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Caveats Against Dealings under the Real Property Act 1900

CAVEATS AGAINST DEALINGS UNDER THE REAL PROPERTY ACT 1900
Justice John Bryson 29 March 2003 (revised)

I am not going to give a complete or well-connected account of the law about caveats. I am going to express some discontents which I feel, as it would be as well that you know that I am not happy about the subject.

There is a lot to be learnt from carefully reading through
(1) Part 7A of the Real Property Act 1900, and
(2) The standard printed caveat form with all the notes printed in it.

The primary operation of a caveat against dealings is stated in s.74H. While a caveat remains in force the Registrar must not, except with the written consent of the caveator record in the register any dealing prohibited by the caveat. What a caveat can be based on is indicated by subs.74F – "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 … ."

A caveat operates in some ways like an injunction; but it operates more powerfully than an injunction; it prevents the transfer of title to a registered interest. The legislative purpose is to provide means to keep the title in its present state while disputes or claims about unregistered interests are fought out.

Another result achieved by a caveat is that it notifies anyone who makes a search of the register and finds the caveat that there is a claim to the interest stated in the caveat. More than that, it gives constructive notice of the claim to anyone who, if he behaved reasonably in his own interests, should search the title. So a caveat can operate in a way which could be called Provisional Registration of the unregistered interest. It is not a legislative purpose expressed in Torrens legislation that a caveat should operate in this way; this operation is a consequence of Courts of Equity absorbing the caveat system into their thinking, particularly their thinking about the influence of notice and constructive notice on equitable interests, and on resolving the competition between equitable interests. It is not only the caveats that actually are lodged and what could have been found out from searching them that enter into a decision about competing equitable interests: not lodging a caveat when there is an opportunity to do so may have an adverse effect on a claim to priority of one equitable interest over another if not lodging the caveat led a person who searched the register and would have found the caveat and learnt what was in it if there had been one, acted to his detriment in some way in which he would not have acted if he had known of the interest claimed. The place of lodging or not lodging a caveat in competitions of priorities of equitable interests is not a subject with which the Torrens legislation expressly deals, except in incidental ways.

The original objects of Torrens legislation included pushing all disputes about equitable interests and other registered interests away from registered title and into the courts, to be fought over by the parties and decided in a forum where outstanding equitable interests do not affect the certainty of title registration. In this scheme of things, caveats are not the permanent or long-term answer to anything. They hold the status quo and give the person claiming an interest an opportunity to establish the interest he claims. The conduct of caveators in litigation seems to show that many caveators and their legal advisors have a different view of a caveat; instead of seeing a caveat as a first step in a course of events directed to establishing whether or not the interest claimed in the caveat really exists, and establishing it in the only realistic way by bringing proceedings in the court, caveators sometimes seem to see themselves as in a position to create an obstruction, and to achieve their ends by holding on firmly until they are removed. This kind of behaviour is something which the caveat mechanism enables people to engage in; but it is not an approach which the courts admire, or endorse. A caveat is not, in the view of the judge, an opportunity to create maximum inconvenience and difficulty with the object of getting paid to withdraw it. A sense that there is leverage and that the trouble being created is much greater than protection of the claim requires is adverse to obtaining a favourable decision.

At one time in the distant past the only course by which a caveat could be removed by a process which started with a lapsing notice was initiated by lodging for registration a dealing, registration of which the caveat forbad. As a purchaser was unlikely to pay his money and take a transfer while he still had to go through that process, the process was not used very often. You can still do this: s.74I. The means of

removing a caveat in the absence of a competing dealing, and the only means, was to apply to the court for an order for its removal. To one like me who did conveyancing work under this former system and later practised at the Bar under it, the present system under s.74J in which there can be a lapsing notice even without a competing dealing is a very considerable law reform. The registered proprietor does not have to proceed in this way: he can apply to the Court straight away: see s.74MA. The time when the registered proprietor needs to establish whether or not there is anything in the claim in a caveat is before he enters into a contract to sell his property, not after, so he initiates the lapsing procedure. Then the Registrar-General sends a notice to the caveator. The caveator has 21 days to apply to the Court for an extension of a caveat; otherwise it will lapse: see subs. 74J(2). You have to do everything before lapse, including persuading the Judge to make the order, taking out the order and lodging an office copy with the Registrar-General.

