

Issues when drafting caveats and seeking their removal

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Overview

- The statutory scheme
- When to lodge a caveat
 - Identifying when you have (and don't have) a caveatable interest
 - What to do if you don't have a caveatable interest
 - Consequences of not lodging a caveat
- Drafting considerations for caveats
- Removal of caveats from title
- Practical considerations for plaintiffs and defendants in caveat proceedings

The statutory scheme

- Statutory scheme is set out in Part 7A, *Real Property Act 1900*
- Right to lodge a caveat against dealings is conferred by s. 74F(1):
Any person who, by virtue of any unregistered dealing or by devolution of law or otherwise, claims to be entitled to a legal or equitable estate or interest in land under the provisions of this Act may lodge with the Registrar-General a caveat prohibiting the recording of any dealing affecting the estate or interest to which the person claims to be entitled.
- While a caveat remains in force, the Registrar-General cannot record in the Register any dealings prohibited by the caveat, but only to the extent that the recording would affect the interest claimed in the caveat: s. 74H
- A caveat does not enlarge or add to the rights that the caveator otherwise would have to the interest claimed.

The statutory scheme (2)

- Three methods by which a caveat may be removed:
 - Lapsing notice when a dealing is lodged: s. 74I
 - Lapsing notice without dealing being lodged: s. 74J
 - Application to the Supreme Court: s. 74MA
- Once a caveat has lapsed or been withdrawn under s. 74MA, any further caveat lodged with the Registrar-General in respect of the same estate, interest or right, and based on the same facts has no effect: s. 74O
 - Two exceptions:
 - Where leave is obtained from the Supreme Court
 - Second caveat is lodged with the consent of the affected person

When to lodge a caveat

Identifying the 'caveatable interest'

- Critical question is whether the caveator has an interest in the land, or whether the right is merely personal or contractual
- Common mistakes
 - Claim under the Family Law Act or Succession Act is not a caveatable interest: *Quek v Beggs* (1990) 5 BPR 11,761; *Ryan v Kalocsay* [2009] NSWSC 1009
 - A 'mere equity' is not a caveatable interest: *Global Minerals Australia Pty Ltd v Valerica Pty Ltd* (2000) 10 BPR 18,463
 - A contractual right to lodge a caveat is only sometimes a caveatable interest: *Surfers Paradise Coaches (Qld) Pty Ltd v Tsu Chan Lin* [2007] NSWSC 475
 - An agreement not to lodge a caveat does not deprive that person of the statutory right to lodge a caveat (but it will be a breach of contract): *Australian Property and Management Pty Ltd v Devefi* (1997) 7 BPR 15,255
- Consider stamp duty implications

Effect of failure to lodge a caveat

- A person who holds an unregistered interest is not required to lodge a caveat to preserve the priority of their interest: *J & H Just (Holdings) v Bank of New South Wales* (1971) 125 CLR 546
- A failure to lodge a caveat is a factor that a court considers in determining whether it is inequitable for a prior equitable interest to retain priority: *Heid v Reliance Finance* (1983) 154 CLR 326

What to do if you don't have a caveatable interest

- It is not unusual for a party to lodge a caveat for some collateral purpose when it does not have a caveatable interest
 - Cost consequences
 - Compensation potentially payable under s. 74P
 - Requirement to commence substantive proceedings to 'vindicate' the interest
- Alternative options
 - Injunction
 - Freezing order
 - Security for Costs

Drafting considerations

- Section 74F(5) sets out the formal requirements for a caveat and requires, among other things, that the “prescribed particulars of the legal or equitable estate or interest” be specified.
- Schedule 3 of the *Real Property Regulation 2008* sets out the information that must be provided:
 - Particulars of the nature of the estate or interest in the land
 - Facts on which the claim is founded
 - Identifies specific information required for different interests
- Conflict with s. 74L, which provides:

If in any legal proceedings a question arises as to the validity of a caveat lodged under a provision of this Part, the court shall disregard any failure of the caveator to comply strictly with the requirements of this Part, and of any regulations made for the purposes of this Part, with respect to the form of the caveat.
- Section 74L merely excuses defects of form. The failure to specify the nature of the interest in a fundamental way (eg. merely referring to an ‘equitable interest’) is more than a defect of form: *Hanson Construction Materials Pty Ltd v Vimwise Civil Engineering Pty Limited* [2005] NSWSC 880; *Circuit Finance P/L v Crown & Gleeson Securities P/L* [2005] NSWSC 997

