2014 (NSW)*, Regs. 4 to 9 & Sch. 3, 4 & 5. Practitioners in other jurisdictions should be aware that, although cognate Torrens title legislation in other jurisdictions is generally similar, there are sometimes significant differences.

Objectives

- 4 As the word itself denotes, a caveat warns the inquirer to beware. But the aspiring caveator should also beware of the limited role, use and function of the caveat. Caveats have three principal functions.
- 5 The *first* function, which is the explicit consequence of provisions of the *Real Property Act, 1900 (NSW)*, is that a caveat against dealings, while it subsists, prevents the registration of those classes of dealings which it prohibits. In the case of a caveat against primary applications, the object of the caveat is to prohibit the relevant land from being brought under the *Real Property Act*. Here the caveator seeks to prevent the applicant from getting the benefit of an indefeasible Torrens title free of the caveator's interest.
- 6 The primary concern of most caveators will be to prevent registration of an inconsistent dealing where such registration would obtain for the incoming proprietor an indefeasible title. By 'prevent' I do not mean that the caveat can necessarily prevent registration absolutely. In effect, the caveat's function is to preserve the opportunity to litigate the claim without being shut out by the event of an incoming proprietor obtaining indefeasible title.
- 7 If challenged, the caveator must be prepared to litigate that claim or see the caveat (and in all likelihood the interest itself) lapse. One sees caveats which are, on their face good, but fail at trial because they depend on contentious facts and claims which fail at trial. Thus, to formulate a caveat which appears

valid on its face is only half the job. The caveator should certainly formulate the claim clearly and in accordance with recognised concepts concerning an estate or interest in the relevant parcel of land. The solicitor should at the time of taking instructions for the caveat take from the client a careful statement of the facts and evidence relied on, and it will be prudent to pursue, to the extent possible at that point,¹ such further enquiries as may be necessary to fill in any gaps in the necessary elements disclosed by the client's personal instructions.

- 8 The prudent caveator will not stop at lodgement of the caveat but, at least in a preliminary way, collect the evidence needed for the prospective contest, within the limits of practical availability. The solicitor will be prudent to have an eye to questions of the admissibility of such evidence and to reflect on what might be sufficient for an interlocutory hearing and what for a final hearing. At the very least, the nature of the estate or interest claimed and the practical issues, both legal and commercial, should be analysed and carefully considered at the time of formulating and lodging the caveat – not left to be worked out in a rush upon receipt of a lapsing notice.

- 9 The solicitor will often be confronted with factual and legal questions affecting the nature of the claim and requiring a practical evaluation of the available evidence. Not infrequently the course of time and events may affect and alter the nature of the caveator's (or aspiring caveator's) rights or interest. It may be necessary to engage in a process of ongoing supervision of events. This too will be highly relevant to decisions as to whether and when to commence any relevant proceedings. Sometimes an inchoate right which is not yet caveatable will later mature into an interest in land. At the earlier point in time the aspiring caveator may have no caveatable interest and might be faced with the need to apply immediately for injunctive relief if its rights cannot be consensually protected. It may be difficult to determine at what point it matures into a caveatable interest. An example is the right of a beneficiary to the administration of an incompletely administered estate in which he or she is to take in due course a devise of land. Until the completion of the administration this does not constitute an interest or estate in land. It can be quite difficult to decide at what point the administration is complete and the right has matured into an interest in land. There will be other cases in which an interest of one kind presently exists, but is later altered. E.g., where an option is exercised. In other cases, what is initially clearly a caveatable interest may later become doubtful. E.g., where a contract for sale has been allegedly rescinded and there is dispute as to the validity of the rescission.

- 10 The caveat is really a kind of interlocutory protection. It has been described as a 'statutory injunction'. The practice sometimes seen of lodging a contentious caveat and deferring litigation to establish the claim until the proprietor decides to lapse the caveat is a dangerous one. The caveator who sits by for years instead of commencing Court proceedings to vindicate his, her or its claim runs the risk that a limitations, laches or discretionary defence may intervene to defeat the claim. A further risk is that the quality of the supporting evidence may deteriorate with the delay.

¹ As discussed below, there will be cases in which it will be necessary to await the commencement of proceedings and use of the Court's compulsory processes to collect necessary evidence. In such cases at the time of caveating, or upon the occurrence of events affecting the caveat's continuing validity, it will be necessary to make practical judgments as to the anticipated strength of the claim. Perforce such assessment will be made on the material available, including inferences and where it is clear that the viability of the claim is going to depend on an assessment of evidence which is not yet available, care in assessing the risks will be particularly necessary.

- 11 Defective caveats are frequently seen. Sometimes the cause of action relied on does not give rise to an estate or interest in the relevant parcel of land. This is frequently a consequence of inadequate consideration of the nature and elements of the caveator's claim. For example, a charge over the proceeds of sale is not a charge over the relevant land, and does not constitute a caveatable interest. The failure to recognise such a weakness can mean that the caveator neglects other alternatives for the protection of his or her rights, such as injunction.
- 12 It should also be remembered that caveats involve a notification regime. No regime of notification can be devised which is completely proof against accidents and slips. Moreover, the ingenuity of the dishonest debtor is not to be underestimated. For example, the provision of s. 74J(2) leaving proprietors responsible for service and proof of service of lapsing notice provides some scope for the dishonest or careless proprietor to get rid of a caveat improperly or wrongly, i.e., without the lapsing notice coming to the attention of the caveator, because the protection afforded by the requirement for a statutory declaration proving service to be lodged depends on the honesty and care of the person serving the lapsing notice. Of course there are other protections against fraud, namely the fraud exception to indefeasibility and also the Torrens Assurance Fund, but these protections have their own limitations. Conversely, the caveator who does not take care to state a correct address for service, or who fails to lodge notice of change of address for service runs the hazard that a duly served lapsing notice may not come to the caveator's attention.
- 13 I mention these inherent limitations at this point because in consideration of the practical function and use of a caveat in preventing registration of competing dealings with land, one must always consider the place of the caveat in a wider appreciation of what is necessary or appropriate for an efficient protection of the client's position. Where the usefulness and efficacy or availability of the caveat reaches its limit, the prudent practitioner will reflect on additional or alternative measures. The objective of the caveator so far as the prevention of competing dealings is concerned is to provide what is very much a second best level of protection. Any caveat carries within itself the seed of further contention, of a potential court case. A caveat is a pretty good holding mechanism, but many further steps lie between a caveat and a fruitful return for the creditor.
- 14 Practitioners and clients should thus realise that caveats represent significant but limited protection. It is but one weapon in the armoury, with its own inherent uses and limitations. Even where there is a clearly caveatable interest or estate, and even without frauds or mishaps, the protection afforded by a caveat is by no means so practically secure as a registered interest.
- 15 The *second* function is to prevent s. 43A of the *Real Property Act* from coming into play in favour of a subsequent purchaser of the legal estate to defeat the caveator's claim: *Taleb v. National Australia Bank Ltd* [2011] NSWSC 1562; (2011) 82 NSWLR 489 at [40]-[49]. Section 43A(1) provides:
- “(1) For the purpose only of protection against notice, the estate or interest in land under the provisions of this Act, taken by a person under a dealing registrable, or which when appropriately signed by or on behalf of that person would be registrable under this Act shall, before registration of that dealing, be deemed to be a legal estate.”
- 16 In *Taleb*, Bryson AJ decided that where registration of a particular dealing is prevented by a particular caveat (a matter depending on whether the terms of the caveat have been framed to prohibit dealings of the kind in question) then that dealing is not a 'dealing registrable' within the meaning of this provision, even if the caveat is the only thing preventing registration. Accordingly, s. 43A did not assist the incoming mortgagee in that case.

- 17 This is another reason why it is important for this purpose that the caveator's real estate or interest be adequately and accurately set out and described in the caveat.
- 18 The *third* function, which is a by product of the system, is that a caveat is a way of giving notice of an equitable claim in respect of land.
- 19 In relation to *mere equities* this works a little differently from the caveat's role in relation to equitable estates or interests. In a competition of equities there is the rule that where the equities are otherwise equal, the first in time prevails. This rule does not assist a claimant who asserts a *mere equity* to prevail over a claim to an equitable estate or interest (such as an equitable mortgage) obtained for value and without notice of a prior mere equity: *Double Bay Newspapers Pty Ltd v A W Holdings Pty Ltd* (1996) 42 NSWLR 409. A mere equity is a claim to an equitable interest which can only be established with the grant of equitable relief by the Court, such as a claim which depends on rectification of an instrument, or upon an equity founded in part performance, or a claim to set aside a conveyance obtained by fraud.
- 20 A mere equity does not enter into competition with an equitable estate held by a bona fide purchaser for value *without prior notice* of the mere equity. Thus, for a claimant who asserts a mere equity, one function of a caveat will be to publish notice of the equity in the hope that a subsequent claimant to an equitable estate will search and get notice of the prior claim before acquiring his or her interest.
- 21 In the case of an equitable estate or interest, the caveat has also a more negative function. *Failure* to caveat *may* and often will lead to the postponement in priority of an earlier equitable estate or interest in favour of a later one. But this consequence is not automatic. The starting point here is the principle that where the equities are equal, the first in time prevails, so that in a competition between equitable estates the first in time has priority, unless there is something in the circumstances to make it inequitable that the earlier should prevail. Because the facility of a caveat is available and because persons dealing with land may be expected to search the title, a failure to caveat will be a factor to be thrown into the balance when assessing which equity should prevail in a contest of equities. In considering the circumstances as a whole, the Court may consider that a failure to caveat, combined with other circumstances, amounts to conduct which, in justice, postpones the equity of the prior claimant to that of a latter claimant. Failure to caveat is not necessarily postponing conduct, but, taken with other circumstances, it may be and it may often be so. A person who claims entitlement to an equitable interest and fails without any good excuse to caveat certainly runs a great risk that his interest may fail in a competition with a subsequent claim. Circumstances that will make it inequitable that an earlier equitable estate should prevail over a later one will include cases where some act or omission by the holder of the earlier interest has led the other to acquire the later interest on the supposition that the earlier one did not exist: *Heid v. Reliance Finance Corporation* (1983) 154 CLR 326 at 341; *Person to Person Financial Services v. Sharari* [1984] 1 NSWLR 745 at 747-748; *Double Bay Newspapers Pty Ltd v A W Holdings Pty Ltd* (1996) 42 NSWLR 409; *Taleb v. National Australia Bank Ltd* [2011] NSWSC 1562; (2011) 82 NSWLR 489. The paradigm case is where the earlier interest holder has failed to caveat before the later holder acquires for value an interest on the faith of a recent search which did not disclose any caveat by the earlier holder. The onus of proof lies on the party alleging postponing conduct and the consequence of loss of priority is a serious one and it requires postponing or disentitling conduct of commensurate seriousness to warrant such a conclusion, something blameworthy and causative, not merely general considerations of the fairness of the result: *Champion Homes Sales Pty Ltd v JKAM Investments Pty Ltd*; *Hotray Pty Ltd v JKAM Investments Pty Ltd* [2014]

NSWSC 952 at [89]-[91]. It ‘must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced’: *Lapin v Abigail* [1930] HCA 6; (1930) 44 CLR 166 at 204 (citing Lord Cairns LC from *Shropshire Union Railways and Canal Co v The Queen*).

