



The Four “Ws” of Caveats – WHO, WHAT, WHY and WHEN?

Presented By:

Dino Di Rosa
Di Rosa Lawyers

Friday 29 May 2015

THE FOUR “Ws” OF CAVEATS – WHO, WHAT, WHY and WHEN?

Dino Di Rosa

29 May 2015

Caveats are a necessary weapon in the arsenal of the lawyer or conveyancer who is looking to secure the interests of their client where their client alleges a caveatable interest in land.

They are very inexpensive, and therefore can be easily sold to clients, expedient and relatively hard to get wrong at lodgement, because the Lands Titles Office will always correct any errors you have made before they will accept the document for lodgement (although it always makes a good impression with anyone who might be interested if your Caveat is clearly drafted without errata from the Lands Titles Office examiners).

But with anything that appears to be simple and straightforward, there are always nuances that the practitioner should be aware about, particularly if their caveat is challenged, as they can often be.

This paper is a bit a “how to” and “what to do” primer on caveats, their lodgement, removal and withdrawal. Tips to avoid the traps for young and relatively inexperienced players in what can turn out to be a very complicated area of law if you do not get the basics right.

INTRODUCTION

What is a “Caveat”?

The term “caveat” comes from the Latin *“let the person beware.”*

In lay terms, it refers to a notice or warning to refrain from some action, pending the decision of the Court.

For example, a caveat may be lodged against a grant of probate or administration (section 26 *Administration and Probate Act 1919 (SA)*), a dealing in land (discussed below), or to prevent the arrest of a ship (rule 7 *Admiralty Rules 1988 (Cth)*).

In legal parlance, a caveat refers to a formal notice to the registered proprietor of land (owner) that the individual registering the caveat (caveator) claims a legal or beneficial interest in the land.

The caveat prevents the owner of land from “dealing” with the land until the caveator's interest has been determined by the parties involved, or by the Court.

A caveat is primarily protective in nature; that is, it is a claim to receive notice before any dealing with land occurs: *J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546; [1972] ALR 323.¹

A caveat also has a secondary function of warning individuals searching the register of the existence of the caveated interest.

A. LEGISLATIVE FRAMEWORK APPLICABLE TO CAVEATS

Statutory Regime of Caveats in South Australia

The law dealing with caveats is set out in Part 16 of the *Real Property Act 1886 (SA)* (“the Act”) and more specifically section 191(a) to (l).

¹ See also the passage of Windeyer J in *J & H Just (Holdings) Pty Ltd v Bank of New South Wales* [1971] HCA 57; (1971) 125 CLR 546 at 558:

[T]he primary purpose of a caveat against dealings is not to give notice to the world of an interest. It is to warn the Registrar-General of a claim. The word caveat has long been used in law to describe a notice given to an official not to take some step without giving the caveator an opportunity to oppose it ... If a person intending to deal with the registered proprietor becomes aware of a caveat, it is notice to him of a claim that an interest is outstanding; and then caveat emptor.

Who is the “Caveator” and the “Caveatee”?

The term “Caveator” is defined in section 3 of the Act as “any person lodging a caveat” and “Caveatee” as “any person against whose application for any purpose a caveat has been lodged, and shall include the registered proprietor of any land in respect of which a caveat has been lodged.”

Effect of Caveat

The purpose of a caveat is to prevent the registration of any subsequent interests on a title in order to preserve a prior unregistered dealing.

Once a caveat has been lodged it will remain on the title until it is withdrawn by the caveator, removed by the Registrar upon an application for its removal by the caveatee, or removed by the Court.

Types of Caveats

The two most common types of caveat lodged under section 191 of the Act are:

1. “Absolute” caveats – these forbid the registration of any subsequent dealing with the relevant land;
2. “Permissive” caveats – these allow the registration of subsequent dealings with the relevant land but subject to the claim of the caveator or to any conditions set out in the caveat.

Registration of Caveats and “Caveatable Interest”

Section 191 of the Act provides as follows:

Any settlor of land or beneficiary claiming under a will or settlement, or any person claiming to be interested at law or in equity, whether under an agreement, or under

an unregistered instrument, or otherwise howsoever in any land, may lodge a caveat with the Registrar-General forbidding the registration of any dealing with such land, either absolutely or unless such dealing shall be expressed to be subject to the claim of the caveator, or to any conditions conformable to law expressed therein:

Caveats are registered on the Certificate of Title at the Land Titles Office.

