

Seminar at Cranston McEachern Lawyers

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# Caveats on Land Titles

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*Uses and Abuses*

*Presenter: The Honourable Matt Foley*

*Barrister-at-law*

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While all reasonable care has been taken by the author in presenting this publication, the content, statements and issues raised in this paper are by way of general observation as to the law in a summary form and does not seek to address all legal issues comprehensively and does not constitute advice by the author in relation to any particular circumstances which may either directly or indirectly relate to the issues of law addressed in this paper.

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# About the Presenter

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The presenter at this seminar will be The Honourable Matt Foley. Matt is a practising Brisbane barrister admitted in 1983. He is also admitted to the High Court of New Zealand.

He served as Attorney-General of Queensland in 1995-96 in the Goss government and again from 1998 to 2001 in the Beattie government. He introduced Queensland's first legislation to provide for the property rights of de facto couples (*Property Law Amendment Act 1999*) and the landmark *Guardianship and Administration Act 2000* to enhance access to justice for persons with a decision-making incapacity.

He has appeared in a number of leading cases including *Hoch v R* (1988) 165 CLR 292 (High Court - similar fact evidence), *Aldridge v Booth* (1988) 80 ALR 1 (Federal Court - sexual harassment), *Allen's Asphalt P/L v. SPM Group P/L* [2010] 1 Qd R 202 (Queensland Court of Appeal - caveat) and *Gill v New Zealand Home Bonds Limited* [2014] NZCA 506 (NZ Court of Appeal - contract for financing of sale of land).

Matt is also Adjunct Professor of Social Work at the University of Queensland.

# Seminar Outline

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Introduction – What is the Purpose of a Caveat?

The Effect of Lodging a Caveat on a Land Title

The Formal Requirements of a Caveat

What is a Caveatable Interest?

Registered Owner

Lapsing of a Caveat

Court's Power to Remove a Caveat

Law Reform

Concluding comments – Questions and Review

# What is the Purpose of a Caveat?

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The term “Caveat” derives from the Latin word meaning “beware”. Most lawyers are familiar with the Latin maxim “*caveat emptor*” (let the buyer beware).

A caveat on a land title is much more than a mere warning to a buyer to beware. It is a statutory injunction preventing registration of any instrument affecting the land in question.

It should not be confused with a caveat against a grant of probate in relation to a deceased estate. This is an entirely different creature. Such a caveat is governed by *Uniform Civil Procedure Rules*, Chapter 15 (Probate and Administration) particularly Part 7 (Rules 623 to 628).

The purpose of a Caveat was discussed by Mason CJ, Dawson and McHugh JJ in the High Court case of *Leros Pty Ltd v Terara Pty Ltd*<sup>1</sup>:

*“The purpose of a Caveat, as stated earlier, is to operate as an injunction against registration of an inconsistent dealing otherwise than in accordance with the Caveat so as to enable, in the ultimate analysis, a determination of the conflicting claims.”*

Their Honours had said earlier<sup>2</sup> that:

*“That is because the purpose of a Caveat against dealings is to operate as an injunction to the Registrar-General to prevent registration of dealings forbidden by the Caveat until notice is given to the Caveator so that he or she has an opportunity to oppose such registration.”*

Caveats play a vital role in the Torrens system of title by allowing the opportunity for unregistered, equitable interests to be considered by the courts while retaining the certainty of registered title. In the High Court case of *Breskvar v Wall* (1971) 126 CLR 376, at 381, Barwick CJ classically observed that “the Torrens system ... is not a system of registration of title but a system of title by registration”.

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<sup>1</sup> (1992) 174 CLR 407 at [422].

<sup>2</sup> (1992) 174 CLR 407 at [419].

