

# E-Conveyancing and Caveats<sup>1</sup>

## Introduction

Lodging a caveat is not a trivial act to be undertaken lightly. It has immediate legal effect and can have significant commercial and financial consequences. Caveats act as an injunction preventing the registration of dealings. This means that when filing a caveat the client must be ready, if necessary, to demonstrate to the Court that there is a serious question to be tried that the interest in land which is asserted in the caveat exists. Legal practitioners and licensed conveyancers who advise on, prepare and certify caveats that are lodged electronically have an important role to ensure that obviously unmeritorious caveats are not lodged.

This speech will first outline the new e-Conveyancing regime implemented in New South Wales and what it means for both legal and conveyancing practitioners. Under the new electronic system, both legal practitioners and conveyancers are empowered to certify numerous Registry Instruments, including caveats, and I propose to outline the various certification requirements specified in the legislation and the relevant rules.

I will then speak specifically on the issue of caveats and provide a brief outline on caveatable interests. I will conclude this presentation by discussing the standard the Court expects of practitioners and the Court's approach to practitioners who do not observe the certification requirements as set out in the relevant rules and legislation. As I am sure you are all aware, I delivered a judgment earlier this year when I was sitting as Duty Judge regarding a conveyancer who certified a caveat without making any inquiries to ascertain whether or not there was a caveatable interest. I will outline what the Court expects of legal and conveyancing practitioners following the introduction of e-Conveyancing, and what could happen should those expectations not be met.

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<sup>1</sup> A paper delivered by the Hon Justice François Kunc, a judge of the Supreme Court of NSW, on 9 November 2019 at St Anthony's Primary School for the Toongabbie Legal Centre's e-Conveyancing and its Fundamentals conference. I gratefully acknowledge the assistance of my tipstaff, Mr Charles Light BA LLB (Hons) (ANU) in the research and early drafting of this paper. All errors are my own.

## **e-Conveyancing – the new frontier**

In February 2017, the New South Wales Government announced a suite of new electronic conveyancing reforms. These changes were brought into effect by the *Electronic Conveyancing (Adoption of National Law) Act*, bringing New South Wales into line with the National Conveyancing Laws. At the time the announcement was made, a timetable was released to mandate the use of electronic conveyancing by solicitors and conveyancing practitioners by July 2019 for standard property transactions. By that time, all paper certificates of title were also to have been phased out and replaced with “e-Titles”, also known as “CoRD” (control of the right to deal).<sup>2</sup>

By 1 July 2018, all mortgages and discharge of mortgages, caveats and withdrawal of caveats were to be lodged using an Electronic Lodgment Network, and by 1 July 2019, that requirement of electronic lodgment also extended to all transfers.

While the introduction e-Conveyancing brings conveyancing practices into the modern era, it also adds an additional level of complexity to the conveyancing industry. The conveyancing industry in New South Wales is heavily regulated, including, but not limited to, the following pieces of legislation and regulations: the *Conveyancing Act 1919* (NSW), the *Conveyancing (General) Regulation 2018* (NSW), the *Real Property Act 1900* (NSW), the *Real Property Regulation 2014* (NSW), the *Electronic Conveyancing National Law* (NSW), the *NSW Participation Rules for Electronic Conveyancing* which are made pursuant to s 23 of the *Electronic Conveyancing National Law*, and the *Conveyancing Rules* which are made pursuant to s 12E of the *Real Property Act*,

Pursuant to schedule 3 of the *NSW Participation Rules for Electronic Conveyancing*, version 5, which was created under s 23 of the *Electronic Conveyancing National Law*, the following Registry Instruments can be certified by a certifier and filed with NSW Land Registry Services, with a certifier being defined as a subscriber providing certifications as set out in the Participation Rules:

- Caveats;

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<sup>2</sup> Media Release issued on 28 February 2017, the Minister for Finance, Services and Property.

- Withdrawal of caveats;
- Transfers;
- Mortgages;
- Discharge of mortgages;
- Transmission applications; and
- Refinancing documents.

Of these Registry Instruments, the most common relate to mortgages, transfers and caveats.

The rules require a certifier to take reasonable steps to verify to the best of the knowledge of that certifier the following things at a minimum:

1. The identity of the person seeking to have the document certified;<sup>3</sup>
2. That the certifier holds a properly completed Client Authorisation for the Conveyancing Transaction;<sup>4</sup>
3. That the certifier has retained evidence supporting the document being certified. Any evidence supporting the Conveyancing Transaction must be retained for at least seven years from the date of lodgment;<sup>5</sup> and
4. The document being certified is correct and compliant with the relevant legislation.<sup>6</sup> In ensuring the Registry Instrument is compliant with the relevant legislation, the standard the Court expects is that of a prudent conveyancing practitioner.<sup>7</sup>

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<sup>3</sup> Sch 3, clause 1, *NSW Participation Rules for Electronic Conveyancing*, version 5.