- 22 The practitioner should recall that the caveat in this respect protects only against postponement to a later interest. The obverse *can* also happen. It is still *possible* for a caveator to fail in competition with a claimant asserting a prior equity, even though the other claimant has not lodged a caveat, and even though a recent search was performed prior to entry into the transaction. That would be so, for example, if the transaction was going to be entered into or the consideration was bound to be performed in any event regardless of the result of the search. It is *reliance* on the clear title as a basis for giving the consideration that is important. In *Champion Homes Sales Pty Ltd v JKAM Investments Pty Ltd; Hotray Pty Ltd v JKAM Investments Pty Ltd* [2014] NSWSC 952 the subsequent caveators’ failure to search in one case or in the other to adduce evidence of reliance on a search was fatal to the claim of one subsequent caveator that an earlier interest was postponed by reason of failure to caveat and was also an important factor in rejection of the claim of another subsequent caveator that the prior interest holder had been guilty of postponing conduct in other aspects of its conduct.
- 23 Such possibilities provide yet another illustration of the point that it is not the function of a caveat to be a substitute for registered security. This is true not only as matter of legal principle, but also as a matter of practical approach. A registered title and a clear statement of the client’s rights in a deed is a much happier alternative to a 3 to 7 day court case in which nice questions of fact and inexact proofs are brought to bear upon which creditor should prevail. Caveats need not, but often do, go with an unduly lax and informal approach to a transaction. Not uncommonly a proprietor owns property subject to first ranking registered security. A new creditor comes along. Perhaps it is a new loan. Perhaps it is the performance of some other consideration. Instead of granting a registered second mortgage, or a registered charge, or transferring the promised estate, the proprietor satisfies the victim with an unregistered interest protected by a caveat or even by an informal interest, such as a ‘right to caveat’ which may or may not amount to an equitable charge, depending on the implications that might or might not be spelt out of its exact terms. Such blandishments have sufficient plausibility to satisfy many more or less friendly creditors, such as family members, or business acquaintances or even employees. Commonly the nature of the interest being given is informally recorded, and ill considered. Attention to stamp duty is neglected, which can have consequences which the parties do not expect. Attention to requirements such as the consent of a prior mortgagee to further encumbrances (frequently required by mortgage terms) is overlooked. Sometimes the debtor is quite conscious of the requirement. In short, a caveat is certainly a valuable protection, if properly prepared and if the interest which it secures is properly considered and recorded, and the requisite formalities and consents are attended to. However, in practice it often turns out that the parties proceeded by this route because the money was wanted quickly or the debtor fobbed off proper arrangements, or the creditor was ignorant or lax. It is not safe to regard a caveat as a quick and simple way of recording an interest while careful thought is postponed about the nature of the interest which should be recorded.
- 24 It is trite, but unfortunately necessary to reiterate, that it is no part of the function of a caveat to prevent, delay or block a proprietor in dealing with land over which the caveator has no equity or legal estate. It is not a legitimate use of caveats to protect or assist unsecured creditors in the recovery of their claims. That observation applies equally to spouses or de facto spouses or domestic relationship partners claiming property settlements as it does to unsecured commercial creditors. Real estate agents have often been culprits. Such attempts have been condemned: *Downie v Kenny* [1986] ANZ ConvR 494; (1986) NSW ConvR 55-270; *Truefilm Pty Ltd v JR Investment Holdings Pty Ltd* (2004) NSW ConvR 56-096; [2004] NSWSC 372; *Pacific Blue Australia Pty Ltd v Somalis* [2008] NSWSC 75; *Arkbay Investments Pty Ltd (in liquidation) (receivers and managers appointed) v Tripod Funds Management*

Pty Ltd [2014] NSWSC 1003; *Arkabay Investments Pty Ltd (in liquidation)(receivers and managers appointed) v Tripod Funds Management Pty Ltd (No 2)*[2015] NSWSC 330. These authorities establish that normal consequences of such behaviour will be an order for indemnity costs of the proceedings for removal of the caveat and an order for compensation under s. 74P for the loss attributable to the subsistence of the caveat.

- 25 A further variation on the theme is the case of the professional or trade creditor whose claims are not compliant with some mandatory statutory condition of enforceability, such as those found in the regulation of builders and real estate agents, and even solicitors. Sometimes these claims, which appear on the documents to be secured, are in fact unsecured or even wholly untenable, because of particular statutory provisions. It is not a legitimate function of a caveat to circumvent such statutory conditions by dressing an unenforceable claim in the clothing of a proprietary interest: *Investmentsource Corporation Pty Ltd v. Knox Street Apartments Pty Ltd* & Ors (2002) 56 NSWLR 27.

Alternatives

- 26 If the client's interest is not of a kind which can or should be caveated, then the availability of alternatives must be considered, as the circumstances permit, such as moving for injunction to restrain the breach of a negative stipulation concerning dealing with land, or the maladministration of an estate or discretionary trust which holds the relevant land, or a freezing order to prevent the dissipation of assets to defeat the process of a court.
- 27 Where orders have been obtained affecting the title to land, or restricting the right of dealing with or the use of land or any buildings thereon, then pursuant to section 187(a) of the *Conveyancing Act, 1919 (NSW)* the orders may be registered in the General Register of Deeds in the prescribed manner.
- 28 In the case of freezing orders affecting the relevant land, this can be done because the freezing orders are orders 'restricting the right of dealing with ... land ... made by [a] court'. Section 191(1) has the effect that the freezing orders may be so registered even though the land is under the *Real Property Act*. That is because they are orders that are, "effective against the land without any recording in the Register kept under that Act." Section 191(2) preserves the operation and benefit of the *Real Property Act* in favour of any person entitled to obtain the registration of any dealing under that Act, including the benefit of s. 43.
- 29 It is clear that the effect of registration under s. 187 is not as powerful as the lodgment of a caveat. It will have the effect however, that any person who performs a search on a title against which the orders are registered should get notice of the orders. It is therefore a prudent step to take in respect of all properties affected by orders in any manner described in s.187.

Formal requirements

- 30 In NSW, the formal requirements for caveats against dealings are prescribed by s. 74F of the *Real Property Act, 1900*, Regs. 4, 5(b), 7, 8&9 and Sch. 3, 4 and 5 of the *Real Property Regulation, 2014*. The prescribed form for a s. 74F caveat is form 08X. The requirements for caveats against primary applications are prescribed by s. 74B of the Act and the above mentioned provisions of the Regulation. The prescribed form for a caveat against a primary application is form 00PAX. The forms, and instructions for completing the forms are available at:

http://www.lpi.nsw.gov.au/land_titles/dealing_forms/land_title_dealing_forms

The instructions should be carefully followed.

- 31 A s. 74F caveat must be in the approved form (s. 74F(5)(a)) and must contain the name and address of the caveator (s. 74F(5)(b)(i)-(iii)), an address for service of notices on the caveator (s. 74F(5)(b)(viii)) and the name and address of the registered proprietor (s. 74F(5)(b)(iv)). It must contain the prescribed particulars of the legal and equitable estate or interest to which the caveator claims to be entitled (s. 74F(5)(b)(v) and *Real Property Regulation, 2014 (NSW)*, Reg. 7; Sch. 3). It must contain the current folio reference for the land or registered interest to which the caveat relates: s. 74F(5)(b)(vi). Where the caveat relates to only part of the land in the folio, it must describe it: s. 74F(5)(b)(vii) and Regulations 8 & 9 and Sch. 4 and 5 contain further regulation on this point, including as to the use which may be made of plans. Similar requirements exist in relation to caveats against primary applications.
- 32 The most commonly breached requirements, which are also the most important requirements, are those prescribed by Sch. 3 to the Regulation. A copy of Sch. 3 is appended to this paper. The basic function of these provisions is to require the caveator to specify, with appropriate particularity, the interest claimed. However, these are by no means the only important formal requirements which are from time to time overlooked.
- 33 The caveat against dealings or actions ought to specify what dealings are prohibited. See form 08X, section G and Sch. 2. See section G in the instructions for completion of form 08X.
- 34 It ought to correctly specify the name and address of the registered proprietor. In *Truefilm Pty Ltd v JR Investment Holdings Pty Ltd* (2004) NSW ConvR 56-096; [2004] NSWSC 372 the caveator stated in the appropriate box the proprietor's name and the address of the building at which the proprietor's solicitor had his office, without even stating the solicitor's name. Not surprisingly, when the registrar general sent out notice of the caveat to that address, it did not come to the attention of the proprietor or his solicitor, with the consequence that they were unaware of the caveat until a pre-settlement search was made. The result was that the settlement had to be postponed and there was damage, comprising loss of interest, which the caveator was ordered to pay as damages under s. 74P of the Real Property Act, 1900 (NSW).
- 35 It ought to correctly specify the caveator's address for service of notices. In *Express Loans and Finance Pty Ltd v. Hunter* [2004] NSWSC 142 a caveator changed its address, failed to notify the Registrar General and did not receive a lapsing notice which was sent to the old address. Bryson J said, 'These circumstances meet with my disapproval, and have disposed me against granting any immediate interlocutory relief.'
- 36 It must be signed by the caveator or by the caveator's solicitor or agent: s. 74F(5)(d).
- 37 It must be verified by statutory declaration endorsed on the form: s. 74F(5)(d). The declarant should be made to understand the nature of a statutory declaration and the consequences prescribed for false declarations.