# Effect of Lodging a Caveat on a Land Title

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The lodging of a caveat on a land title has drastic effects. It is a statutory injunction which “prevents registration of an instrument affecting the lot over which the caveat is lodged from the date and time endorsed by the Registrar on the caveat as the caveat’s date and time of lodgement” pursuant to Section 124 of the *Land Title Act 1994*:

## **“LAND TITLE ACT 1994 - SECT 124**

### *124 Effect of lodging caveat*

- (1) *A caveat prevents registration of an instrument affecting the lot over which the caveat is lodged from the date and time endorsed by the registrar on the caveat as the caveat's date and time of lodgement.*
- (1A) *Subsection (1) has effect for a caveat until the caveat lapses or is cancelled, rejected, removed or withdrawn.*
- (2) *However, lodgement of a caveat does not prevent registration of the following—*
  - (a) *an instrument specified in the caveat as an instrument to which the caveat does not apply;*
  - (b) *an instrument if the caveator consents to its registration;*
  - (c) *an instrument executed by a mortgagee whose interest was registered before lodgement of the caveat if—*
    - (i) *the mortgagee has power under the mortgage to execute the instrument; and*
    - (ii) *the caveator claims an interest in the lot as security for the payment of money or money's worth;*
  - (d) *an instrument of transfer of mortgage executed by a mortgagee whose interest was registered before lodgement of the caveat;*
  - (e) *another interest that, if registered, will not affect the interest claimed by the caveator.*
- (3) *The exceptions mentioned in subsection (2)(c) and (d) do not apply to a caveat lodged by the registrar.*
- (4) *The exception in subsection (2)(d) does not apply to a caveat lodged by the registered owner.*

- (5) *Lodgement of a caveat does not create in the caveator a registrable interest in the lot affected by the caveat.”*

Under the Torrens system of land title registration in Queensland a caveat is a most powerful instrument. It should be remembered, however, that a caveat is not, of itself an interest in land. Section 124(5) makes it clear that the lodgement of a caveat does not create in the caveator a registrable interest in the lot affected by the caveat.

# Formal Requirements of a Caveat

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The formal requirements of a caveat are as set out in Form 11 of the Queensland Land Registry and derive from Section 121 of the *Land Title Act* 1994:

## **“LAND TITLE ACT 1994 - SECT 121**

### *121 Requirements of caveats*

- (1) *A caveat must be signed by or for the caveator.*
- (2) *The caveat must state—*
  - (a) *the name of the caveator; and*
  - (b) *an address where documents can be served on the caveator; and*
  - (c) *unless the registrar dispenses with it, the name and address of—*
    - (i) *the registered owner of the lot affected by the caveat; and*
    - (ii) *anyone else having the right to deal with the lot affected by the caveat; and*
  - (d) *the registered interest affected by the caveat; and*
  - (e) *if the caveat relates to only a part of a lot--a description of the affected part; and*
  - (f) *the interest claimed by the caveator; and*
  - (g) *the grounds on which the interest is claimed.*
- (3) *This section applies to all caveats under this Act other than a caveat prepared and registered by the registrar under section 17.”*

Pursuant to Section 122(1) of the *Land Title Act* 1994 a caveat may be lodged by:

- a person claiming an interest in a lot;
- the Registrar;
- a registered owner of the lot;
- a person to whom an Australian Court has ordered that an interest in a lot be transferred;



- a person who has the benefit of a subsisting Order of an Australian Court in restraining a registered proprietor from dealing with a lot (e.g. the Child Support Agency in the case of a person with a substantial sum of unpaid child support).

Further provision is made for the lodging of a caveat in the following circumstances:

- by a person objecting to an application for adverse possession (s 104 of the *Land Title Act 1994*);
- pursuant to an order of the Supreme Court when a person applies for an order that another person be registered as proprietor of a lot (s 114 of the *Land Title Act 1994*);
- by a purchaser under an instalment contract (s 74 of the *Property Law Act 1974*); and
- an interest holder in the water allocation who has given Notice under Section 101(1)(b) of the *Water Act 2000*.

An equitable mortgagee may lodge a caveat but it will be a lapsing caveat to which Section 126 applies.

It should be further noted that there are further circumstances in which the lodging of a Caveat is permitted:

- by a person objecting to an application for adverse possession (Section 104 of the *Land Title Act 1994*);
- when a person applies to the Supreme Court for an Order that another person be registered as proprietor of a lot (Section 114 of the *Land Title Act 1994*); and
- by a purchaser under an instalment contract (Section 74 of the *Property Law Act 1974*).