<sup>4</sup> *Ibid*, clause 2.

<sup>5</sup> *Ibid*, clause 3.

<sup>6</sup> *Ibid*, clause 4.

<sup>7</sup> Australian Registrars National Electronic Conveyancing Council "Model Participation Rules Guidance Note" version 5, updated February 2019, 7.

As I noted in my judgment on this matter, making a declaration “to the best of the knowledge” of the certifier implies that the certifier has taken appropriate steps to satisfy himself or herself, through inquiry, of the matters certified, so as to make the statements reliable and meaningful. If the certifier has not taken such steps, the certification is misleading.<sup>8</sup>

The certification process is important for numerous reasons. Certifications of Registry Instruments give other parties to a transaction greater confidence that the rules, as defined in the Participation Rules, have been complied with and the Registry Instrument is correct. Certifications also provide a representation by the certifier to the Registrar and the Court that the Registry Instrument which has been lodged complies with the relevant legislation, the Participation Rules and any other specific requirements. The certifier is responsible for ensuring all requirements relating to the certification are met. As such, if the requirements for the certification cannot be met, then the Conveyancing Transaction proposed should not proceed and the certification should not be made.

Certifications are required any time a Registry Instrument is digitally signed. When giving a certification, the certifier must ensure that it can demonstrate compliance with the certification requirements. The introduction of e-Conveyancing increases the power of solicitors and conveyancers in lodging Registry Instruments, and subsequently increases the reliance the Court has on solicitors and conveyancers to use that power only after proper consideration.

As New South Wales’ conveyancing system moves to a completely electronic platform, the role of conveyancers, solicitors and other persons qualified to prepare and lodge Registry Instruments becomes all the more important. Ordinary members of the public are no longer able to lodge Registry Instruments without the intervention of a subscriber, who will in most cases be a solicitor or a licensed conveyancer. Caveat extension applications are among the most common dealt with in the Equity Division Duty List and Real Property List, and one consequence of these changes is

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<sup>8</sup> I adopted, by analogy, a test set out in *Australian Securities and Investments Commission v Vines* [2005] NSWSC 738; (2005) 55 ACSR 617.

likely to be that we see fewer applications brought by people who lodged caveats without any professional advice.

The requirement to give the requisite representations and certifications operates to confer on solicitors and conveyancers the role of guardian at the gate. The legislative and regulatory scheme which I have outlined assumes that the person making the various representations and certifications in an electronically lodged Registry Instrument has the requisite degree of knowledge and has approached their task with appropriate diligence. The Court and the community expect nothing less.

### **Caveats - What is a caveatable interest?**

A caveat can only be lodged to protect a proprietary interest in Torrens title land. Pursuant to s 74F(1) of the *Real Property Act 1900* (NSW), this interest must be “a legal or equitable estate or interest in land.”

Common examples of caveatable interests may include, but are not limited to,

- The interest of a purchaser under a contract for the sale of land;<sup>9</sup>
- The interest of a mortgagee, whether legal or equitable;<sup>10</sup>
- The interest of someone claiming an easement over a piece of land;<sup>11</sup>
- The interest of a chargee;<sup>12</sup>
- The interest of a unit holder in a unit trust;<sup>13</sup>
- The interest of a landowner with the benefit of a restrictive covenant burdening the subject land;<sup>14</sup>

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<sup>9</sup> *Re Wadham* (1879) 13 SALR 70 at 78.

<sup>10</sup> *Re Victorian Farmers' Loan and Agency Co Ltd* (1898) 22 VLR 629.

<sup>11</sup> *Re Paul* (1902) 19 WN (NSW) 114.

<sup>12</sup> *Griffith v Hodge* (1979) 2 BPR 9474.

<sup>13</sup> *Costa & Duppe Properties Pty Ltd v Duppe* [1986] VR 90.

<sup>14</sup> *Midland Brick Co Pty Ltd v Welsh* (2006) 32 WAR 287.

- The interest of a lessee under a lease, or an agreement for a lease,<sup>15</sup> and
- The interest of a person arising from contributions made to the purchase price of a property.<sup>16</sup>

The caveatable interest must be an interest in land; a caveat cannot be lodged to protect a contractual or personal right, or a statutorily-based right that does not confer an interest in land.<sup>17</sup> Similarly, a caveat cannot be lodged to protect what is a claim to exercise a cause of action.<sup>18</sup> For example, an interest under the *Family Law Act* or the *Property (Relationships) Act* is not a caveatable interest.