It is here that the strange stories which try the patience of the judiciary really begin. Surprisingly often counsel initiating an application to extend the caveat tell me that their client does not know exactly when the notice of lapse was received. How a person receiving a notice of such importance could restrain himself from immediately writing a note on the notice recording the date on which he got it, and signing the note, is beyond my understanding. I have to believe although I cannot comprehend that there are people in the world who do not make such notes, because it happens so often. Of all the things that you should have when you apply for an extension of the time available for you to do something, you should certainly equip yourself with an understanding and a clear story about how much time already is available to do it.

Another story that judges are recurringly told is that there was some delay in actually finding out about the lapsing notice because the address to which the notice was sent was an address with which the caveator does not have a particularly close connection. Service and the address for service on the caveator are dealt with in s.74N. In a similar way I do not understand why a person who is making a serious claim, and impeding the rights of another person who owns some property, would not think through the effectiveness of the arrangements made for him to hear about a challenge. The address of the house where one used to live, or of an accountant one used to retain, or of a solicitor who is dead is not a good thing to quote when you yourself have an interest in hearing and finding out that your claim is under challenge. There are variations on these, such as misstating the address, giving the address of one solicitor but losing contact with the solicitor, and the stories can go on; the Judge is not very impressed with any of them as the difficulty has to be weighed against the difficulty for the registered proprietor created by the caveat.

But the crown of all the troubles is making the application at or near the end of the available period. It is very rare for an application to extend a caveat to be made promptly. When 21 days are available, making the application by day 18 is, as applications go, spectacular. To me this does not reflect an adequate sense or understanding of the importance of one's own claim, or of the difficulty it has imposed on the registered proprietor. An attempt to keep one's caveat and one's claim alive is something to which, it seems to me in the abstract, a caveator would attend with alacrity if he sincerely believed in the claim. That is not what usually happens. When someone initiates an application to extend the caveat I usually hear a lame tale of inattention and a poor explanation of the passage of time. I do not want to know that the caveator was in Monte Carlo; if you go overseas you should leave someone in charge of your affairs. I do not want to know that the caveator's favourite solicitor was in Monte Carlo; there is another good solicitor next door; see him, and see him straight away. If you are going to use up any of the limited time available to you, use it purposefully and efficiently to try to arrange matters with the registered proprietor, and if at all possible, settle your dispute; but do not neglect to make a timely application to the court. The unfortunate suspicion you wish to avoid creating is that you are pursuing Fabian strategy and delaying progress, and that obstructing the registered proprietor is part of your object. It is easy to give this impression.

Hanging over all caveat applications, although not always articulated, is the question: "If you think you have a good claim, why have you not sued to establish it, and when and how are you going to?" A caveator should come forward with a concrete answer to the question before anyone has time to ask it. Debating the caveat and not the interest claimed looks like exploiting the process, and so does not clearly stating what the claim is and suing to establish it with alacrity.

What then is a timely application? There is little use in making an application on the last available day before the caveat lapses, or on the day before that. There is a statutory requirement to give notice to the registered proprietor before you make the application. See s.74K and dwell on subs.(3):
(3) Unless the Supreme Court has made an order dispensing with service, it may not hear an application made under subsection (1) unless it is satisfied that all interested parties disclosed by the notice which gave rise to the application have been served with copies of the application before the hearing.

The court cannot waive or ignore this. The court can dispense with service of the notice, but that cannot be done simply to overcome a difficulty created by the caveator's inattention. Dispensing with service is a measure taken where actual service of notice is for some practical reason impossible, or is being evaded. The fact that you have not made proper use of the time available to give notice and bring your application is not a reason why you should get an extension of caveat without giving notice. "All interested parties" could include some mortgagees, or other persons with registered interests, as well as the registered proprietor.