Consequences of informality

- 38 In any legal proceedings s. 74L requires the Court to disregard any failure of the caveator to comply strictly with requirements 'with respect to the form of the caveat'. This provision does not excuse defects of substance: *Multi-Span Constructions No 1 Pty Ltd v 14 Portland Street Pty Ltd* (2001) 10

BPR 19,253; [2002] ANZ ConvR 85; [2001] NSWSC 696 at [127]-[132]; *M J Leonard Pty Ltd v Bristol Custodians Limited (in liquidation) & Anor* [2013] NSWSC 1734 at [29]. A Court cannot amend a caveat. In proceedings for extension of the Caveat a defect in form will be disregarded, because s. 74L so requires. ‘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 deficiencies of form may be.’ *Multi-Span* at [130] per Barrett J. The cure for that is to lodge a new caveat.

39 On the other hand, a merely technical misdescription of the caveator’s interest will be capable of being disregarded: *Windella (NSW) Pty Ltd v Hughes* (1999) 49 NSWLR 158, per Santow J. It should be noticed however that in *Windella* Santow J relied on a decision of *In the Marriage of Stevens* (1991) 105 FLR 459; 15 Fam LR 51, of which Barrett J strongly disapproved in *Multi-Span*. *Windella* and *Multi-Span* can be reconciled, but it should not be assumed that the observations in *Windella* apply in a case where the caveat does not contain within itself a description of the caveatable interest upon which the caveator relies on his application for an extension of the caveat. *Multi-Span* says a forthright ‘no’ to that. The Court will not extend such a caveat.

40 The Court has repeatedly held that a claim for an interest described merely as ‘equitable interest’ or ‘an interest in the land’ is defective: *Vo v. Nguyen* [2014] NSWSC 1622 at [7]; *Sanna v. Wyse and Young International Pty Ltd (No. 2)* [2015] NSWSC 581 at [9], [16], [32]; *Hanson Construction Materials Pty Ltd v Vimwise Civil Engineering Pty Ltd* [2005] NSWSC 880; (2005) 12 BPR 23,355; *Circuit Finance Pty Ltd v Crown & Gleeson Securities Pty Ltd* [2005] NSWSC 997; (2005) 12 BPR 23,403; *Complex Scaffolding Solutions Pty Limited v Doueihy* (2014) 17 BPR 33,753. The superaddition of other words which do not actually give particulars of the nature of an estate or interest in land which is claimed does not solve the problem. For example in *Sanna* at [9] it was held that the words ‘an interest in the land whilst professional costs are owed and unpaid by the registered proprietor to the caveator’ did not comply with the s. 74F(5) requirement for the caveat to give particulars of the nature of the estate or interest in land that is claimed by the caveator. In *James Estate Wines Pty Ltd v Rabobank Australia Limited* [2015] NSWSC 712, at [15], the words, “Caveatable interest in the land by virtue of a documented share farming agreement” were held to be insufficient, even with the addition of a reference to proceedings that were then on foot. Young A-JA there explained that, the purpose of stating the particulars of the estate or interest claimed in the caveat is,

“to show the extent of the caveator's claim because there should only be a prohibition of further dealings with the land which protect the claim made by the caveator and no further. In the instant case, it is almost impossible to know what is the extent of the caveator's equitable interest.”

41 The caveator is not however required to specify the quantum of the estate or interest claimed, except in the case of:

- (a) a mortgagee, chargee or covenant chargee, who must state 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), or
- (b) a lessee for a term or for a renewal or extension of a term, who must state 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): *Real Property Regulation, 2014*, Sch. 3, items 4, 5 and 10(b).

- 42 Non-compliance with the requirement to state the amount of the mortgage liability is generally not fatal because of the direction in s. 74L that a failure of strict compliance is to be disregarded: *Champion Homes Sales Pty Ltd v JKAM Investments Pty Ltd; Hotray Pty Ltd v JKAM Investments Pty Ltd* [2014] NSWSC 952 at [125], following *FTFS Holdings Pty Ltd v Business Acquisitions Australia Pty Ltd* [2006] NSWSC 846 at [23]; *Business Acquisitions Australia Pty Ltd v Renshall* [2006] NSWSC 1238 at [33]. It should not be assumed, however, that this consequence would apply universally. The particular circumstances must always be considered in considering whether, in the circumstances of the particular case the defect is one of mere form or one of substance. Where circumstances are proved to show that the defect misled a subsequent interest holder into entering into a transaction, the caveator may have difficulty in repelling a submission that it should have priority only to the extent of the particulars disclosed in its caveat and that its wider claims should be postponed in priority to the subsequent interest. Paradoxically, one can envisage circumstances where a failure to state any particulars of quantum might be safer for an equitable mortgagee or charge than giving a figure which is too low. Where the mortgage or charge is given to secure a particular debt for a sum certain as well as all other moneys due or accruing from the debtor, the prudent course will be to refer in the caveat to both the principal sum and also to the ‘all moneys’ provision. Where there is provision for interest, that also should be stated in the caveat.
- 43 It is unnecessary to state whether the estate or interest is legal or equitable: *Real Property Regulation, 2014*, Sch. 3, item 10(a); *Champion Homes Sales Pty Ltd v JKAM Investments Pty Ltd; Hotray Pty Ltd v JKAM Investments Pty Ltd* [2014] NSWSC 952 at [122]. In *Champion* at [122] it was held on this basis that the description ‘mortgage’ was a sufficient description of the estate of an equitable mortgagee. In that case also an ambiguity in the reference to the relevant instrument (which was capable of referring to either of two instruments of the same date) was said at [123]-[124] to be a formal defect which should be disregarded.
- 44 In *Manson v Della-Bosca & Anor* [2014] NSWSC 1232 at [41] it was held that the effect of Sch. 3, item 10(b) was there was no requirement to state, and therefore defect by reason any failure of the caveator to state, the quantum of his interest in a constructive trust arising out of contributions to the purchase money or the use of purchase money to which he was jointly entitled.

Effect of caveats

- 45 The statutory effect of a caveat has been described in the comment above on the first function. The further effect in terms of the interaction with equitable remedies has been described in the comment on the second function.
- 46 As has been said, a caveat (s. 74B) against a primary application prohibits, while it subsists, the Registrar General from bringing the affected land under the Real Property Act. An important difference from s. 74F caveats, is that a caveat against a primary application subsists for only 3 months unless some action is taken by the caveator within that time to extend its life: s. 74B.
- 47 Section 74F is the more familiar Caveat. The section in its current form covers a diversity of subjects. A s. 74F caveat may prohibit one or more of the following actions by the Registrar General without the consent of the Caveator:
- registration of a dealing or plan affecting the estate or interest of the caveator set out in the caveat;
 - the grant of a possessory application;
 - the registration of any delimitation plan;
 - the cancellation of the recording of an easement; or

- the extinguishment of a restrictive covenant.

The critical words in s. 74H(1)(a) are that the action is prohibited 'if it appears to the Registrar-General that' the relevant dealing, grant, plan, cancellation or extinguishment 'is prohibited by the caveat'.

- 48 In Sch. 2 in prescribed form 08X, the menu of prohibitions is generally worded in a manner to limit the prohibition to actions which affect the interest or estate claimed by the caveator. Sub-s. 74H(5) specifies a great list of actions which a Caveat will not prohibit the Registrar General from doing, 'except so far as it [the caveat] otherwise specifies'. It is therefore critically important to describe your interest or estate accurately and effectively.
- 49 Take care in selecting what you want to prohibit. Sub-section 74H(5) is well worth a look, when you are framing your caveat. Nothing will be more deflating than to lodge a caveat, only to find that the interest is defeated by some action which your caveat was not framed to prevent. Essentially, when drawing a caveat, your task is to select the appropriate ones out of the above listed five kinds of action, and then to describe your estate or interest in sufficient terms to ensure that the Registrar General will be able to recognise a dealing or other action which would be inconsistent with it and which your caveat prohibits.
- 50 Of course the prohibition will only remain while the caveat remains in force. Upon the lodgment of a dealing inconsistent with that prohibition any person who is or claims to be entitled to an estate or interest in the land may request the issue of a lapsing notice and serve it on the caveator: s. 74I. The effect of such notice is that upon proof of service of the notice and the expiry thereafter of 21 days the caveat will lapse unless an order extending the caveat is sooner obtained from the Supreme Court of New South Wales and lodged with the Registrar General: s. 74I. A registered proprietor may also request at any time, pursuant to s. 74J, a lapsing notice to issue, with the same consequences. The other way of getting rid of a caveat is by order of the Supreme Court under s. 74MA, or, of course, by voluntary withdrawal by the caveator.
- 51 If and when the caveat lapses, the prohibited dealings may then be registered.

Who may caveat?

- 52 Sections 12 and 12B of the Real Property Act, 1900 (NSW) confer powers on the Registrar General to lodge caveats.
- 53 A caveat against a primary application may be lodged by any person who claims a legal or equitable estate or interest in land that is the subject of the primary application: s. 74B(1)
- 54 A person claiming entitlement to a legal or equitable estate or interest in the land under the Real Property Act may lodge a caveat against dealings: s. 74F(1), or against possessory applications: s. 74F(3).
- 55 A registered proprietor who fears improper dealing may lodge a caveat against dealings: s. 74F(2).
- 56 A person claiming entitlement to a legal or equitable estate or interest in the land under the Real Property Act that is the subject of a delimitation plan that has been lodged may lodge a caveat against registration of that plan.

- 57 A person claiming entitlement to a legal or equitable interest in an easement, which is the subject of an application for cancellation under s. 49 of the Act, may lodge a caveat against the granting of that application.
- 58 A caveat against the granting of an application under Pt. 8A for the extinguishment of a restrictive covenant may be lodged over the servient tenement by
- A person with a registered interest or who is claiming entitlement to a legal or equitable interest in the dominant tenement, or
 - A person who is recorded in the Register as having the right to release, vary or modify the covenant, or
 - A person who is recorded in the Register as a person whose consent is required to a release, variation or modification of the covenant.