# What is a Caveatable Interest?

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What is the nature of the interest of “a person claiming an interest in a lot” pursuant to Section 122(1)(a) of the *Land Title Act 1994*?

The term “*interest*” is not defined in the *Land Title Act 1994* which does however contain a dictionary in Schedule 2 which includes definitions of Caveator and Caveatee.

The term “*interest*” is defined at Section 36 of the *Acts Interpretation Act 1954*:

*“interest, in relation to land or other property, means—*

- (a) a legal or equitable estate in the land or other property; or*
- (b) a right, power or privilege over, or in relation to, the land or other property.”*

Many cases have come before the Courts for consideration of whether or not the caveator has a caveatable interest<sup>3</sup>. It would be convenient to give some examples where Courts have found a caveatable interest:

- the interest of purchaser under a contract of sale of an estate in fee simple<sup>4</sup>
- Similarly, a purchaser under a contract of sale of a water allocation or a lesser estate would have a caveatable interest. In such a case however, it is more likely that a settlement notice will be lodged which has similar effect to a caveat pursuant to Section 141 of the *Land Title Act 1994*:

## **“LAND TITLE ACT 1994 - SECT 141**

### *141 Effect of settlement notice*

- (1) The deposit of a settlement notice prevents registration of an instrument affecting the lot or an interest in the lot until the notice lapses or is withdrawn, removed or cancelled.*
- (2) However, a settlement notice does not prevent registration of—*
  - (a) an instrument specified in the settlement notice as an instrument to which the notice does not apply; or*

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<sup>3</sup> For a detailed discussion of such cases see Stephen Colbran and Sheryl Jackson “Caveats” FT Land and Tax 1996.

<sup>4</sup> *Re Oiltool Sales Pty Ltd: Classified pre-mixed concrete Pty Ltd* [1996] QWN 11.

- (b) *an instrument if the transferee consents to its registration; or*
- (c) *an instrument of transfer of mortgage executed by a mortgagee whose interest was registered before lodgement of the notice; or*
- (d) *another interest that, if registered, will not affect the interest the subject of the notice; or*
- (e) *an instrument lodged before the notice.”*

- The interest of an unregistered mortgagee of an estate in fee simple is a caveatable interest but such an equitable mortgagee can only lodge a lapsing caveat under Section 122 of the *Land Title Act 1994*.
- The interest of a beneficiary of a constructive, resulting or implied trust. (It should be noted however that this does not arise merely from an application for a property adjustment order under the *Family Law Act 1975*. Legal practitioners may wish to consider whether to seek declarations of interest pursuant to constructive trust in addition to the normal application for a property adjustment order).
- A purchaser under a rescinded contract may have an equitable lien supportable by a caveat in respect of deposit and other money paid pursuant to the contract (*Ex Parte Lord* [1985] 2 Qd R 198).
- The interest of a mortgagor seeking to impeach a sale by the mortgagee on the ground that the mortgagee improperly exercised the power of sale (*Re Cross and National Australia Bank Limited* [1992] QCONVR 54-433).
- The interest arising from a statutory charge created pursuant to Section 189AB of the *Bankruptcy Act 1966* (Cth) over the debtor's property in the amount of the debtor's unsecured debts when the debtor signs an authority under Section 188 of the *Bankruptcy Act 1966* (Cth).

The *Land Title Practice Manual (Qld)* lists a number of cases where the interest of the caveator did **not** constitute an interest in the land or otherwise failed to sustain a valid caveat:

- “• *A vendor's lien (for unpaid purchase money) is not capable of giving rise to any equitable lien on the lot (s 191 of the Land Title Act 1994).*