When lodging a caveat, the caveatable interest must exist at the time the caveat is lodged, meaning a caveat cannot be lodged for an interest which will arise in the future, such as a future family provision claim.<sup>19</sup> Similarly, a caveat cannot be lodged to protect an interest that is barred by the statute of limitations, because that statute not only bars enforcement of the interest but extinguishes it entirely.<sup>20</sup> Additionally, a caveat cannot be lodged to protect a mere equity, which falls short of an equitable interest,<sup>21</sup> but a caveat can be lodged to protect an equity,<sup>22</sup> and also where the right claimed is, in the circumstances, elevated by statute into an interest in land.

In addition to what I have just outlined, other interests which are not capable of being protected by a caveat include:

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<sup>15</sup> *Antar v Fairchild Development Pty Ltd* [2008] NSWSC 638.

<sup>16</sup> *Morling v Morling* (1992) 16 Fam LR 161.

<sup>17</sup> *Linden v Wigg* (1968) 88 WN (pt 1) (NSW) 109 at 115.

<sup>18</sup> *Ex parte Goodlet & Smith Investments Pty Ltd* [1983] 2 Qd R 792.

<sup>19</sup> *Martin v Official Trustee in Bankruptcy* [1990] Tas R 64 at 69.

<sup>20</sup> *Verebes v Verebes* (1995) 7 BPR 14,408 at 14,411.

<sup>21</sup> *Re Pile's Caveats* [1981] Qd R 81.

<sup>22</sup> *Re McKean's Caveat* [1988] 1 Qd R 524 at 525.

- A person who only has an interest in the proceeds of the sale of land, unless they also have the right to compel the sale,<sup>23</sup> and
- A residuary beneficiary under a will does not have an interest in the land until administration of the estate is complete.<sup>24</sup>

Section 74F(5) of the Act outlines the requirements for a caveat to be lodged. In addition to being in “the approved form”, a caveat must specify “the prescribed particulars” of the interest the caveator claims. Explicitly specifying the prescribed particulars is required so the registered proprietor may know the claim that they need to meet, and the Registrar-General may determine if a dealing lodged for registration is inconsistent with the interest claimed by the caveator.

In years gone by, strict adherence to the formal requirements of a caveat was required to effectively lodge a caveat. Had a caveat not met all the formal requirements, it would have been rendered defective. Since then, s 74L of the Act has come into operation, which now requires the Court to disregard a caveator’s failure to comply strictly with the requirements of Part 7A and the regulations concerning the form of the caveat. Even if there has been a failure to specify a caveatable interest, so long as there was a caveatable interest, the caveat may still be effective. Despite the introduction of s 74L, the regulations under the *Real Property Act*<sup>25</sup> impose specific requirements for lodging a caveat and if the failure to comply with the formal requirements is so far removed that the Court cannot disregard the non-compliance, then the Court will treat the caveat as being invalid.

Should a caveat be lodged over a property “without reasonable cause”, s 74P(1)(a) provides that the person who lodged the caveat is liable to pay compensation to any person sustaining a pecuniary loss “attributable to” the caveat. Prior to 1996, the legislation used to be narrower, requiring compensation to be payable upon someone lodging a caveat when the lodgement was “wrongfully and without reasonable cause.” This requirement has since been amended to only require there

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<sup>23</sup> *Davies v Uratoriu* (1995) 6 BPR 13,917.

<sup>24</sup> *Commissioner of Stamp Duties (QLD) v Livingston* [1965] AC 694.

<sup>25</sup> Clause 7 of Sch 3 to the *Real Property Regulation 2014* (NSW).

to be no reasonable cause. The broadening of the legislation reflects the legislature's view of the serious nature of lodging a caveat and the impact it can have when done improperly. It is worth noting that "without reasonable cause" does not simply mean lodging a caveat without a caveatable interest, and should someone lodge a caveat without a caveatable interest, that does not necessarily mean they did so "without reasonable cause." The test which the Court applies is "whether the caveator had an honest belief, based on reasonable grounds" that they had a caveatable interest when lodging the caveat.<sup>26</sup> There may be a question whether that test needs to be reconsidered in light of the certification requirements that now apply to the e-lodgement of caveats.