Caveatable interests

- 59 The basic principle is that an equitable interest in the land is sufficient to support a caveat against it, even if the caveator does not have a registrable instrument and even if the caveator may not be entitled to an instrument which will lead to a recording in the register. What is required is ‘an interest in respect of which equity will give specific relief against the land itself, whether this relief be by way of requiring the provision of a registrable instrument, or in some other way giving satisfaction of the interest claimed by the caveator out of land itself, for example by ordering the sale of the land and payment out of the proceeds of an amount in respect of which the caveator has a charge: *Composite Buyers Ltd v. Soong* (1995) 38 NSWLR 286 at 288F-G.
- 60 It is not sufficient that the claimant merely has a right to restrain the proprietor from dealing with the land, as in the case of the grantee of a right of first refusal: *Sahade v BP Australia Pty Ltd* [2004] NSWSC 512; or a joint venturer whose co-venturer has covenanted against dealing with land except for the purposes of the joint venture: *Redglove Projects Pty Ltd v Ngunnawal Local Aboriginal Land Council* [2004] NSWSC 880; or a mere licensee, such as a shareholder in a company title scheme. A mere negative covenant against alienation will not amount to a caveatable interest.
- 61 A mere contractual grant of a right to lodge a caveat will not amount to a caveatable interest: *Express Loans & Finance Pty Ltd v Hunter* [2004] NSWSC 142; *Redglove Projects Pty Ltd v Ngunnawal Local Aboriginal Land Council* [2004] NSWSC 880; *Belissimo v. J C L Investments Pty Ltd* [2009] NSWSC 1260 at [18]; *Sanna v Wyse and Young International Pty Ltd (No. 2)* [2015] NSWSC 581 at [27], [40], unless the terms of the particular contract sufficiently evince an intention to create a proprietary interest without which the grant would be futile: *Murphy v Wright* (1992) 5 BPR 11,734; (1992) NSW ConvR 55-652; *Troncone v Aliperti* (1994) 6 BPR 13,291; (1994) NSW ConvR 55-703. In *Murphy v. Wright* Handley JA said, “A registered proprietor cannot by contract confer a right to lodge a caveat where no caveatable interest exists.” In *Sanna* at [27] Darke J observed that an express term granting ‘a caveatable interest’ over real property was ‘too uncertain to give rise to the creation of any particular proprietary interest in the subject property’, as it ‘could relate to a variety of types of interest, and the type of interest is neither expressly identified, nor able to be discerned by implication.’ In *James Estate Wines Pty Ltd v Rabobank Australia Limited* [2015] NSWSC 712 Young A-JA pointed out that simply describing or labelling something as an ‘interest in land’, which is no more than a contractual licence, even in the very instrument conferring the right, does not change the legal character of the right from a mere contractual licence into an interest in land. In that case his Honour applied long

standing authority to hold that the interest of a share farmer under a share farming agreement was no more than a contractual licence and was not caveatable, despite an express term in the contract by which the parties attempted to agree that it was ‘an interest in land’.

- 62 In *Taleb v. National Australia Bank Ltd* [2011] NSWSC 1562; (2011) 82 NSWLR 489 at [52] Bryson AJ further discussed right to caveat clauses and said, “There have been many cases at first instance where such documents have been scrutinised and it has been decided that there is or is not an implication that it was intended to create an equitable charge. Each case is a decision on the interpretation of the particular contractual provision under consideration.” At [54] his Honour said that, “The implication must exist in reality; it cannot be spun out of no more than a reference to a caveat.” In *Express Loans & Finance Pty Ltd v Hunter* at [13] his Honour had earlier cautioned that mere permission to lodge a caveat given in a contract may operate as no more than an agreed purpose of obstructing the path of the proprietor without taking the further step of creating an estate or interest in the land. These views were reiterated by his Honour in *Taleb* at [62-63]. However, this approach does not mean that the expression of permission to lodge a caveat may never be sufficient to carry the implication of a charge. In many cases including the Court of Appeal’s decisions in *Murphy v. Wright* and *Troncone v Aliperti* such an implication was drawn where the right to lodge the caveat was been given in an instrument in which it has been possible to discern, as a matter of construction, that the right was given as security for the payment of a debt or the performance of an obligation. A recent example is *Westpac Banking Corporation* [2015] NSWSC 869. The observations of Robb J in that case at [45] that,

“Clause 22 must have been inserted in the Investor Agreement for some purpose. If that purpose was not to permit Dr Wai to create an equitable charge over the Property, if there was a default, then it had no purpose.”

may be contrasted with the possible purposes canvassed by Bryson J in *Express Loans* and *Taleb*. The course of authority establishes that the mere the availability of the ‘obstruction of the path’ purpose as a possibility will not by itself negate the necessity of an implication to the grant of a charge. If it were otherwise, the implication would generally not be drawn. But that is not the approach taken in many of the cases, including the two Court of Appeal decisions mentioned above, nor is it the approach recommended by Bryson J, who commends the particular terms of the particular instrument read as a whole as the materials which must be attended to in arriving at a correct construction. That principle of construction indeed commands universal acceptance, but it is clear that in this particular area the question of construction will often be finely balanced and there have been differences of emphasis between the judges in this area as may indeed be seen from Bryson AJ’s discussion in *Taleb* at [58]-[60] of earlier cases in which his Honour expressed disagreement with the earlier expressions of the principle to be applied to these ‘right to caveat’ clauses and expressed the view that there is no general principle that establishes what implication must be drawn in all cases from the grant of authority to lodge a caveat. The earlier cases to which his Honour referred were *Coleman v Bone* (1996) 9 BPR 16,235 at 16,239, where McLelland CJ in Eq had said:

“Where the authority to lodge a caveat is given in connection with an obligation by A to pay money to B, and there is no sufficient indication to the contrary, the implication is that the estate or interest granted is an equitable charge to secure payment to B of that money,”

and *Iaconis v Lazar* [2007] NSWSC 1103; (2007) 13 BPR 24,937 where Young CJ in Eq approved McLelland CJ in Eq’s statement of the principle.

Earlier, in *Northern Star Agriculture Pty Ltd v Morgan and Banks Developments Pty Ltd* [2007] NSWSC 98, at [57], Young CJ in Eq expressed the view that *Troncone*, “does not support the

proposition that whenever there is the grant of a right to lodge a caveat, there is automatically a grant of an equitable charge. At its highest it says that in the ordinary case, if there is nothing more, a court can presume such a grant ...” This approach was followed in *Bondi Beach Astra Retirement Village Pty Ltd v Hohman* [2010] NSWSC 260 at [118] by Ward J and in *Westpac Banking Corporation* [2015] NSWSC 869 at [44] by Robb J.

The disagreement of Bryson AJ in *Taleb* with earlier decisions was referred to by Brereton J in *Application by Commonwealth Bank of Australia* [2014] NSWSC 279 but his Honour did not need to come to a view on that subject as his Honour was able to find a clear path to construction from the terms of the instruments. One instrument granted a right to caveat in respect of what was expressed to be an ‘unsecured loan’. That did not support the implication of a charge. A second instrument granted a right to caveat in support of an appointment of the creditor as attorney with power of sale of the subject property in case of default. His Honour held that that also did not support the implication of a charge (but it may be queried whether the effect of the appointment did not amount to a power to compel sale and recoup the debt from the proceeds – and thus to a charge). A third agreement in that case conferred an express charge.

- 63 Caveats contain a provision for endorsement of the proprietor’s consent to lodgement, but the only legal effect of this is to dispense with the requirement for the Registrar General to serve notice of the caveat on the proprietor: *Taleb* at [51]. However, from an evidential point of view, such consent is well worth having as an admission where the claimed interest depends on facts which are set out in the caveat.
- 64 The lesson to be drawn from this discourse on ‘right to caveat’ clauses is that they are not a safe measure. The hazard is easily avoided by the simple expedient of words expressly granting a charge, using the word ‘charge’ and then having the instrument assessed for duty by the OSR.
- 65 The following estates, interests and equities are examples of caveatable interests:
- .1 Any registered estate or interest.
 - .2 An equitable mortgage or charge over the land.
 - .3 A fixed and floating charge over a chargor’s property where the chargor owns land.
 - .4 An easement or right of way over the land.
 - .5 A lease.
 - .6 An option to renew a lease.
 - .7 An option to purchase land.
 - .8 A purchaser’s interest under a contract to purchase land.²

²It is a matter of controversy whether this can be the case where completion of the purchase is subject to a requirement of consent by a third party, where that consent has yet to be obtained. Compare *Egan v. Ross* (1928) 29 SR(NSW) 382; *Brown v. Heffer* (1966) 116 CLR 340; *McWilliam v. McWilliam’s Wines Pty Ltd* (1964) 114 CLR 656; *Shanahan v Fitzgerald* [1982] 2 NSWLR 513 with *Jessica Holdings Pty Ltd v Anglican Church Property Trust Diocese of Sydney* (1992) 27 NSWLR 140; *Forder v. Cemcorp Pty Ltd* (2001) 51 NSWLR 486; and *Multi-Span* at [126]. In *Chief Commissioner of Stamp Duties v ISPT Pty Ltd* (1998) 45 NSWLR 639 at 654-5 Meagher JA said that no estate arises before consent. The question was adverted to, but not resolved, by the High Court in *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 77 ALJR 1853 at [56]-[57], although the discussion may contain a hint. It may be relevant to this controversy that the statute permits a caveat in respect of an interest in the land and does not have to rise to an ‘estate’. Some hint at this solution is given by occasional use in the authorities of the expression ‘an interest sufficient to

- .9 A purchaser's lien for the deposit and instalments paid prior to completion.
- .10 A vendor's lien for unpaid purchase money.
- .11 The right of a person who has become a trustee of the land (including a trustee in bankruptcy or trustees for sale) to become registered proprietor of the legal estate.
- .12 A beneficiary of a simple express trust, or resulting trust, or constructive trust.
- .13 The rights of a beneficiary of a unit trust, where the terms of the trust deed provide that the unitholders are entitled to the beneficial interest in the trust fund as an entirety, but that subject thereto no unitholder is entitled to any particular security or investment or any part thereof: *Jonsue Investments Pty Ltd v Balweb Pty Ltd* [2013] NSWSC 325.
- .14 The right of the beneficiary of a proprietary estoppel.
- .15 The right of a former proprietor to rescission of a transaction procured by misrepresentation, undue influence or other unconscionable conduct.
- .16 The equity of a claimant under the doctrine of part performance.
- .17 A constructive trust arising by reason of a proprietary estoppel: *DeLaforce v. Simpson-Cook* [2010] NSWCA 84; (2010) 78 NSWLR 483; *Naumovski v. Naumovski* [2015] NSWSC 2.