- *A registered owner of land who seeks the appointment of statutory trustees for the sale of the land, once having executed a Form 1 – Transfer to Trustees and divested himself/herself of the legal estate, has no caveatable interest as against the registered trustee (Re Trapas Pty Ltd [1991] Q Conv R 54-398).*
- *An agreement to share in the profits on resale of land (developed with the use of funds lent by the caveator) in the absence of an intention to give the caveator security over the land for its loan did not confer on the caveator an interest sufficient to support a caveat (Simons v David Bengel Motors Pty Ltd [1974] VR 585).*
- *A mere application under s 196 of the Property Law Act 1974 for relief where the caveator alleged that he mistakenly made improvements on the caveatee's land was held not to be a sufficient interest to support a caveat (Ex parte Goodlet and Smith Investments Pty Ltd [1983] 2 Qd R 792).*
- *A mere right of pre-emption was held not to be a sufficient interest to support a caveat (Re Rutherford [1977] 1 NZLR 405).*
- *A beneficiary under a discretionary trust does not have an interest in land owned by the trust that will support a caveat (Walter v Registrar of Titles [2003] VSCA 122).*
- *A purchaser of a proposed lot under a contract of sale prior to the registration of the survey plan describing that lot is not entitled to an equitable interest in the land under that contract.*
- *In some instances, a purchaser under a conditional contract of sale, that is, a contract that is subject to an unsatisfied condition precedent, will not have a caveatable interest until after the condition has been satisfied (Re Bosca Land Pty Ltd's Caveat [1976] Qd R 19; Re C M Group Pty Ltd's Caveat [1986] 1 Qd R 381 and Re Dimbury Pty Ltd's Caveat [1986] 2 Qd R 348. Note also Nicholson v Fowler [1981] NZLR 97; Jessica Holdings Pty Ltd v Anglican Property Trust Diocese of Sydney [1992] NSW Conv R 55-626 and Re Bluestone Pty Ltd's Caveat [1993] Q Conv R 54-447) (see also Burr P, 'Purchaser under Conditional Contract has Caveatable Interest' (1993) 67 ALJ 295)."*

# Registered Owner

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A registered owner is entitled to lodge a caveat under Section 122(1)(c) which does not lapse. This is important to remember in the case of a dispute between the registered owner and a mortgagee seeking to exercise a power of sale.

A caveat by the registered owner against a transfer by a mortgagee exercising a power of sale will prevent registration of such transfer until a caveat is withdrawn or the matter settled by the Court (Section 124(4) of the *Land Title Act 1994* and *McKean's Caveat*<sup>5</sup> and *Re Cross v National Australia Bank*<sup>6</sup>).

A caveat lodged by a joint tenant cannot prevent another joint tenant severing the joint tenancy as Section 59 of the *Land Title Act 1994* confers a right on a registered owner of a lot subject to a joint tenancy to unilaterally sever the joint tenancy by registration of a transfer executed by the registered owner.

It is important to remember when lodging a caveat from the registered owner to file also a consent in Form 18 from the registered owner.

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<sup>5</sup> [1988] QdR 524.

<sup>6</sup> [1992] QCONV R 54-433.

# Lapsing of a Caveat

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In most cases a caveat lapses 3 months after the lodgement of the caveat unless the caveator starts proceedings in a Court of competent jurisdiction to establish the interest claimed under the caveat: Section 126(4) of the *Land Title Act* 1994.

The limited circumstances in which a caveat does not lapse are set out in Section 126(1):

## ***“126 Lapsing of caveat***

- (1) *This section does not apply to a caveat if—*
- (a) *it is lodged by the registered owner; or*
  - (b) *the consent of the registered owner is deposited when the caveat is lodged; or*
  - (c) *an office copy of a court order mentioned in section 122(d) or (e) is deposited when the caveat is lodged; or*
  - (d) *it is lodged by the registrar under section 17; or*
  - (e) *it is lodged other than under this division.”*

The registered owner and any other person with a registered interest e.g. a mortgagee, has a right to receive from the Registrar written notice of the lodgment of a caveat: Section 123 *Land Title Act* 1994.

A registered owner keen to accelerate the lapsing of the caveat may give notice to the caveator to take action within fourteen (14) days otherwise the caveat will lapse. The relevant steps are set out at Section 126(2) – (6):

## ***“126 Lapsing of caveat***

...