For a caveat to be registered, the caveator must have a "caveatable interest" in the land.

In the Tasmanian case *Woodberry v Gilbert* (1907) 3 TAS. L.R. 7, Clarke J enumerated seven classifications of "claim to an interest in land" so as to create a caveatable interest:

1. A right to the present or future possession of land, either as owner of the fee simple, or as a tenant for life, or for years, or for some shorter period.
2. A right to the proceeds of the sale of the land or to a share thereof; or to payment of a sum of money secured by mortgage of the land.
3. A right to rent or annuity charged on the land.
4. A right to take a natural product of it.
5. A right to the rents and profits of the land.
6. A right to water from a well on the land or from a stream running through it.
7. A right to enter upon the land for the purpose of securing the benefit of a contract for the purchase of anything situate or growing on the land.²

According to *Halsbury's Laws of Australia*, the following interests have been held capable of supporting a caveat:³

1. an interest as purchaser under an agreement for sale;⁴
2. a claim in the land under a resulting trust or constructive trust (eg where the caveator is the de jure spouse or de facto spouse of the caveatee);⁵

² See also N.W. Martin, 'Caveats – General Conveyancing Matters' (Speech Delivered at the Law Society of South Australia, Adelaide, 28 February 1980).

³ LexisNexis, *Halsbury's Laws of Australia*, Online (at 27 November 2013) 355 Real Property, '(V) Caveatable Interests' 355-8280.

⁴ *Fernandes v Houstain* (1963) 4 FLR 355.

3. an interest as grantee under an option to purchase land;
4. an interest as purchaser under a conditional agreement for sale, where the courts would grant an injunction to protect the interest;⁵
5. an inchoate interest in land;⁷
6. an equitable mortgage;⁸
7. the interest of a registered mortgagor, where the mortgagee has entered into a voidable contract of sale;⁹
8. an easement;¹⁰
9. an oral agreement for the extension of an easement supported by acts of part performance;¹¹
10. a profit à prendre;¹²
11. the interest of a unit holder in a unit trust;¹³
12. a beneficial interest under a resulting trust;¹⁴
13. a builder's contractual right to charge the land with all moneys owing;¹⁵
14. a vendor's lien;¹⁶
15. a purchaser's lien;¹⁷
16. exclusive mining rights.¹⁸

⁵ *Baumgartner v Baumgartner* (1987) 164 CLR 137.

⁶ *Jessica Holdings Pty Ltd v Anglican Property Trust Diocese of Sydney* (1992) 27 NSWLR 140; (1992) NSW ConvR ¶155-626.

⁷ *Kuper v Keywest Constructions Pty Ltd* (1990) 3 WAR 419 at 432 per Malcolm CJ.

⁸ *Avco Financial Services Ltd v White* [1977] VR 561.

⁹ *Sinclair v Hope Investments Pty Ltd* [1982] 2 NSWLR 870; (1983) ANZ ConvR 184; (1983) NSW ConvR ¶155-113.

¹⁰ *Re Paul* (1902) 19 WN (NSW) 114.

¹¹ *Deanshaw v Marshall* (1978) 20 SASR 146.

¹² *Permanent Trustee Australia Ltd v Shand* (1992) 27 NSWLR 42.

¹³ *Costa and Duppe Properties Pty Ltd v Duppe* [1986] VR 90; (1985) V ConvR ¶154-176.

¹⁴ *Official Trustee in Bankruptcy v P & R Alvaro Enterprises Pty Ltd* (1992) 111 FLR 47; (1993) ANZ ConvR 26; BC9200184.

¹⁵ *Griffith v Hodge* (1979) 2 BPR 9474; *Venios v Machon* (1986) 3 BCL 171; *Gibson v Co-ordinated Building Services Pty Ltd* (1989) 4 BPR 9630; *Rising Developments Pty Ltd v Hoskins* (1996) 39 NSWLR 157; BC9601077; *Wright v Bridge Wholesale Acceptance Corp (Aust) Ltd* [1993] 1 VR 502.