Interests which are not caveatable

66 The following claims are examples of claims which are not caveatable:

- .1 A creditor's claim to payment of an unsecured debt.
- .2 A claim for a property settlement under the *Family Law Act, 1975 (C'th)*: *Vo v. Nguyen* [2014] NSWSC 1622; *Bethian Pty Ltd v. Green* (1977) 3 Fam LR 11,579 at 11,583.
- .3 A claim for a property adjustment under the *Property Relationships Act, 1984 (NSW)*: *Vo v. Nguyen* [2014] NSWSC 1622; *Ryan v. Kalocsay* [2009] NSWSC 1009.
- .4 Mere rights of first refusal, also called rights of pre-emption
- .5 A right to receive property upon completion of the administration of a deceased's estate, where the administration is not complete.
- .6 A right to receive property under a will, where the administration of the estate is not complete.
- .7 So, also, a claim for family provision under the *Succession Act, 2006 (NSW)* or the *Family Provision Act, 1982 (NSW)* (repealed).
- .8 A mere right to be paid out of the proceeds of sale of the land. (But the superaddition of a right to compel sale converts such an interest into a charge, which is caveatable).
- .9 The rights of a discretionary object of a trust.
- .10 The rights of a mere shareholder in respect of the company's property.
- .11 The rights of a beneficiary of the unit trust where the terms of the trust deed provide that the unit holders do not have any interest in any asset comprising the trust fund: *Jonsue Investments Pty Ltd v Balweb Pty Ltd* [2013] NSWSC 325.
- .12 The contractual rights of a mere joint venturer to have a co-venturer apply property to the agreed venture.³
- .13 Estate agents' right to commission.

support a caveat' and the difficulty in defining exhaustively the concept of an 'interest'. Compare, *Jonsue Investments Pty Ltd v Balweb Pty Ltd* [2013] NSWSC 325 at [22], [43].

³Not infrequently, however, the terms of a particular joint venture agreement will provide for a venturer to, upon the happening of some defined event, acquire a specific proprietary interest in some defined property originally owned by the co-venturer. Careful analysis of the nature of the rights conferred by the particular joint venture agreement is always prudent.

- .14 The interest of a share farmer under a share farming agreement: *James Estate Wines Pty Ltd v Rabobank Australia Limited* [2015] NSWSC 712.

Estate agents' commission

- 67 A claim to commission by a real estate agent does not, without more, confer a caveatable interest in land. *A fortiori*, where there is no signed agency agreement, because in such case the agent is not even entitled to commission: *Property Stock and Business Agents Act, 1941 (NSW) (repealed)*, s. 42AA(1); *Property Stock and Business Agents Act, 2002 (NSW)*, s. 55 (note the transitional provisions in Sch. 1, clauses 14 & 18); *Investmentsource Corporation Pty Ltd v. Knox Street Apartments Pty Ltd* (2002) 56 NSWLR 27. These observations are not affected by the enactment of s. 55A, subsequent to *Investmentsource*. Section 55A confers upon courts discretionary and conditional power to give relief from the effect of s. 55, since unless and until such relief is granted, the position is as stated by s. 55.

Builders

- 68 Builders not infrequently include charging clauses in their contracts. Of course, if the liability is sterilized by reason of failure to comply with the *Home Building Act, 1989(NSW)*, there may be nothing for your builder's charging clause to secure. It should be remembered that this legislation is frequently amended. Look at the precise terms of the charging clause, and examine the effect of the particular contravention (if any) of the Act upon the builder's contractual and restitutionary claims.

Costs in relation to unwarranted caveats

- 69 In *Downie v. Kenny* [1986] ANZ Conv. 494; (1986) NSW Conv R 55-270 a plaintiff sought costs on the common fund basis against a real estate agent who lodged a caveat claiming an 'interest in land' specified as, "as selling agent for a commission of \$3600". Young J stated,

"... it must be made very clear to agents, if it was not clear before, that they cannot pressure their principals into paying disputed commissions by lodging caveats on the title where they have no interest in land."

His Honour made the order, as sought, for costs on the common fund basis. The common fund basis now having been abolished, the appropriate analogue now is the indemnity basis which is now the appropriate order in such cases.

- 70 *Downie v. Kenny* has a wider significance than mere application to estate agents. Young J's observations referred the caveat as completely unwarranted as to law, in circumstances which, 'can only have been deliberately intended to delay the settlement'. Any case of a clearly unwarranted caveat which has been used to harass the proprietor will be a proper occasion for the making of an indemnity costs order: see, *Pacific Blue Australia Pty Ltd v Somalis* [2008] NSWSC 75; *Arkbay Investments Pty Ltd (in liquidation) (receivers and managers appointed) v Tripod Funds Management Pty Ltd* [2014] NSWSC 1003; *Arkbay Investments Pty Ltd (in liquidation)(receivers and managers appointed) v Tripod Funds Management Pty Ltd (No 2)*[2015] NSWSC 330. The oppressive use of unwarranted caveats has come in for criticism by the Court in various ways on a number of occasions.

Claims under unstamped instruments

- 71 An interest or estate which would otherwise subsist under an unstamped instrument in respect of which the instrument or transaction is dutiable under the *Stamp Duties Act, 1920 (NSW)* or the *Duties Act, 1997 (NSW)* is sterilized: *Stamp Duties Act, 1920* s. 29; *Duties Act, 1997*, s. 304; *Australian Property and Management Pty Ltd v. Devefi Pty Ltd* (1997) 7 BPR 15,255; *Dent v. Moore* (1919) 26 CLR 316; *Ash Street Properties Pty Ltd v Pollnow* (1987) 9 NSWLR 80; *Reliance Financial Services Pty Ltd v Baddock* [2002] NSWSC 857 at [46]; *Bedroff Pty Ltd v Rennie* [2002] NSWSC 928 at [73]-[77]; *McKensy v Hewitt* [2004] NSWSC 636. The point was doubted on an interlocutory basis in *Weston v Metro Apartments Pty Ltd* [2002] NSWSC 682 at [20].
- 72 It follows that, there being no legal or equitable estate or interest arising, there is no caveatable interest while the default continues.
- 73 Section 211 of the *Duties Act, 1997* makes separate and different provision for mortgages, in that it does not sterilize the whole mortgage, but only limits it to the value upon which duty has been paid. It must follow that a caveatable interest can arise, to that extent, in respect of an insufficiently stamped mortgage. However an unstamped mortgage is both unenforceable: *Duties Act, 1997* s. 211; and unregistrable: *Duties Act*, s. 301; *Taleb v National Australia Bank Ltd* [2011] NSWSC 1562; 82 NSWLR 489 at [41]. A consequence of its being unregistrable is that the mortgagee is not eligible for that reason (if no other) to the benefit of s. 43A of the *Real Property Act*: *Taleb*, at [40].
- 74 Once duty is assessed and paid the instrument is deemed always to have been effectual: *Official Trustee in Bankruptcy v. D'Jamirze* (1999) 48 NSWLR 416, but so far as questions of priority are concerned, and the operation of s. 43A of the *Real Property Act*, this principle may not apply. *Taleb* would seem to be against its application in that situation. Rush off quickly and get your assessments, exemptions and deferrals from the Chief Commissioner. Don't wait until you get into Court. Don't content yourself with an undertaking to the Court to pay the duty, or you might find yourself in a test case.

Statute of frauds

- 75 A claimant who relies upon the doctrine of part performance, because of the invalidating effect of the statute of frauds upon his, her or its agreement, does not in truth sue upon the agreement. The claim is an equity founded in the conscience of the vendor and the Court gives an equitable remedy.
- 76 The attraction of this appeal to fairness should not blind one to the difficulties, often encountered, in satisfying the elements required to bring oneself within the doctrine. The Court is not there to disobey the statute of frauds.
- 77 It is therefore always worth while to hunt around for the pieces of paper which, put together, might conceivably amount to a sufficient note or memorandum in writing of the contract to bring it outside the invalidating reach of s. 54A of the *Conveyancing Act, 1919 (NSW)*. A useful starting point for the law in this area is *Tonitto v Bassal* (1992) 28 NSWLR 564.
- 78 When you are hunting around for such pieces of paper, and there is a caveat bearing signed consent by the vendor, or, if not so signed, yet referred to by the vendor in signed correspondence, consider it carefully. It might be a dog's breakfast. But it might well get you across the threshold of a 'sufficient note or memorandum', particularly if there is some other extant writing to go with it.

Lapsing notice or s. 74MA?

- 79 I have referred above to the two means of obtaining lapsing notices, i.e., applying to the Registrar General for issue of such a notice: *Real Property Act*, s. 74J; or lodging a dealing prohibited by the caveat: *Real Property Act*, s. 74I.
- 80 Proof of service is an important matter. It is effected or arranged by the applicant for the lapsing notice, who 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: ss. 74I(3), 74J(2).
- 81 An advantage of the lapsing notice procedure is that (provided the requisite proof of service is lodged within 4 weeks of issue of the notice by the Registrar General) the caveat lapses automatically upon the expiry of 21 days after service of a lapsing notice unless the caveator obtains and lodges with the Registrar General in the meantime an order of the Court extending the operation of the caveat. By this procedure, the burden of initiating Court proceedings is placed on the caveator and no doubt in many cases the caveat can be thus removed without the need for any court proceedings.
- 82 If the caveator does move for an extension of the caveat, it is a rare case in which a final order for its extension could be obtained within the 21 days. The normal course is to apply for an interlocutory extension ‘until further order’ pending trial. Such interlocutory or interim applications are dealt with on the principles applying to the grant of an interlocutory injunction. The caveator must show a serious question for trial, and must show that the balance of convenience supports the grant of the interlocutory extension and must give to the Court the usual undertaking as to damages: *C J Redman Construction Pty Ltd v. Tarnap Pty Ltd* [2005] NSWSC 1011; 12 BPR 23,395 at [3]; *Makrypodis v. Eleisawy* [2014] NSWSC 1429 at [31].
- 83 Because of the delay in obtaining the issue and service of a lapsing notice and the necessary further delay of 21 days for it to expire, it will sometimes be an insufficiently expeditious procedure from the proprietor’s point of view. The typical case is where a sale or mortgage transaction is due to complete and a caveat has been lodged at a late stage. In such contingencies, the remedy provided by s. 74MA of the *Real Property Act*, is attractive. The proprietor confronted with a late caveat blocking an imminent transaction can thus seek an order that the caveat should lapse.
- 84 Typically such application, in such a case of urgency, will be commenced in the duty list and will receive urgent attention from the Court. A s. 74MA application is a sort of reverse injunction. The principles that govern such applications were described by Campbell JA (with whom Tobias and Macfarlan JJA agreed) in *Bayblu Holdings Pty Limited v Capital Finance Australia Limited* [2011] NSWCA 39 at [20]:

“... on an application for an order to remove a caveat it is not necessary for the court to make a final determination as to the interest claimed by the caveator or a final determination as to the priority that the caveator may or may not have over competing interests. Rather, the court should enquire whether the caveator would have been granted an interlocutory injunction to protect the interests

that the caveator claimed in the caveat. If no such interlocutory injunction would have been granted the caveat should be ordered to be withdrawn.”