The consequences of not getting an extension, or of allowing a caveat to lapse, are serious because you cannot just lodge another one unless you get the leave of the Court. If you do the Registrar-General will treat it as of no effect. See s.74O.

So if your caveat is really important, you must respond with alacrity to a notice of lapse. You must think straight away about affidavits, counsel and court. Don't hesitate, litigate! Of course, if your caveat is not really important, but was just a pawn in some manoeuvre, you do not need to bother.

There was a marked shift in the Court's response to belated applications in *Wonderland Business Park v. Hartford Lane* [2001] NSWSC 86. The caveator received the lapsing notice on 2 February 2001 and applied ex parte on 23 February 2001 for extension of the caveat. No explanation at all was given on affidavit for not making the application in due time. There was no opportunity of course to issue and serve the Summons, even on short notice, before the Court decided whether to extend the caveat. So the plaintiff did not get an extension, and was left to try what it could do by way of applying, at the return of the Summons, four days later, for an injunction, or for leave to lodge further caveat. In the mean time however the existing caveat lapsed and the registered proprietor was left deliciously free to deal with its own property, not a situation about which the court would feel much concern.

At about the same time, on 22 February 2001 in *Discount Corporation v. Ireland* [2001] NSWSC 81 a lapsing notice was served on 1 February, the application was made ex parte on 21 February, and the Judge was not prepared to make an ex parte extension.

The word should have gone around quickly. A note about this appeared in the April 2001 issue of the Australian Law Journal, 75 ALJ 226; and from the judicial point of view that should have been the end of last minute applications. However it has not been. On 27 April 2001 in *Malouf v. O'Donohoe* [2001] NSWSC 335 Young CJ in Eq took the forbearing course of allowing the caveat to lapse without extension, but giving leave, ex parte, to lodge an identical caveat on condition that it was to be withdrawn on the return day unless the court extended the period. This should have been understood to be an unusual indulgence in the early days of the spread of professional advertence to the implications of s.74K, but it has not been. When I sat as Duty Judge for two weeks in March 2003 there were several applications for extension of caveat, made ex parte and on the last or second last available day, without any real attention being given to the need to give notice of the application. These did not get a sympathetic hearing, although they got varying outcomes, and some achieved modest success in various forms, depending on what evidence they had to show about the strength of the underlying claim.

I would like to spread an understanding, based on published judgments, that the judicial mood is that the Equity Bench does not find late applications interesting, and is not disposed to be helpful. A real claim of justice supported by strong and clear evidence of a prima facie claim to an interest in the land may get some concession, such as leave to lodge another caveat for a few days; but the sands are running out.

I turn to talk about what a caveat can do. A caveat can claim an interest in land; see s.74F. There are a number of permutations in s.74F, but at the centre is a requirement that a caveat claim an interest in land. As you should know, King Charles made a very good law which said that an interest in land has to be put in writing. If a caveat has any real claim on attention it will refer to an instrument in writing; the printed form says that it should. The judge will ask: where is the instrument? Where is the stamp? A caveat is not a good vehicle for advancing some claim which is not distinctly established by a written instrument, but is beyond the shadowy boundary between equitable interests in land and mere equities such as claims to set aside transactions on the ground of undue influence, mistake, claims for rectification, and other claims which are not so much a claims that an equitable interest already exists as claims that, if a Court of Equity looks at some complex facts, it ought to decide that the plaintiff should be given an interest. What you need to advance a claim like that is not a caveat; you need to commence your proceedings straight away, without delay, claim what you want to claim and apply for an interlocutory injunction to restrain dealings. In effect a caveat operates as an interlocutory injunction