¹⁶ *Ex parte Lord* [1985] 2 Qd R 198 sub nom *Re Herringe*; *Ex parte Lord* [1985] 2 Qd R 198; (1985) ANZ ConvR 337; (1985) Q ConvR ¶154-187.

¹⁷ *Re Caveat Registered under the Real Property Act 1886*; *Ex parte Catt* [1933] SASR 413.

¹⁸ *Re Caveat of Gamboola Cabonne Phosphates Ltd* (1919) 19 SR (NSW) 227; 36 WN (NSW) 89.

Examples of non-caveatable interests include:

1. a mere debt owed by one party to another where the debt is not secured against the land or has connexion with the land;¹⁹
2. the interest of a purchaser under a conditional contract of sale where the courts would not protect the interest by granting an injunction;²⁰
3. a marshalling claim;²¹
4. a prima facie equity to set aside a transaction for fraud;²²
5. a right of pre-emption;²³
6. the interest of a person who has made improvements to another person's land but has not obtained an order for relief;²⁴
7. an agreement to share profits on resale of land;²⁵
8. mere possession of a building site by a builder;²⁶
9. if a worker is owed money in relation to work they have done on the land (in which case a Worker's Lien should be adopted);
10. a mere equity to set aside a mortgagee's sale allegedly made in breach of the mortgagee's duties.²⁷

Trustees in bankruptcy can also lodge caveats over property owned by a bankrupt and the bankrupt's spouse to protect the estate and interest of the trustee of the bankrupt's estate.

¹⁹ *Re Wossidlo* (1934) 52 CLR 301 and also see 1 ALJ page 73.

²⁰ *Re Bosca Land Pty Ltd's Caveat* [1976] Qd R 119; (1976) 34 LGRA 437; *Re Dimbury Pty Ltd's Caveat* [1986] 2 Qd R 348; *Re CM Group Pty Ltd's Caveat* [1986] 1 Qd R 381; *Jessica Holdings Pty Ltd v Anglican Property Trust Diocese of Sydney* (1992) 27 NSWLR 140; (1992) NSW ConvR ¶155-626.

²¹ *Mir Bros Projects Pty Ltd v Lyons* [1978] 2 NSWLR 505; *Sarge Pty Ltd v Cazihaven Homes Pty Ltd* (1994) 34 NSWLR 658; BC9405356.

²² *Re Pile's Caveats* [1981] Qd R 81.

²³ *Walker Corp Pty Ltd v WR Pateman Pty Ltd* (1990) 20 NSWLR 624; (1991) ANZ ConvR 80; (1990) NSW ConvR ¶155-542 (compare *Transfield Properties (Kent Street) Pty Ltd v Amos Aked Swift Pty Ltd* (1994) 36 NSWLR 321; 6 BPR 13,599; [1995] ANZ ConvR 532; BC9402991; *Beneficial Finance Corp Ltd v Multiplex Constructions Pty Ltd* (1995) 36 NSWLR 510; BC9504452.

²⁴ *Eudunda Farmers Co-op Society Ltd v Mattiske* [1920] SALR 309; *Re Rutherford* [1977] 1 NZLR 504; *Ex parte Goodlet & Smith Investments Pty Ltd* [1983] 2 Qd R 792; *Attorney-General v Methodist Church of New Zealand* [1996] 1 NZLR 230; *McDonald v Isaac Construction Co Ltd* [1995] 3 NZLR 612.

²⁵ *Simons v David Bengel Motors Pty Ltd* [1974] VR 585.

²⁶ *HG & R Nominees Pty Ltd v Caulson Pty Ltd* (2000) V ConvR ¶154-630; [2000] VSC 126; BC200001676.

²⁷ *Swanston Mortgage Pty Ltd v Trepan Investments Pty Ltd* [1994] 1 VR 672; (1994) ANZ ConvR 176; (1993) V ConvR ¶154-487

A registered proprietor may also lodge a caveat against dealings with his or her own land. Examples would be if the registered proprietor believes their interest in the land may be threatened by fraudulent activity or to prevent the registration of a transfer until payment of the purchase price.