- 85 One other advantage of s. 74MA is that it is available to, “Any person who is or claims to be entitled to an estate or interest in the land described in a caveat ...”: s. 74MA(1), whereas the lapsing notice procedure under s. 74J can only be initiated by the registered proprietor of an interest or estate in the land. In *Matouk v. Matouk (No. 2)* [2015] NSWSC 748, Slattery J made a s. 74MA order against another caveator on the application of a plaintiff who was herself a caveator claiming to set aside a transfer that she had made to her daughter on the ground that it had been procured by fraud, undue influence and unconscionable conduct. Her son had claimed in his caveat to be the beneficiary of a declaration of trust made in his favour by the daughter.

Whether to challenge the caveat at all?

- 86 In *Pham v. Sebie* [2015] NSWSC 745 Young A-JA reminded us of the rule of *Tasker v. Small* (1837) 3 Mylne and Craig Reports 63; 40 ER 848, “that in a suit for specific performance the only parties are to be the purchaser and the vendor because it is only between them that there is privity of contract.” His Honour pointed out that it is the vendor’s duty to remove the caveats and not the purchaser’s responsibility. To the extent that his Honour said that the purchaser probably has no locus standi to have the caveat removed, his Honour may have been overlooking the terms of s. 74MA(1). Nevertheless, as his Honour observed it is for the vendor to convince the Judge hearing the suit that specific performance should not be ordered because the vendor is unable to get rid of the caveats. “Otherwise an order will be made that the vendor remove the caveats and if he or she preaches that order, then the usual order for imprisonment will be made. Alternatively, the Court will order that so much of the purchase price be withheld from the vendor as will discharge caveats ... which claim that there is some sort of secured loan against the vendor’s interest in the property” at [4].
- 87 Thus, the purchaser does not need to incur the expense and trouble of joining other caveators to a suit for specific performance, but should be astute to enquire of caveators how much is required to discharge their caveats, so that orders of the kind to which his Honour referred can be formulated if necessary.

Interlocutory extensions and retentions - the role of case management considerations

- 88 In *Makrypodis v. Eleisawy* [2014] NSWSC 1429 at [32]-[33], Lindsay J reminds us that,

“32. The guidance available from consideration of an application for an interlocutory injunction (discussed in cases such as *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57 at 68 [19] and 81-82 [65] and *Kolback Securities Limited v Epoch Mining NL* (1987) 8 NSWLR 533 at 535) must be read in the context of the Court’s statutory mandate.

33. So far as may be material, s 74K(2) of the Real Property Act provides that, on the hearing of an application for an order extending the operation of a caveat following the service of a lapsing notice, the 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 the Court, or may make such other orders as it thinks fit, but, if [the] Court is not so satisfied, it shall dismiss the application.”

34. The Court is thus, ultimately, directed to consider whether a caveator's claim "has or may have substance": *Sutherland v Vale* [2008] NSWSC 759; 14 BPR 26, 255 at [10]-[11]; *Jensen v Giugni* (1994) 6 BPR 13, 667 at 13,668-13,669; BC 9403433 at 4-5."

89 His Honour went on to observe, at [36]-[39] that the overlapping character of the serious question for trial and balance of convenience elements is particularly evident, "where, as here, an applicant contends that his, her or its ability to prove a case at trial and, in the meantime, proof of the existence of a serious question to be tried depends on the availability of an order for the production of documents" and made some important observations concerning the intrusion of case management considerations on the assessment of these matters. In particular, his Honour observed that:

"38. Upon a consideration of whether a caveator's claim "has or may have substance" within the meaning of the Real Property Act, s 74K(2), it is incumbent upon the Court to take into account the case management principles for which the Civil Procedure Act 2005 NSW, ss 56-58, provide. In the context of a particular case, that may require express consideration of what orders may be required for the just determination, and efficient disposal, of proceedings so as to advance the dictates of justice. Where there is an element of uncertainty as to a caveator's prospective entitlement to ultimate relief, the Court must consider what course is best calculated to achieve justice between the parties, in the circumstances of the particular case, pending the resolution of uncertainty, bearing in mind the consequences of any order for parties who are, or may be, affected by it.

39. It is open to the Court, in discharging the judicial function conferred on it by s 74K(2), to allow to a caveator a reasonable time within which to secure the benefit of interlocutory processes such as those governing the discovery of documents: *Rutledge v Jaluit Pty Limited* (1991) 6 BPR 13,826, 13,829-13,830; BC 9101466 at 8-10; *Jensen v Giugni* (1994) 6 BPR 13,667 at 13,668-13,669; BC 9403433 at 4-5."

The usual undertaking as to damages, security for the usual undertaking, and other undertakings.

90 If you want an interlocutory extension of caveat, you must give to the Court the usual undertaking as to damages. If you are a defendant wanting to resist (pending hearing of the suit) a peremptory order under s. 74MA, you must give to the Court the usual undertaking as to damages to avoid the making of an order immediately. You should be ready to do so at the first return.

91 If you are acting for the party seeking to get rid of the caveat and a caveator suggests to you that it is not necessary for the usual undertaking to be given because of a suggestion that s. 74P provides sufficient protection, you should roundly reject all such suggestions. As can be seen from the discussion below of the elements necessary for a successful claim under s. 74P, that provision is far from being as good a protection as the usual undertaking as to damages. One very obvious difference is that a caveator who has a wrong but honest and reasonable belief that he or she has a caveatable interest will not be liable under s. 74P. Yet in any case where an interlocutory extension of a caveat is granted it is likely that there would be such a belief, because otherwise there would not be a serious question for trial. Thus, in nearly all such cases there will be no liability under s. 74P and it is therefore essential to insist on the usual undertaking being given. Even in the unusual case where a caveator imposes on the Court a claim as if it were genuine in which it has in fact no honest belief, why should the defendant accept the onus of proof of such dishonesty – an element it would not have to establish for a claim under the usual undertaking as to damages? There is no chance of getting an interlocutory extension or of avoiding on an interim basis the making of a s. 74MA order without giving the usual undertaking as to damages. Do not agree to dispense with it.

- 92 If a caveator's means are insufficient and there are other interested persons standing behind it, it may be asked and required to provide security for the undertaking. If the caveator is impecunious and is suing for the benefit of others, or if the plaintiff has substantial assets overseas but insufficient assets within Australia to make good its undertaking as to damages, the Court may require (if the defendant so seeks) the plaintiff to give security for the undertaking as to damages, for an amount which could reasonably be apprehended to be the likely quantum of the loss which might be caused to the defendant or to a third party as a consequence of the interim extension being granted. Typical cases where a plaintiff is suing for the benefit of others are where it is a company, or a trustee, or an agent for others. These categories are not exhaustive. It is not sufficient basis for the imposition of such a condition that a plaintiff caveator, suing only for his or her own benefit, may be impecunious or of modest means. The Court does not exist only to help the rich. But a proper basis for the imposition of such a condition exists where the proverbial 'man of straw' is put up as the plaintiff behind which are sheltering interested persons who have the means to fulfil the obligations arising under the usual undertaking as to damages.
- 93 The imposition of such a condition is out of the normal course. It is for the defendant to raise the point and at least raise some evidence of circumstances that would show that such a condition is appropriate. Therefore, a defendant who wishes to seek the imposition of such a condition will give notice of it to the caveator, and will come armed with some evidence showing that the plaintiff is suing for the benefit of others and not merely for its own benefit, and also with evidence identifying at least the likely heads of loss if the caveat were extended, and with some credible information as to the potential quantum. Obviously the prediction of quantum will in many cases be an inexact science, though sometimes it can be precisely stated.
- 94 A prudent defendant will give notice of these matters to the caveator. The Court is likely to hesitate before imposing such a condition without a reasonable opportunity to the caveator to address the question. If after such opportunity the caveator fails to address it appropriately, the Court is likely to have greater confidence in reaching a conclusion that the imposition of a condition requiring security for the undertaking is warranted.
- 95 It will be prudent for a proprietor in such cases to call for the caveator to produce financial information showing that it has or has not the means to foot such a bill. Once proceedings are on foot such call should prudently be made by Notice to Produce. The amount of material called for should be appropriately targeted. No adverse inferences are likely to be drawn from failure to comply within a short time with a burdensome demand for documentary production. Conversely, a caveator's failure to comply with a modest, targeted Notice to produce such records will not be a good look. In short, to make your point stick, keep your Notice focussed. If your demand is too onerous you are really letting them off the hook.
- 96 Frequently the caveator will obfuscate, not answering the notice or not answering it fully. The choice for the proprietor is then to proceed without full compliance or to seek an adjournment. It should not be assumed that the Court will give to the proprietor some benefit of the doubt as to the caveator's means. The Court will act on the evidence and may well consider that the proprietor must live with its own forensic decisions. The prudent course will be to seek a short adjournment with a direction to the caveator to comply with the notice to produce. The price of this may well be an interim extension of the caveat for the period of the adjournment. Obviously, one must tailor one's approach to the commercial exigencies of the particular case.