which the caveator grants to himself. In fact it has more powerful operation than an injunction, because it even prevents a transfer of title by registration by a registered proprietor who is prepared to disobey an injunction. If a caveat is to be extended the court considers much the same matters as fall to be considered on a claim for an interlocutory injunction. The strength of the plaintiff's prima facie case and the balance of convenience are prominent subjects for consideration. Another subject for consideration is the protection given to the registered proprietor for any loss caused by maintaining the caveat if it should turn out that the registered proprietor should not have been impeded in that way. Caveators and those who represent them do not seem to have much perception of the risk of paying damages under s.74P if a caveat is maintained. This risk ought to be borne in mind when engaging in some manoeuvre of which a caveat is part. It may well have some influence on the decision of a judge on an application to extend a caveat; just as the Judge will consider whether an interlocutory injunction can be supported by an undertaking as to damages, and whether if the damage happens the undertaking is likely to be complied with, the Judge may well consider how much reality there is in the protection available to the registered proprietor. This is a proper subject for counsel for the registered proprietor to bring under consideration; if the caveator has no money and no prospect of paying any damages, the Judge will not necessarily refuse protection for that reason; but it is something that the Judge ought to know.

The Court looks at the substance of the claim. The whole caveat process is procedural and ancillary. The main conflict is somewhere else – not in whether or not a caveat can be maintained, but in whether or not the interest claimed actually exists and should be enforced. If there is an elaborate dispute about the caveat the Court will develop a sense that the controversy has gone off the rails.

In former days the claims made in caveats were examined with some technicality, but that is no longer appropriate having regard to s.74L. It is still appropriate however to address the substance of the plaintiff's claim. This not only goes to what is in the document which creates the alleged interest in land; the Judge is also interested in the value of the plaintiff's claim, and in the impact of the caveat on the registered proprietor's interest. At this point I will say how amazing it is what people will agree to give charges over their land for. People sign agreements with builders which have the effect of giving the builder a charge over the land on which the property is being built for any claim which the builder might ever make; sometimes they give the builder a charge over all land owned by the building owner. I do not understand what can be in the minds of people who agree to retain mortgage brokers and sign a document giving the mortgage broker a charge over all their property; but they do. In *Narui Gold Coast Pty Ltd v. Charles Harrison Pty Ltd* [2003] NSWSC 35 the vendor had agreed in a contract of sale to this: "35.1 The Vendor hereby agrees to grant the Purchaser a charge over real property of which it is registered proprietor to secure the Purchaser's rights to any indemnity or indemnities which the Purchaser has or becomes entitled to under this contract." This appears to give, immediately, a charge over all land whatever of which the vendor was registered proprietor, whether or not any right to an indemnity had accrued. In any event, the caveat had to be maintained because an argument to that effect had substance. This proves, I would think, that people will sign anything. A written document creating a perfectly good, unarguable charge over a huge amount of land will not necessarily lead the Judge to allow a caveat to continue over the whole of the property. The Judge is interested in how much the claim realistically is, and will consider limiting the land restricted to enough money to secure it; or requiring the caveator to accept a charge over a fund of money paid into court or held by solicitors, instead of any charge over land. You can expect to find some sensitivity against excessive use of caveats as more than security but as measures of coercion.

A curious development has been that people have begun to give written agreements not so much as an agreement to create an interest in land, such as a charge or other security interest, but an agreement that some other person may lodge a caveat. I believe that this is what is known in Logic as a Pure Referent. What is wrong with this is that an agreement allowing a caveat to be lodged is not one of the things for which s.74F authorises a caveat to be lodged. There are variations of this; an agreement in clear words to grant a charge or other interests accompanied by an agreement that a caveat may be lodged is not hard to understand, but if the only thing dealt with is the agreement to lodge a caveat, the caveator depends on finding some implication that there was an intention to create a caveatable interest in land. There have been variations; in some cases the registered proprietor has actually signed the caveat, not always in an appropriate place. A series of cases about odd situations like these begins with *Troncone v. Aliperti* (1994) 6BPR 13291. A recent example was *Thu Ha Nguyen v. Larry Quock Huy On* [2003] NSWSC 50 (17 February 2003). The emergence of this approach expresses an attitude in which a caveat is an end in itself and a security, not a means of enforcing some other right. I do not think that a human mind could invent the idea of security consisting only of an agreement that a caveat may be lodged, unless it had already formed patterns of thought around the use of caveats for obstruction and pressure, rather than ancillary to establishing rights.

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