- (2) *A caveatee of a caveat to which this section applies may serve on the caveator a notice requiring the caveator to start a proceeding in a court of competent jurisdiction to establish the interest claimed under the caveat.*
- (3) *The caveatee must notify the registrar, in the way the registrar requires, within 14 days of service of the notice on the caveator.*
- (4) *If a caveator does not want a caveat to which this section applies to lapse, the caveator must—*
- (a) *start a proceeding in a court of competent jurisdiction to establish the interest claimed under the caveat—*

*if a notice under subsection (2) is served on the caveator—within 14 days after the notice is served on the caveator; or*

*if a notice under subsection (2) is not served on the caveator—within 3 months after the lodgement of the caveat; and*

*(b) notify the registrar, in the way the registrar requires, within the 14 days or the 3 months that a proceeding has been started and identify the proceeding.*

*(5) If the caveator does not comply with subsection (4), the caveat lapses.*

*(6) The caveator is taken to have complied with subsection (4)(a) if, before the caveat was lodged—*

*(a) a proceeding has been started in a court of competent jurisdiction to establish the interest claimed under the caveat; and*

*(b) the proceeding has not been decided, discontinued or withdrawn.*

A Court of competent jurisdiction is any Court with jurisdiction to establish the interest claimed under the Caveat. This may be the Supreme Court or District Court. In the case of matrimonial or de facto proceedings it will be the Family Court or Federal Circuit Court.

# Court's Power to Remove a Caveat

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The registered owner or other caveatee may apply to the Supreme Court at any time for an order that the caveat be removed under Section 127 of the *Land Title Act* 1994:

***“127 Removing a caveat***

- (1) *A caveatee may at any time apply to the Supreme Court for an order that a caveat be removed.*
- (2) *The Supreme Court may make the order whether or not the caveator has been served with the application, and may make the order on the terms it considers appropriate.”*

Significantly the Supreme Court has power to order the removal of the caveat whether or not the caveator has been served with the application: Section 127(2). The legislature has given broad powers to the Supreme Court to prevent abuses of caveats. As a statutory injunction a caveat has a profound effect on the rights of registered owners to deal with their property.

The Family Court has held that it has jurisdiction to deal with an application for removal of a caveat under section 127 of the *Land Title Act* 1994 (Qld) where it arises out of a common substratum of facts and forms part of a single justiciable controversy in family proceedings per Forrest J in *Auricchio & Auricchio and Ors (No. 2)* [2014] FamCA 240.

The correct approach of the Court on an application to remove a caveat is set out by Holmes J (as she then was) in the Court of Appeal decision in *Cousins Securities P/L & Ors v CEC Group Limited & Anor* [2007] 2 QdR 520 at [38]:

*“Re Jorss' Caveat made it plain that the onus was on the caveator to satisfy the court, as for an injunction, that there was a serious question to be tried and that the balance of convenience favoured the retention of the caveat on the title. Australian Broadcasting Corporation v O'Neill had clarified that the former involved showing “a sufficient likelihood of success to justify in the circumstances the preservation of the status quo”. There was no evidence, the appellant argued, to establish that the elements necessary to the application of s 55 of the Property Law Act existed.”*

The approach of the Court to removing a caveat is similar to the approach adopted on an interlocutory injunction namely:

- deciding whether there is a serious question to be tried;
- whether the balance of convenience favours the retention of the caveat on the title.



A question arises as to whether a Caveat lapses if the Caveator commences a proceeding in a Court of competent jurisdiction but the Caveator's proceeding is struck out. This situation was considered by the Queensland Court of Appeal in *Allen's Asphalt Pty Ltd v SPM Group Pty Ltd* [2010] 1 QdR 202. In that case the Appellant Defendant, SPM Group Pty Ltd ("SPM") are entered into a credit agreement with the Respondent Plaintiff, Allen's Asphalt Pty Ltd ("Allens"), so that SPM could purchase building materials from Allens. Under the terms of that agreement SPM agreed "*to charge all their equitable interest in freehold or leasehold property*". Allens claimed that SPM exceeded its terms of credit under the agreement and lodged a Caveat over SPM's land to secure the alleged debt. Ultimately the debt was only \$3,158.44 and related solely to Allens' legal costs. Allens filed a claim against SPM in the Supreme Court for a declaration that it held an interest as equitable chargee of the land, and orders under Section 99(2) *Property Law Act 1974* (Qld) that the property be sold and that SPM deliver up vacant possession within thirty days. Further or in the alternative Allens claimed \$3,158.44 together with interest and indemnity costs. Allens did not serve the claim on SPM.