Form of Caveat (Discussed below at “Drafting Caveats”)

Section 191(a) of the Act provides:

a caveat shall be in the appropriate form, and shall be under the hand and verified by the declaration of the caveator or his agent, and shall contain an address within South Australia to which notices may be sent or at which proceedings may be served;

Registrar-General to make Memorandum of Receipt

Section 191(b) of the Act provides:

upon the receipt of a caveat the Registrar-General shall make a memorandum thereon of the date and hour of the receipt thereof, and shall enter a memorandum thereof in the Register Book, and shall forthwith send a notice of such caveat through the post office to the person against whose title such caveat shall have been lodged, directed to his address appearing in the Register Book;

Not to Register Dealings Contrary to Caveat

Section 191(c) of the Act provides:

so long as any caveat shall remain in force the Registrar-General shall not, contrary to the requirements thereof, register any dealing with the land in respect of which such caveat shall have been lodged: Provided that notwithstanding the receipt of a caveat the Registrar-General shall, subject to the other provisions of this Act, proceed with and complete the registration of any instrument affecting the said land, which

instrument is produced for registration before the receipt of the caveat by the said Registrar-General;

Persons “Interested” may Summons Caveator

Section 191(d) of the Act provides as follows:

the registered proprietor or any other person claiming estate or interest in the land may, by summons, call on any caveator, including the Registrar-General, to attend before the Court to show cause why the caveat should not be removed; and the Court may, after allowing the parties a reasonable opportunity to be heard, make such order as appears just in the circumstances; (if the caveator does not appear in response to the summons, the Court may, if satisfied that the summons was duly served, proceed to hear and determine the application in the caveator's absence);

Removing a Caveat

The caveatee may apply to have the caveat removed in accordance with section 191(e) of the Act which provides as follows:

the caveatee may, except when the caveat is lodged by a settlor, or by a beneficiary under a will or settlement, or by the Registrar-General under Part 19 of this Act, make application in writing to the Registrar-General to remove the caveat, and shall in such application give an address in South Australia to which notices or proceedings relating to the caveat may be sent, and the Registrar-General shall thereupon give twenty-one days' notice in writing to the caveator, requiring that the caveat be withdrawn;

Mode of Removing or Discharging Caveat

Section 191(f) of the Act provides:

the Registrar-General shall, after the lapse of twenty-one days from the posting of such notice to the address mentioned in the caveat, or of such extended time as may be ordered by the Court, remove the caveat from the Register Book by entering therein a memorandum that the same is discharged;

Action to Establish Validity of Claim

Section 191(fa) of the Act provides:

a caveator may bring an action in the Court to establish the validity of the claim on which the caveat is based;

Extensions of Time

Section 191(g) of the Act provides that the caveator may apply to the Court for an order to extend time as follows:

the Court may, on the caveator's application, extend the period of 21 days until an action under paragraph (fa) is determined or for any other period;

Withdrawing Caveat and Payment of Costs

Section 191(h) of the Act provides:

any caveator may, by notice in writing to the Registrar-General, withdraw his caveat at any time; but the Court may, notwithstanding such withdrawal, order payment by the caveator to the caveatee or other person interested of any costs incurred by the caveatee prior to the receipt by him of notice in writing of the withdrawal of the caveat;

Entry to be Made by Registrar-General

Section 191(i) of the Act provides:

an entry shall be made by the Registrar-General in the Register Book of any order made by the Court relating to any caveat, or of the withdrawal, lapse, or removal of any caveat;

Lodging a Caveat Without a “Caveatable Interest”

A caveator who lodges a caveat without possessing a caveatable interest in the land may be liable in damages to a person who suffers loss as a result.

Section 191(j) of the Act provides:

any caveator other than the Registrar-General who shall have lodged or refused or neglected to withdraw any caveat wrongfully and without reasonable cause, shall be liable to make compensation to any person who may have sustained damage thereby, and such compensation may be recovered by action: Provided that, if proceedings shall have been taken in the Court by the caveatee or other person interested, the amount of such compensation may be assessed by the Court acting in the same proceedings; or the Court may direct an action to be brought to ascertain and recover such amount;

Not to Lodge Further Caveat Without Permission

Section 191(k) of the Act provides:

it shall not be lawful for any caveator other than the Registrar-General, or for anyone acting on behalf of such caveator, to lodge a further caveat relating to the same matter without the permission of the Court;

The Court may Order Costs if Caveat by Registrar-General is Removed by Court

Section 191(l) of the Act provides:

where any caveat lodged by the Registrar-General shall be removed by the Court, such Court may order the costs sustained by the person at whose instance such caveat was removed to be paid out of the estate on behalf of which such caveat was entered.