While compensation is available to for a party who has had a caveat improperly lodged against their property; that compensation can only go so far to compensate a registered proprietor for adverse consequences of a caveat that should never have been filed in the first place. The community also suffers when unmeritorious caveats are lodged because the Court's time is taken up dealing with an issue which should not have arisen instead of other pressing, more legitimate claims.

### **Practitioners who have not meet the certification requirements**

So far I have outlined the new e-Conveyancing rules relating to certifications more broadly, and briefly dealt with some of the basics in relation to caveats. I now want to discuss the intersection of the two in a case which came before me earlier this year when I was sitting in the Duty List about a conveyancer who failed to properly certify a caveat, and lodged the caveat anyway.<sup>27</sup> I will quickly outline the facts of the case and the way it was subsequently dealt with by the Court.

A vendor entered into a contract for the sale of a property. Two weeks before that contract was set to settle, a caveat was lodged over the property by the vendor's wife's company. At the time the caveat was lodged, the vendor and his wife were in the process of separating. The alleged interest in the land according to the caveat was listed as merely being an "agreement". No further details were provided of the interest in the land.

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<sup>26</sup> *Beca Developments Pty Ltd v Idameneo (No 92) Pty Ltd* (1990) NSWLR 459 at 469-470.

<sup>27</sup> *Guirgis v JEA Developments Pty Limited* [2019] NSWSC 164.



The vendor's solicitor made enquiries of the caveator as to what the agreement, as specified in the caveat, referred. No information was provided to the vendor's solicitor to explain what the agreement related to. The matter came before me urgently to remove the caveat before the contract was due to settle.

At the hearing, the vendor's wife conceded that there was no written loan agreement between the company and the vendor. She further conceded that there was no agreement where the vendor had given the company a mortgage, charge or any other interest in the property. The caveat was lodged as a tactic for the purposes of negotiation in the lead up to a Family Court hearing. I readily acknowledge that while at times it can be difficult to ascertain whether or not a caveatable interest exists, this was not such a case. There was very clearly no interest at all in the land when the caveat was lodged.

I subsequently questioned the vendor's wife about who certified the caveat and what inquiries were made by the certifier. I was informed the certifier had been a conveyancer and the conveyancer had failed to make any inquiries as to the terms of the loan agreement, such as when the agreement was entered into or even as to whether the alleged agreement was oral or in writing. It was apparent that the caveat was deficient in at least five respects by reference to the requirements I have set out earlier in these remarks. Those deficiencies were:

1. The facts on which the claim was based, including most importantly, whether the alleged agreement was oral or written and when it was said to have been entered into were not included;
2. There was no statement of the amount of the debt or its nature pursuant to the agreement;
3. For the certifier to be able to state that "to the best of the knowledge of the" conveyancer the caveator had a good and valid claim to the estate or interest claimed requires more than a casual or incomplete inquiry. There was a complete failure to take proper steps, or indeed any steps, to ascertain whether or not the defendant had a good and valid claim to the estate or interest claimed in the caveat;

4. The first certification that the conveyancer had taken reasonable steps to ensure that the caveat was “correct and compliant with relevant legislation and any Prescribed Requirement” could not have been correct; and
5. The second certification was also completely misleading because the conveyancer had not retained any evidence.

Because of those deficiencies, I concluded that the conveyancer had lodged the caveat for the defendant with either a reckless disregard for the conveyancer’s obligations or the conveyancer had failed to meet the standard of care to be expected of a reasonably competent conveyancer certifying a caveat.

I ordered that the caveat be removed and made a direction that the conveyancer appear before me to explain why the matter should not be referred to NSW Fair Trading, the applicable oversight body for conveyancers, to determine whether or not disciplinary action should be taken against them.

When the conveyancer appeared before me, they candidly acknowledged that they had never lodged a caveat before and only did so due to the supposed urgency of the situation. Upon questioning, the conveyancer conceded that even if there was an agreement for a lender to advance funds to a borrower, without more that agreement did not give the lender an interest in the borrower’s land. The conveyancer informed me that they had enrolled in an appropriate course in relation to the electronic lodging of caveats and would be attending that course within the next 12 months.

In the circumstances of that case, given especially the conveyancer’s candid admission of failure, their apology and their undertaking to complete further relevant education, I decided it was not necessary to refer the conveyancer for further action. However, the Court has a role to ensure the integrity of the operation of the laws relating to conveyancing to which the Court must give effect. Where it appears to the Court to be necessary, and after affording the person concerned procedural fairness, I see no reason why the Court should not draw matters such as the case I just outlined to the attention of the appropriate oversight authority for it to take such actions as it thinks fit. The moral of the story is that the new certification obligations must be taken seriously by legal and conveyancing practitioners.