Fourteen months after Allens filed the Supreme Court claim, Allens filed an application under Uniform Civil Procedure Rule 24 for an order that the claim filed be renewed. It served the application on SPM. SPM responded by filing an application to be heard together with Allens' application, for orders that Allens' Caveat over SPM's land be removed; that Allens' claim be struck out; and the judgment be given in the proceedings for SPM with indemnity costs. In the event the Judge at first instance refused to renew Allens' Supreme Court claim and struck out the claim. The Judge refused, however, to remove the Caveat as Allens had indicated they wished to bring proceedings in the Magistrates Court against SPM.

The majority decision dismissing the Appeal was given by Muir JA with whom Daubney J agreed. Muir JA referred to the High Court's observations about the purpose of a Caveat set out in *Lyros Pty Ltd v Terara Pty Ltd*<sup>7</sup>, namely an injunction "*so as to enable, in the ultimate analysis, a determination of the conflicting claims*". Muir JA reasoned, however, that this role of the caveat did not necessarily mean that a caveat lapsed when proceedings came to an end<sup>8</sup>:

"[30] *But these pronouncements about the role of a Caveat not warrant the reading into the Act of additional words which would materially alter the effect of its provisions. It is not the case that the role of the Caveat, as explained in the authorities, will not be able to be fulfilled properly or maybe subverted unless*

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<sup>7</sup> (1992) 174 CLR page 407 at [422] and [419], as set above in this article at page 6.

<sup>8</sup> *Allen's Asphalt Pty Ltd v SPM Group Pty Ltd* [2010] 1 QdR 202 at paragraph [30].

*the Appellant's construction is accepted: a construction, I might add, which is not derived from particular words in the relevant sections but from what is perceived to be the unfortunate consequences of permitting a Caveat to exist in the absence of proceedings brought to confirm the interest claimed."*

A dissenting judgment was given by President McMurdo who reached the opposite conclusion at paragraphs [9]-[10]:

*[9] The statute law in Queensland relating to caveats is discretely contained in the Land Title Act 1994 (Qld) ("the Act") Pt 7 Div 2 which, appropriately, is titled "Caveats". The division makes provision for the requirements of caveats;[3] for who may lodge a caveat[4] and for the method of giving notice to a caveator.[5] The registrar of titles must give written notice of lodgment of a caveat to those affected by it.[6] A caveat prevents registration of a subsequent instrument affecting the land[7] until the caveat lapses or is cancelled, rejected, removed or withdrawn.[8] A caveat may be withdrawn.[9] If a caveator does not want a caveat to lapse, the caveator must "start a proceeding in a court of competent jurisdiction to establish the interest claimed under the caveat ... within 3 months after the lodgment of the caveat".[10] The registrar may remove a caveat that has lapsed from the freehold land register.[11] A caveatee may at any time apply to the Supreme Court for an order that a caveat be removed.[12] The registrar may cancel a caveat if satisfied of certain matters.[13] A further caveat with the same caveator can never be lodged in relation to the interest on the same, or substantially the same, grounds stated in the original caveat unless the leave of a court of competent jurisdiction to lodge a further caveat has been granted.[14] A person who lodges a caveat without reasonable cause must compensate anyone suffering resulting loss or damage.[15]*

*[10] The provisions of Div 2 Pt 7 of the Act, most relevantly s 126(4), do not in their terms state that a caveat lapses in circumstances where a caveat has been lodged for more than three months and a proceeding has been started in a court of competent jurisdiction but struck out. Despite this hiatus in these provisions, that must be the intended effect of the scheme relating to caveats in Div 2 Pt 7 of the Act, at least absent a contrary agreement or other compelling reason. Under the scheme, a caveat acts as "an injunction against registration of an inconsistent dealing otherwise than in accordance with the caveat so as to enable, in the ultimate analysis, a determination of the conflicting claims": Leros Pty Ltd v Terara Pty Ltd;[16] Barry v Heider.[17] The scheme contemplates that a caveat should not be lodged over land for more than three months without the caveator commencing proceedings in a court of competent jurisdiction to establish the interest it claims under the caveat.[18] The nature of a caveat and the clear legislative intention to be inferred from Div 2 Pt 7 of the Act is that a caveat more than three months old should ordinarily be removed where there is no "proceeding in a court of competent jurisdiction to establish the interest claimed under the caveat".[19]*

It is submitted that there are likely to be very few cases where a court would refuse to remove a caveat when the substantive proceedings to establish the interest claimed under a

caveat have been dismissed or struck out, notwithstanding the court of Appeal decision in *Allen's Asphalt P/L v. SPM Group P/L*<sup>9</sup>.