Example 1:

- An elderly parent gives money to a child to construct a flat on the child's property to allow the parent to move in with the child. The parent's interest is not recorded on the title. The child tells the parent that he is going to sell the property and retain all the proceeds.
- Not sufficient to state "equitable interest" or "beneficial interest"
- Consider the following:
 - Under the heading 'Nature of the estate or interest in the above mentioned land' - *Beneficial interest in the land held by the registered proprietor on constructive trust for the caveator in a share proportionate to the caveator's contribution to the acquisition of the land.*
 - Under the heading 'By virtue of the facts stated below' - *Pursuant to a joint endeavour between the registered proprietor and the caveator, the caveator made financial contributions in the sum of approximately \$200,000 to the acquisition of the land.*

Example 2:

- Your client is the caveator. A lapsing notice has not been served, and proceedings under s. 74MA have not been commenced. The caveat specifies “equitable interest”.
- Consider withdrawing the caveat and lodging a new one (not prohibited by s. 74O).
- A note of caution - a plaintiff may ask the court to grant an injunction against filing the further caveat: *Verebes v Verebes* (1995) 7 BPR 14,408.

Example 3:

- Your client is the caveator. An application under s. 74MA has been made to remove the caveat.
- The caveat specifies “equitable interest”.
- Available options:
 - Approach the other side and offer to withdraw the caveat on the basis that they consent to your client lodging a fresh caveat which adequately describes the interest in the land.
 - If proceedings have been commenced, file a Notice of Motion seeking leave under s. 74O to lodge a fresh caveat.

Removal of caveats from title

- A person has two options if they wish to remove a caveat from title:
- Serve a lapsing notice under ss. 74I or 74J
 - Advantage is that the onus is on caveator to approach the court to seek an extension
 - Disadvantage is that the caveat will not be removed for 21 days (at a minimum)
- Seek a court order for removal of the caveat under s. 74MA
 - Advantage is that the caveat may be removed quickly
 - Disadvantage is that the registered proprietor must first approach the court (although the onus of demonstrating the caveatable interest is still on the caveator)
 - Procedural issues:
 - Application is made by way of summons
 - No need for a separate notice of motion to abridge the time for service
 - Affidavit annexing (at a minimum) a title search, copy of the caveat, and other relevant interests in the land (eg. registered mortgage)
 - If the matter is urgent, explain the urgency

Removal of caveats from title (2)

- Where a lapsing notice is served, the caveator may seek an order extending the operation of the caveat under s. 74K
- Section 74K(2) provides:
 - ... *on the hearing of an application made under subsection (1), the Supreme Court may, if satisfied that the caveator's claim has or may have substance, make an order extending the operation of the caveat concerned for such period as is specified in the order or until the further order of that Court, or may make such other orders as it thinks fit, but, if that Court is not so satisfied, it shall dismiss the application.*
- Procedural issues:
 - Application is made by way of summons – the application should seek interlocutory relief (extension of the caveat) and final relief (eg. declaration that the interest claimed exists). A summons that only claims an order extending the operation of a caveat until further order is defective: *Wu v Dardaneliotou* [2008] NSWSC 1319
 - No need for a separate notice of motion to abridge the time for service
 - Affidavit setting out information that establishes the interest claimed in the caveat
 - Get instructions to give an undertaking as to damages

Removal of caveats from title (3)

- Whether the application is under s. 74MA or s. 74K, the onus is on the caveator to demonstrate an entitlement to restrain the registered proprietor from dealing with the land pending substantive trial of the caveator's claim. This involves two questions:
 - Whether there is a serious question to be tried; and
 - If so, whether the balance of convenience favours the extension of the caveat
- Balance of convenience question:
 - Usually favours the caveator, but some exceptions include:
 - where there is a superior interest that 'overrides' the claimed interest: *Dunecar Pty Ltd (in liq) v Colbron* [2001] NSWSC 1181
 - Where a caveator has been offered, but has declined, an adequate substitute security: *Marinkovic v Pat McGrath Engineering Pty Ltd* [2004] NSWSC 571 at [56]
 - Where the caveator is otherwise adequately protected (such as in the terms of sale)

Questions?

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