- 97 In s. 74MA cases there is an additional aspect, so far as security is concerned. It is more difficult to infer that a defendant is sheltering other interested parties, since the defendant does not choose who will be parties to the suit. The plaintiff may be able to retort that the proper party is the defendant and not its shareholders or beneficiaries. However, in such cases the prudent course is for the plaintiff to give, in good time, notice of the proceedings and of its requirement for security for the defendant's undertaking as to damages, to the people who stand behind the defendant and who would naturally be expected to provide or procure the security.
- 98 Not infrequently in cases of urgency the Court will require from the plaintiff an undertaking to proceed expeditiously or to make an application for expedition. Recent examples are *Makrypodis v. Eleisawy* [2014] NSWSC 1429 and *Giovanni Antonio Dapas v Robert Connell* [2015] NSWSC 806.
- 99 In that case the defendant also, at the Court's invitation, proffered during the hearing of an application for interlocutory extension of caveats an undertaking to the effect that should the caveats be allowed to lapse (or, having been extended on an interlocutory basis pending delivery of judgment, be ordered to be withdrawn), he would provide security for the plaintiffs' damages claims (in an amount which was there computed by reference to evidence in that case as to what the plaintiff's damages in lieu of specific performance might be. In that case the caveats were protecting the interests of purchasers in respect of claims for specific contracts for the sale of land. The quantum of the undertakings was identified as the difference between the purchase prices under the relevant contracts and the amounts of purchase prices under subsequent contracts of sale entered into by the defendant. This is an example of how undertakings to meet the specific circumstances of the case can be formulated by either party to affect consideration of the balance of convenience on an interlocutory application with respect to caveats.

Extension & removal of caveats - some short points on practice and tactics.

- 100 Don't wait until the last day or penultimate day to commence your application. The Court strongly disapproves of this. It has a practice of refusing *ex parte* interlocutory extensions sought for the first time on the last or second last day of the 21 day notice period. Therefore, a prudent caveator thinks about how the case is to be fought and proved when the caveat is lodged, not at last minute after a lapsing notice has issued. (Sometimes, a Court refusing an extension on this ground will give leave under s. 74O for the lodgment of a fresh caveat, but such indulgence should not be presumed.)
- 101 If you are going to issue a lapsing notice, make sure you are ready to fight the caveator's case. The caveat will often expose the precise nature of the interest claimed very inadequately, but you can usually anticipate what the real case is going to be. Make sure you are ready to meet it, before you stir the caveator into action.
- 102 If you are for a defendant resisting an extension application, and you've got a winning point, it may be advantageous to fight it at the first return, or at least at an early stage. The caveator will be more on the back foot then than ever. The more time passes, the more opportunity the caveator will have to find better evidence, and think of a better case, or just obfuscate and expose your client to the burden of costs. But to fight at the first return, you must be ready and be flexible.
- 103 There is another side of this. The Court's scrutiny of caveats at the interlocutory stage is often driven by an urgent situation. If the defendant does not treat the matter as urgent, a natural reaction is to leave

it to be sorted out at trial. Of course, it is not appropriate for an unarguably bad caveat to remain pending trial, but the enthusiasm for resolving such a point may be diminished when the defendant itself is dilatory. Practically, the more time passes, and the more times the caveat is extended for a limited period, the more appropriate it will seem that the Court should extend it until further order. If you want to oppose interlocutory extension, don't wait too long.

104 It is very important to recognise right at the start what is and is not a caveatable interest. If the claim is arguably caveatable, and if the caveator's conduct has not been unreasonable, it's just a waste of time and money for a defendant to resist an interlocutory extension, unless there is some issue on the balance of convenience which strongly militates against extending the caveat until trial, or some problem with the sufficiency of the usual undertaking as to damages. For example, the position may be difficult for a caveator where third party rights have intervened as a result of the caveator's delay, or where the damage that will be caused to the proprietor or others by continuation of the caveat would be very substantial, or where the proprietor proffers alternative and adequate security for the caveator's claim. In *Booy v. Peters* [2014] NSWSC 1858 an interlocutory extension was refused where the caveators delayed in lodging a caveat, after ample notice that their claim would not be honoured, until the day on which the proprietor contracted to sell the property to a third party. In that case, the Court was also influenced by the proprietor's proffer of an alternate fund as security, and by the weakness of the claim for final relief in respect of the property itself (as distinct from compensation).

105 Another class of case where an extension will normally be refused is where the caveator's claim ranks behind another secured creditor who is proceeding with a sale, or where the proprietor is proceeding with a proper sale. In such cases the appropriate regime is an injunction to restrain dealing with the proceeds of sale surplus to the requirements of the prior ranking creditors, and further, such control would be limited by the amount, or a reasonable estimate of the value, of the caveator's claim.

106 If you want an order under s. 74MA you must prove service or obtain an order under s. 74MA(2) dispensing with service. Likewise, for the extension of a caveat, the Court must be satisfied that the all interested parties disclosed under the lapsing notice, or (in case of a caveat against a primary application) the primary applicant, have been served with the application, unless it is prepared to make an order dispensing with service: ss. 74D(3), 74K(3). The order dispensing with service will only be made under unusual and urgent circumstances. I recall such a case where settlement of a sale was imminent, a harassing caveat from a concreter had recently been removed under a very recent s. 74MA order and a further caveat had been subsequently been lodged by another company, which unknown to the proprietor, and which despite reasonable enquiries could not be located at the address given for it in the caveat or otherwise, in circumstances where it was likely that the new company was connected with the principals of the previous caveator and its introduction was likely to be a vexatious device to defeat the effect of s. 74O and the previous order under s. 74MA. The duty Judge in that situation allowed the Summons to be filed in Court, dispensed with the requirement of service and made an order under s. 74MA for the new caveat to be withdrawn by a time which was about two hours hence.

107 If you are seeking an order under s. 74MA make sure that it limits a time for the defendant's compliance. The effect of sub-s.74MA(3) is that the caveat will lapse if a withdrawal of the caveat is not lodged within the time limited by the order. If the order does not limit a time, sub-s (3) will not operate and you will have to make another application to force compliance. Sub-s. 74MA(3) is very useful and convenient. Pay attention to its terms.

108 If you are opposing a s. 74MA application don't come to Court without proper instructions as to the basis of your client's caveat and don't come without being ready to offer some proof, at least at an

interlocutory level. The onus will be on you to justify the caveat. If there is a sale about to be settled, you might find that you don't get a second chance.

109 The Court retains a discretion to refuse to extend a caveat. It will not extend a caveat if a person with a prior ranking interest is effecting a sale. The best that you will then get is an order that any surplus proceeds of the sale be paid into Court or a controlled account until further order while you conduct your case against the proprietor.

110 The Court takes a dim view of oppressive and unwarranted use of caveats. If your caveat required leave under s. 74O and was put on without leave, don't be surprised if the Court's assistance is reluctant or not forthcoming at all.

Successive caveats claiming the same interest

111 Section 74O of the *Real Property Act* provides that if a caveat in respect of any particular estate or interest in land or any particular right arising out of a restrictive covenant lapses, or is withdrawn after application is made for preparation of a lapsing notice, or is withdrawn or lapses under section 74MA, a further caveat lodged by same caveator in respect of the same estate, interest or right and purporting to be based on the same facts as the first caveat has no effect unless at the time of lodgement it is accompanied by an order of the Supreme Court giving leave for the lodgment of the further caveat, or the further caveat is endorsed with the consent of the registered proprietor, primary applicant or possessory applicant, as the case may be. The addition of an immaterial further item of particulars will not avoid this consequence: *Sanna v. Wyse and Young International Pty Ltd (No. 2)* [2015] NSWSC 581 at [20]; *Taylor v. Commonwealth Development Bank of Australia* (1991) 11 BPR 21,033.

Liability under s. 74P of the Real Property Act, 1900 (NSW)

112 Section 74P exposes caveators who, without reasonable cause, lodge a caveat or, when requested to withdraw it, refuse or fail to withdraw it, to liability to pay compensation to any person who suffers loss that is attributable to such act, refusal or failure. The section also exposes to a corresponding liability persons who without reasonable cause procure the lapsing of a caveat.

113 Compensation is recoverable in any Court of competent jurisdiction. The Supreme Court is not keen on hearing small 74P claims tacked on to the end of a s. 74MA case. You might suffer a costs disadvantage. It's better practice to start the s. 74P case as a separate action in the District Court or Local Court.

114 Section 74P has of course been the subject of a discrete area of discourse. Complication is introduced into an understanding of the authorities by the fact that the current formula, 'without reasonable cause' was settled in s.74P(1) by the *Real Property Amendment Act, 1996*. The effect of the transitional provisions in the Real Property Act, 1900, Sch.3, Pt. 3, item 5 is that that formula applies from an effective date of 1 February, 1997. Previously, the formula was 'wrongfully and without reasonable cause', that being the law from 1988 to 1 February, 1997. The word 'wrongfully' came in with s. 74P in 1988. Prior to that time, s. 98 applied and did not include the word 'wrongfully'. 'Wrongfully and without reasonable cause' was considered in *Beca Developments Pty Ltd v. Idameneo (No. 92) Pty Ltd* (1990) 21 NSWLR 459, a decision of the Court of Appeal which was in turn interpreted by McLelland J in *Dykstra v. Dykstra* (1991) 22 NSWLR 556 at 558. The removal of 'wrongfully' means that some

of the cases have to be treated with care. The effect of the amendment commencing in 1997 was to remove the element of an intention to cause harm.

115 ‘Without reasonable cause’ means without an honest belief based on reasonable grounds that the caveator has a caveatable interest: *Beca Developments Pty Ltd v. Idameneo (No. 92) Pty Ltd* (1990) 21 NSWLR 459 at 469-470, 474 per Clarke JA; *Bedford Properties Pty Ltd v. Surgo Pty Ltd* [1981] 1 NSWLR 106; *Lee v. Ross* (2003) 11 BPR 20,991; (2004) NSW ConvR 56-067; [2003] NSWSC 507 at [21]; *Truefilm Pty Ltd v JR Investment Holdings Pty Ltd* (2004) NSW ConvR 56-096; [2004] NSWSC 372. It is not sufficient to establish liability that there was in fact no caveatable interest. However, in considering what may constitute a reasonable belief it is instructive to record the observations of Wootton J in *Bedford Properties* at 109 as to how such a belief is formed. His Honour there said:

"The drastic nature of the power is relevant in considering what is "reasonable cause" for its use, just as the dangerous character of a thing is relevant to deciding what is reasonable care in handling it. Before exercising such a power, a person can reasonably be expected to get proper advice, and be reasonably sure of his ground. If he does not, he may find that he has acted at his peril. This is all the more so when he knows, as Mr Richards knew, and indeed intended, that his action will prevent an important transaction involving a large sum of money."