B. DRAFTING CAVEATS

Formal Requirements

1. *Appropriate Form*

Caveats must be in an approved or “appropriate” form as required by section 191(a) of the Act.

Section 3 of the Act provides that an appropriate form “means a form that is approved by the Registrar-General.”

The current form is Form C1. I have attached a blank Form C1 to this paper, which is followed by several examples of Caveats setting out various caveatable interests.

2. *Description of Estate or Interest being Caveated*

The land in which the caveator claims to have an interest must be clearly defined in the Certificate(s) of Title Being Caveated panel.

If the caveat relates to the whole of the land comprised in the CT, states as follows: “Whole of the land in CT Volume ____ Folio ____.”

If the caveat relates to only a portion of the land comprised in the CT, for example an allotment or shop, state as follows:

- "Allotment X in ____ being portion of the land in CT Volume ____ Folio ____";
- "Shop X in ____ being portion of the land in CT Volume ____ Folio ____."

The portion must be identified by reference to a plan which may be attached to the caveat or deposited in the LTO or General Registry Office.

The interest against which the caveat is being lodged must also be defined in the Certificate(s) of Title Being Caveated panel.

For example, if a caveat is lodged, not against the proprietor of an estate but rather, against the registered proprietor of a mortgage, the description in the CT panel would state: "Memorandum of Mortgage NO ____ registered over the whole of the land comprised in Certificate of Title Register Book Volume ____ Folio ____."

This also applies to a lease or other caveatable interest.

3. Description of Caveator

The full name and address of the caveator must be stated.

The caveator must be a natural person or legal entity.

If the caveatee is a company, you must state its Australian Business Number or Australian Company Number.

An unincorporated partnership (or a trust) cannot be named as the caveator. The caveator(s) would be the individual partner(s) of the firm or the trustees of the trust, as the case may be.

4. *Description of Caveatee*

Full name and address of the caveatee must be stated.

If the caveatee's current name or address is different from that which is disclosed in the Register Book, this inconsistency must be explained as follows:

- New address: “[*name of caveatee*] formerly of [*old address*] but now of [*new address*]”;
- New name: “[*new name*] formerly [*old name*]”.

Where there is more than one registered proprietor and the caveat is not to be lodged against all of the proprietors, state only the name(s) of those proprietors against whom the caveat is to be lodged. You do not name the other proprietors. This applies even if the proprietors are joint tenants.

5. *“The Caveator Claiming” Panel: Statement of Grounds, Nature of Interest, Quantum of Interest and Scope of Prohibition*

Above all else this is where it is very necessary that you obtain clear instructions from your client as to the interest that they are claiming and whether or not that interest can be supported by a caveat.

In this panel you need to provide a brief statement of the facts or circumstances upon which the claim is based and refer to any relevant documentation or evidence which supports the claim.

It is I think necessary and prudent for you to obtain from your client all supporting documentation in relation to the nature of the interest claimed to get the facts right.

It is important to note that a caveator is unable to caveat the same interest twice without

leave of either the Supreme or District Courts which have jurisdiction to deal with all contentious matters arising from the registration and removal of caveats.

You need to set out the nature of the estate or interest claimed.²⁸ For example, “an estate in fee simple” or “an equitable interest as ...”

You need to include the quantum of the estate or interest claimed if there is one.²⁹

Absolute vs Permissive

As discussed above, the two most common types of caveat lodged under section 191 of the Act are absolute and permissive.

In “the Caveator Claiming” panel, define whether the caveat is absolute or permissive. If absolute, strike a line through the words “unless such dealing is made subject to the claim of the caveator.”

If permissive, do not strike a line through the words “unless such dealing is made subject to the claim of the caveator.”