In 2013 section 126 of the *Land Title Act* 1994 was amended to insert sub-section 126(6)(b) which deals with deals with proceedings “*decided, discontinued or withdrawn*” prior to lodgement of a caveat.

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[3] *Land Title Act* 1994 (Qld), s 121.

[4] *Land Title Act* 1994 (Qld), s 122.

[5] *Land Title Act* 1994 (Qld), s 131.

[6] *Land Title Act* 1994 (Qld), s 123.

[7] *Land Title Act* 1994 (Qld), s 124(1), subject to the matters listed in s 124(2) and s 124(3) to (5).

[8] *Land Title Act* 1994 (Qld), s 124(1)(a).

[9] *Land Title Act* 1994 (Qld), s 125.

[10] *Land Title Act* 1994 (Qld), s 126(4)(a)(ii). Under s 126(6) the caveator is taken to have complied with s 126(4)(a) if a proceeding has been started in a court of competent jurisdiction to establish the interest claimed under the caveat before the caveat was lodged.

[11] *Land Title Act* 1994 (Qld), s 126(7).

[12] *Land Title Act* 1994 (Qld), s 127.

[13] These are listed in *Land Title Act* 1994 (Qld), s 128(1)(a) to (c).

[14] *Land Title Act* 1994 (Qld), s 129(2).

[15] *Land Title Act* 1994 (Qld), s 130.”

[16] [1992] HCA 22; (1991) 174 CLR 407, Mason CJ, Dawson and McHugh JJ at 422.

[17] [1914] HCA 79; (1914) 19 CLR 197, Isaacs J (as he then was) at 221.

[18] *Land Title Act* 1994 (Qld), s 126(4).

[19] *Land Title Act* 1994 (Qld), s 126(4).

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<sup>9</sup> [2010] 1 QdR 202

# Compensation for Improper Lodging of a Caveat

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Any person lodging a Caveat must take care that it is being lodged properly. The legal effect of lodging a Caveat and the resultant prohibition on registration of an instrument affecting the land may cause significant commercial loss. A registered owner who has signed a contract for the sale of the land, for example, will be unable to transfer the interest to the purchaser at settlement. This may result in a significant loss of profit for the registered owner, particularly in a falling market.

The law imposes a duty on a person who lodges or continues a Caveat without reasonable cause to compensate anyone else who suffers loss or damage as a result<sup>10</sup>.

In a proceeding for compensation for an improper Caveat the Court may include in a Judgment for compensation a component for exemplary damages<sup>11</sup>.

In a claim for compensation for an improper Caveat there is a statutory reversal of onus of proof. Section 130(3) of the *Land Title Act* provides:

“(3) *In a proceeding for compensation under subsection (1), it must be presumed that the caveat was lodged or continued without reasonable cause unless the person who lodged or continued it proves that it was lodged or continued with reasonable cause.*”

In *Von Risefer & Ors v Permanent Trustee Company Pty Ltd & Ors* [2004] QSC 248 Atkinson J in the Queensland Supreme Court made an order under Section 130 for the Plaintiffs to pay compensation for certain Defendants' legal fees. As there had been no claim for exemplary damages under Section 130(2), Her Honour did not make such an award although the Court commented that in that case, if a claim had been made, it would have warranted serious consideration.

In the recent Queensland Supreme Court case of *Miller & Anor v Loel & Anor* [2016] QSC 135 at paragraph 14 Mullins J set out the requirements for success in a claim under section 130.

“[14] The heading to [s 130](#) of the Act is “Compensation for improper caveat”. There are conflicting decisions of this court as to whether that has the effect of incorporating an

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<sup>10</sup> *Land Title Act* 1994, Section 130.