116 On the subject of ulterior purposes his Honour made some observations earlier, at 108. In *Arkby Investments Pty Ltd (in liquidation) (receivers and managers appointed) v Tripod Funds Management Pty Ltd* [2014] NSWSC 1003 at [17] Robb J, explained Wootton J’s observations as meaning,

“that an honest belief on the part of the caveator based on reasonable grounds may not be sufficient to provide a reasonable cause for lodging or maintaining a caveat, if the caveat is lodged "not for the protection of his interest but for an ulterior motive and without regard to its effect on transactions to which the caveator had agreed." ”

This passage thus draws attention to a difference between ‘reasonable cause’ as a broader concept than ‘reasonable grounds’. No doubt there is some overlap here also with the honesty requirement.

117 The plaintiff bears the onus of proof. The elements now are that:

- 1 The defendant lodges a caveat, or being the caveator refuses or fails to withdraw such a caveat after being requested to do so.
- 2 (a) The defendant at that time had no honest belief, based on reasonable grounds, that a caveatable interest exists, or
 - (b) if the such belief existed, the defendant nonetheless lodged or maintained the caveat not for the protection of the caveator’s interest but for some ulterior motive without regard to its effect on transactions to which the caveator had agreed.
- 3 The plaintiff sustains pecuniary loss.
- 4 That pecuniary loss is attributable to the act, refusal or failure of the defendant, mentioned above.

118 The liability is to ‘pay ... compensation with respect to that loss.’

119 These principles were applied by Palmer J in *Lee v. Ross (No. 2)* [2003] NSWSC 507. In that case, his Honour upheld a claim for compensation in respect of interest payments made by the proprietor which would have been avoided but for the existence of the caveat.

120 At [25], Palmer J rejected a submission that honest belief is to be understood in a purely subjective sense and said that one must consider:

- .1 Actual belief; and
- .2 Whether the actual belief is honestly held,

and said that the latter question ‘will often overlap the examination of the objective element of the test, namely whether the caveator’s belief is held on reasonable grounds.’ *Lee v Ross* was followed by Gzell J in *Truefilm Pty Ltd v JR Investment Holdings Pty Ltd* (2004) NSW ConvR 56-096; [2004] NSWSC 372 and by Robb J in *Arkbay Investments Pty Ltd (in liquidation) (receivers and managers appointed) v Tripod Funds Management Pty Ltd* [2014] NSWSC 1003.

121 Thus, in assessing whether a belief is honestly held, one does not disregard a want of reasonable grounds to support it. Where a caveat is lodged without any reasonable foundation, in terms of the description of a caveatable interest, and no other explanation is proffered as to a belief by the caveator in the existence of a caveatable interest, the nature of that interest and some basis, however wrongheaded, upon which the caveator believed it to be a caveatable interest, the inference will be available that the caveator did not honestly believe that it had a caveatable interest, and such inference will be hard to resist. This is one of those situations where, although the plaintiff has a legal onus of proof, the defendant has an evidential burden to raise an issue as to a fact. A defendant’s failure to go into evidence on the fact and basis for his, her or its own belief in the existence of a caveatable interest and reason for maintaining the caveat, where the objective material suggests that there was not a reasonable basis for belief that there was a caveatable claim and that there was justification for maintaining it, will allow inferences the more readily to be drawn that no such honest and reasonable belief was held. Further, it will allow inferences to be more confidently drawn from such other evidence as is available as to what the defendant’s real belief and its basis might have been.

122 In *Lee v. Ross* at [40], Palmer J distinguished the words ‘attributable to’ in s. 74P(1) from common law concepts of causation and loss. His Honour said,

“In my view, a practical common sense approach to the identification of compensable loss ‘attributable’ to the wrongful lodgement of a caveat is what is required under s. 74P(1).”

123 At [39]-[42] his Honour rejected a submission that the caveator must know of or foresee the loss suffered by the plaintiff.

124 At [54], his Honour allowed interest pursuant to s. 94 of the *Supreme Court Act, 1970*.

125 Section 74P also permits a caveator whose caveat is lapsed to recover compensation for pecuniary loss that is attributable to the act of procuring the caveat to lapse, against any person who without reasonable cause procured the lapsing of the caveat, provided that if the caveator had an opportunity to prevent the caveat from lapsing, he or she did not fail to take all reasonable steps to prevent it from lapsing. It is obvious that this provision will apply where the caveator has not been

served with the lapsing notice and the party issuing it has falsely or wrongly procured the lapsing by misleading the Registrar General with falsely or negligently by wrongly prepared evidence of service. However, the terms of the section are clearly also capable of applying to the case where the caveator *has* been served, but has through no fault of his or her own been unable to apply for or obtain an order extending the caveat. In such a case the element 'without reasonable cause' would become quite central. I am not aware of any authority dealing with its meaning in the case of *procuring the lapsing* of a caveat. One can envisage in that situation some scope for debate about what could be capable of constituting reasonable cause for procuring a caveat to lapse. Obviously, there will be some requirement of an absence of honest belief in the existence of any reasonable justification for procuring the caveat to lapse. I should think it must apply to the case of a proprietor who correctly believes that the caveator has a just claim and has no reasonable basis for objecting to the continuation of the caveat but decides nonetheless to get rid of it in order to facilitate a transaction to defeat the acknowledged rights of the caveator, knowing that the caveator is not in a position to get an extension within the notice period. How far further this remedy might go and to what other or lesser circumstances it might be capable of applying would require further thought.

Dangers of acting for proprietors and caveators at the same time.

126 It is most imprudent for the solicitor for the proprietor to act for the caveator, to sign the caveat as caveator's solicitor, or to specify that solicitor's address as the address for service of notices on the caveator. This is what one solicitor did in a case in which I was involved in the ensuing litigation. The solicitor, who usually acted for the proprietor, was held to have a retainer from the caveator, an unregistered second mortgagor, (whilst still acting for the proprietor). He had failed to turn his mind to his duties to the caveator and signally failed to protect the caveator, who suffered loss, when the property was sold by the registered first mortgagee. The solicitor was held liable in negligence for the moneys advanced by the caveator, with interest and costs.

127 If approached by a proprietor client and intending caveator, warn the caveator at the outset, orally and in writing that you are not acting for him and cannot advise him. If no such warning is given, you will probably be held to have a retainer from them both, by merely tacit arrangement: *Pegrum v. Fatharly* (1996) 14 WAR 92.

128 You will then incur to the caveator duties of the kind owed by a solicitor for a mortgagee or guarantor, which include duties to make proper enquiries as to the safety of the security and to see to it that the caveator is acquainted with sufficient facts and materials to form his own judgment as to the value of the security: *Polkinghorne v. Holland* (1934) 51 CLR 143. That, of course, will place you in a position of intolerable conflict with your duties to your other client, the proprietor. For anyone who thinks that a solicitor's duty in such case does not extend to advice on the financial aspects of such a transaction *Polkinghorne v. Holland* makes cautionary reading.

129 If the caveator is taking second ranking security without valuation and making an advance to the proprietor, his situation may be analogous with that of a guarantor and you may come under the duties of a guarantor's solicitor, to advise on all matters relating to the transaction, including the wisdom of entering into it, from a practical point of view: *Irvine v Shaw* [1992] ANZ Conv R 85. You will have to take instructions on his financial situation and ensure that he understands the practical consequences should the security prove insufficient.

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Part 2

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Part 2 Dealings and caveats

4 Lodgment of dealings and caveats

- (1) A dealing or caveat that is intended to be lodged at the office of the Registrar-General must:
 - (a) be lodged in the manner approved by the Registrar-General, and
 - (b) be accompanied by the relevant fee set out in Schedule 1.
- (2) Despite subclause (1) (b), if a dealing or caveat is to be lodged electronically, the relevant fee set out in Schedule 1 must be paid in accordance with the participation agreement (within the meaning of the *Electronic Conveyancing National Law (NSW)*) under which the lodgment is authorised.

5 Certain instruments in paper form to comply with Schedule 2 requirements

Each of the following instruments must comply with the requirements set out in Schedule 2 if the instrument is intended to be lodged at the office of the Registrar-General in paper form:

- (a) an application or dealing that is required by the Act or any other Act to be in an approved form,
- (b) a caveat referred to in section 74B or 74F of the Act,
- (c) a declaration of trust (or a duplicate or an attested copy) lodged in accordance with section 82 of the Act.

6 Joint tenancy or tenancy in common to be stated

- (1) The following applications and dealings must state whether the persons concerned take as joint tenants or as tenants in common and, if they take as tenants in common, the shares in which they take:
 - (a) an application by 2 or more persons to be registered as proprietors of land,
 - (b) a transfer, mortgage, charge or lease in favour of 2 or more persons.
- (2) If the persons take as tenants in common, and if the shares in which they take are expressed as fractions, the shares must be stated by means of fractions having a common denominator and each numerator or denominator of the fraction must be an integer (for example: "A takes as to five-tenths, B takes as to three-tenths and C takes as to two-tenths").

7 Caveats: particulars of estate or interest claimed

The following caveats must specify the particulars set out in Schedule 3 in relation to the estate or interest to which a caveator claims to be entitled:

- (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.

8 Caveats applying to part of land only: description of part

- (1) This clause applies to 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 that relates to part only of the land described in a folio of the Register or a current lease must describe the part in accordance with the requirements of Schedule 4.

9 Annexure of plans to dealings or caveats

- (1) A plan must not be annexed to a dealing or caveat lodged in the office of the Registrar-General unless the Registrar-General so approves.
- (2) A plan that is annexed to a dealing (other than a lease of premises) or caveat must comply with the requirements of Schedule 5.
- (3) A plan that is annexed to a lease of premises must comply with the requirements of Schedule 6.
- (4) Unless the Registrar-General otherwise approves, a lease of premises for a term of more than 25 years must show the leased premises in a plan annexed to the lease that complies with Schedule 6.

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Schedule 3

Schedule 3 Particulars of estate or interest to be specified in caveats

(Clause 7)

- 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 items 4 and 5), or
 - (c) how the estate or interest claimed ranks in priority with other estates and interests in the land.