Additional restrictions can be imposed and these must be included in this panel. For example, caveators may wish to have a requirement that dealings can only be registered with their written consent.

You will remember that the registration of a caveat prevents any further registrations against the relevant title.

A caveat that is absolute may present a difficulty where a lease or mortgage may be required to be registered and to which the caveator does not have any objection.

²⁸ See for example *Official Trustee in Bankruptcy v P & R Alvaro Enterprises Pty Ltd* (1993) ANZ ConvR 26.

²⁹ For further discussion see Don Mackintosh, ‘Caveats’ (Paper presented to the Law Society of South Australia, 28 June 2001; updated 19 May 2009) at 10-11.

If the caveator was to withdraw the caveat to allow the registration of the lease or mortgage, they cannot then lodge another caveat on the same grounds.

A caveator may be criticised and subject to a claim for damages and/or costs order for lodging an absolute caveat where a permissive caveat would have served the caveator's purpose, for example where the caveator claims an estate or interest as lessee in relation to the land, preventing the caveatee from refinancing and discharging a mortgage to enable registration of a fresh mortgage.

You need to get clear instructions about which of the two types of caveat, absolute or permissive, your client wishes to lodge and it is important that your client understands the difference and the consequences.

6. Address for Notices or Proceedings

Must include an address within South Australia to which notices may be sent or at which proceedings may be served. If you are acting for an interstate client or as agent of an interstate law firm, then clearly you need to state your firm's address in this part of the instrument.

7. Execution and Attestation

The caveat must be executed by the caveator or his/her agent.

If the caveator or his/her agent is a natural person, their signature must be witnessed by a person who either knows him/her personally or is satisfied as to their identity.

The witness must sign and print their full name and provide their address and business hours telephone number.

If the caveator is a body corporate, it must execute the caveat in accordance with any formalities prescribed by the statute under which it is incorporated and by its constitution if required.

Note that a penalty of up to \$2,000.00 or 6 months imprisonment applies for improper witnessing.

Note also that at this point in time caveats are not subject to the Verification of Identity regime in place with many other instruments, in particular Memoranda of Transfer, but prudence and best practice requires that you should know your client or be able to verify their identity particularly where you are signing the caveat as their agent.

8. Declaration

The contents of the caveat must be declared as being “true in substance and fact” by either the caveator or his/her agent.

The declaration must be made before an individual who is authorised by law to take such declarations.

If the caveator is a body corporate, its director or secretary must make the declaration on its behalf.

9. Certification

A caveat must be certified as being “correct for the purposes of the *Real Property Act* 1886”³⁰ on the back page of Form C1.

The certification must be made by either a solicitor, registered conveyancer or the caveator.

³⁰ Section 273 of the Act.

When to lodge a Caveat

It is critical that upon receiving instructions from a client who may have a caveatable interest that they wish to protect and preserve, that you alert them to their potential right to caveat and that you obtain written instructions to caveat or not to caveat, as the case may be.

This is particularly so when, for example, your client has just signed a contract to purchase land, even though the contract may be at arm's length, and particularly where the parties may be related in some way or have some history where the completion of the contract may be at risk. In those circumstances, you should urge your client to caveat immediately and if they do not wish to caveat to obtain their signed instructions in this regard.

Another example is where two parties in a relationship separate, and there is real estate in the sole name of the opposing party, or is registered in the name of a body corporate or trust over which they have control, then it is common and prudent practice to lodge a caveat on behalf of your client, which will remain in place until and unless the parties agree to, or the relevant Court makes orders, for the division of that asset.

Because caveats are expedient and inexpensive, there really is no excuse not to lodge immediately once you have appraised yourself and your client of the risk and obtained their instructions to lodge.