<sup>11</sup> Section 130(2) *Land Title Act* 1994.

*additional element of improper purpose that must be proved to claim compensation, apart from showing the caveat was lodged or continued without reasonable cause: Farvet Pty Ltd v Frost [1997] 2 Qd R 39 and Re Brooks' Caveat [2014] QSC 76. Although the defendants claim summary judgment in their application, the focus of the hearing of the application was on the manner in which the claims were pleaded. There was not full argument on the conflict between these decisions, but in any case the conflict would be better resolved by reference to arguments addressing the merits of a claim, rather than the manner of pleading. Until the conflict is resolved, it may be prudent if the pleading based on [s 130\(1\)](#) of the Act alleged improper purpose, in addition to lodgment or continuance of the caveat without reasonable cause. It may be that, in any case, the grounds relied on to establish improper purpose overlap with the grounds relied on to show lodgment or continuance of the caveat without reasonable cause: Brooks at [18]."*

# Law Reform

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There is an ongoing debate in relation to Caveats as to whether their scope should be extended or confined.

The drafting of the current Section 122 of the *Land Title Act* 1994 refers to “a person claiming an interest in a Lot”. This replaces Section 98 of the *Real Property Act* 1861 which referred to a person with “an estate or interest in any land” as having a right to lodge a Caveat. The *Land Title Practice Manual* (Queensland) at [11-0030] observes:

*“It is likely that ‘an interest in a lot’ will not have a narrower meaning than ‘an estate or interest in any land’ therefore, the case law in relation to Section 98 of the Real Property Act 1861 is of assistance in the interpretation of Section 122(1)(a) of the Land Title Act 1994.”*

An argument has been advanced by an academic, Sandra Boyle of the School of Law at Murdoch University, to extend the class of caveatable interests. In a thoughtful article<sup>12</sup>, she advances an argument for broadening caveatable interests beyond those which are proprietary in nature:

*“What is a caveat? It is itself a statutory injunction.(48) It has all the characteristics of that equitable remedy. It restrains the Registrar of Titles from registering a dealing that is inconsistent with, or at the very least, not made subject to, the caveator's alleged claim. It effectively prohibits a registered proprietor from dealing with his land in a manner inconsistent with rights and obligations that he may have created.*

*It confers no proprietary interest itself. Its purpose and function is to maintain the status quo to preserve and protect the rights of a caveator. It prohibits the caveator's interest from being defeated by the registration of a dealing without the caveator having first had the opportunity to invoke the assistance of a Court to give effect to the interest.(49) The interest may arise through the application of legal rules and principles or it may arise because a specific equitable remedy exists to protect it.*

*To limit the right to caveat only to interests which are classified as proprietary in nature is to deny the very purpose of a caveat.*

*It is said of equity:*

*“The essential concern of equity is remedy where needed. In some contexts equity allows a bundle of remedies so cohesive and purposeful that the rights which they protect take on the appearance of an institution of interests in property. To require of equity, however, that it should at all times underwrite a proprietary system is to forget its origins and to pervert its destiny.”(50)*

*The same is appropriate to a caveat.”*

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<sup>12</sup> Sandra Boyle “Caveatable Interests – the Common Lore Distinguished”, Murdoch University Electronic Journal of Law [1993] Mur UEJL 8.

# ACKNOWLEDGMENT

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I acknowledge the considerable assistance derived in the preparation of this Seminar paper from Part 11 of the *Land Title Practice Manual (Qld)* of the Department of Natural Resources and Mines.

## Further Reading

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1. *Land Title Practice Manual*, Part 11 – Caveat.
2. Macdonald, McCrimmon, Wallace, McCrimmon and Weir, *Real Property Law in Queensland*, Fourth Edition, Thomson Reuters, Sydney 2014 .
3. *Land Titles Law and Practice Qld* (Thomson Reuters, Westlaw Subscription Service).
4. Hughson, Mary-Anne; Neave, Marcia; O'Connor, Pamela – “*Reflections on the Mirror of Title: Resolving the Conflict Between Purchasers and Prior Interest Holders*” [1997] MelbULawRw 16; (1997) 21 (2) Melbourne University Law Review 460.