General Do's and don'ts

1. Do obtain a title search in relation to the relevant land (do not rely on a copy of a title or some other record);
2. Do ensure that you have copies of all relevant supporting material to correctly identify the nature of the interest claimed to ensure it is prima facie caveatable;

3. Do not express the caveat in terms that are too wide; the caveat must not forbid the registration of dealings in land in which the caveator has no legal or equitable interest;³¹
4. Do not lodge a caveat against all of the registered proprietors if the interest claimed relates to or was granted by only one of the proprietors;³²
5. Notwithstanding that the caveator may be entitled to claim an interest, the caveat will be bad if the caveat claims some other interest that the caveator is not entitled to;³³
6. The caveator must have an existing interest in the land. In order to support the lodgement of a caveat it is not sufficient that the interest may arise in the future;³⁴
7. Ensure that the caveat is lodged by or on behalf of the correct entity; that is, ensure that the caveator is described correctly, as the Court has held that the identity of the caveator is fundamental and that a sufficient misdescription can render the caveat defective;³⁵
8. Before you lodge the caveat on behalf of your client, always do a check search to see if there are any dealings that may have been recently entered against the land that may not appear on your title search.

Summary – Drafting Caveats

1. Get money in trust;
2. Identify the interest to be protected;
3. Decide whether to make the caveat absolute or permissive;
4. Ensure the formal requirements are completed accurately;
5. Execute and witness;
6. Lodge the caveat;
7. Report to client.

³¹ *Roclin Investments Pty Ltd v Makris* [2004] SASR 17.

³² *Australian Wine Industries Pty Ltd v Imbrogno* (1995) ANZ ConvR 195.

³³ *Caravan & General Finance Pty Ltd v Clearview Developments Pty Ltd* (1976) 15 SASR 404.

³⁴ *Albert Del Fabro Pty Ltd v Wilckens and Burnside Pty Ltd* [1971] SASR 121.

³⁵ *Cini v Pets Paradise Franchising (SA) Pty Ltd* (2008) 102 SASR 177.

C. WITHDRAWING CAVEAT

As set out above, a caveator may withdraw his/her caveat at any time: section 191(h) of the Act.

Formal Requirements

1. *Appropriate Form*

The current form for withdrawing a caveat is Form W1. A blank copy of the form is attached for your ease of reference.

2. *Caveat Being Withdrawn*

Insert the caveat number in this panel.

3. *Certificate(s) of Title From Which Caveat is Being Withdrawn*

Insert the title reference from which the caveat is to be withdrawn. The title must correspond exactly with the wording on the caveat.

4. *Whole or Part of the Land*

Indicate whether the whole or part of the land in the caveat is being withdrawn by striking out the word "whole" or "part." See also the "Operative Clause" (below).

5. *Description of Caveator*

The full name and address of the caveator must be stated.

6. Operative Clause

If withdrawing the caveat in full, leave paragraph (a) of the operative clause and strike out paragraph (b).

If withdrawing the caveat only in part, leave paragraph (b) and strike out paragraph (a).

7. Execution and Attestation

The withdrawal of caveat must be executed by the caveator. It cannot be executed by the agent for the caveator. It is important to remember this if the withdrawal of the caveat is urgent, for example, for an impending settlement, and where your client may not be readily available to execute the withdrawal of caveat.

The witness must sign and print their full name and provide their address and business hours telephone number.

Note once again that a penalty of up to \$2,000.00 or 6 months imprisonment applies for improper witnessing.

Note also that, as with caveats, withdrawals of caveat are not subject to the Verification of Identity regime, but best practice mandates that you know your client, that they have authority to execute the withdrawal (for example, if they are a director of a corporate caveator) and that you are otherwise able to verify their identity.

8. Certification

The withdrawal of caveat must be certified as being “correct for the purposes of the *Real Property Act 1886*”³⁶ on the back page of Form W1. The certification must be made by either a solicitor, registered conveyancer or the caveator.

³⁶ Section 273 of the Act.

Summary – Withdrawal of Caveats³⁷

1. Decide whether to withdraw caveat in full or in part;
2. Ensure the formal requirements are completed accurately;
3. Execute and witness;
4. Lodge Form W1 with LTO.

D. REMOVING CAVEAT

There are two methods by which an individual can have a caveat removed.

1. Application to Registrar-General

The caveatee may apply to the Registrar-General to have the caveat removed by completing LTO Form A3.

The Registrar-General shall, upon receipt of the application, give 21 days' notice in writing to the caveator, requiring the caveator to withdraw the caveat: section 191(e) of the Act.

After the lapse of 21 days from the posting of the notice to the caveator, the Registrar-General shall remove the caveat from the Register Book: section 191(f) of the Act.

If the caveator intends on sustaining the caveat, the caveator must apply to the Court for an Order to extend the time for removal beyond the 21 days: section 191(g) of the Act.

2. Application to Court

Section 191(d) of the Act provides that the registered proprietor or any other person claiming estate or interest in the land may initiate an action in Court by calling the caveator to show cause why the caveat should not be removed.

³⁷ For further discussion regarding withdrawal of caveats see Don Mackintosh, 'Caveats' (Paper presented to the Law Society of South Australia, 28 June 2001; updated 19 May 2009) at 23-24 and Rachel Spencer, *Property Law Practice SA: A Handbook for Lawyers and Conveyancers* (Presidian Legal Publications, 2009) 89-90.

The procedure to be followed on an application to the Court for the removal of a caveat and for the extension of time for the removal of a caveat is provided for in Part 9 of the *Supreme Court Civil Rules 2006* and *Supreme Court Civil Supplementary Rules 2014*.

Section 207A of the *Supreme Court Civil Rules 2006* provides as follows:

207A—Application for extension of time for removal of caveat

(1) An application for an extension of time for removal of a caveat under section 191 of the Real Property Act 1886 is to be supported by an affidavit.

(2) The affidavit is to—

(a) exhibit the caveat and notice from the Registrar-General;

(b) identify the facts allegedly giving rise to the caveator's interest in the land;

and

(c) explain why and for how long an extension of time is required.

Sections 196 and 197 of the *Supreme Court Civil Supplementary Rules 2014* provide as follows:

196—Application for extension of time for removal of caveat

(1) An application for an extension of time for removal of a caveat under section 191 of the Real Property Act 1886 is to be made as soon as possible after receipt of the notice from the Registrar-General and not left until shortly before the 21 day period expires.

(2) When an application to extend time for removal of a caveat cannot be dealt with in sufficient time in the normal course of a general list, the plaintiff may request to have the summons made specially returnable.

(3) A party or his or her lawyer personally may be penalised in costs on an application to extend time when the need for the application is due to their own delay.

197—Service of summons

(1) Service of the summons may be effected pursuant to section 191(b) of the Real Property Act 1886.

(2) When an application is brought to extend time for removal of a caveat, and an address for service has not been entered by the defendant, proof is to be given of the service of the summons.

Application to the Registrar-General is the least expensive way of having the caveat removed, however, the range of individuals who can apply to the Registrar-General is more limited than those that can apply to the Court. Accordingly, some individuals who may be affected by a caveat will be unable to apply to the Registrar-General for the caveat's removal.

Initiating an action in Court is the more expensive way of removing a caveat, however it provides a number of advantages including: a wider range of individuals can apply to Court than those that can apply to the Registrar-General; and where the individual seeking to remove the caveat is aware that the caveator is prepared to take the matter to Court in order to sustain the caveat, time and expense may be saved by initiating the action themselves rather than applying to the Registrar-General and thereafter having to wait for the 21 day period to lapse.

E. PRIORITY NOTICES

Overview of "Priority Notices"

The Registrar-General recently proposed the introduction of "Priority Notices", which is the second of four reforms to be introduced in preparation for South Australia's participation in electronic conveyancing.³⁸ The Act has now been amended to include Priority Notices in the newly introduced Part 13A.

³⁸ Service SA, 'Priority Notices' (24 April 2015) Government of South Australia <<http://www.sa.gov.au/topics/housing-property-and-land/land-services-industry/national-electronic-conveyancing/priority-notices>>; Land Services Group, 'Priority Notices Proposal (Version 1)' (24 April 2015) <<https://www.sa.gov.au/topics/housing-property-and-land/land-services-industry/national-electronic-conveyancing/priority-notices>>.

A "Priority Notice" has been defined as being "an instrument lodged in the Lands Titles Office (LTO) that allows a party to protect the priority of dealings they intend to lodge in the LTO."³⁹

The Land Services Group has suggested that using such Notices as a means of protecting parties' interests will become increasingly important when duplicate Certificates of Title are abolished and electronic conveyancing commences.

The Land Services Group further states that Priority Notices will:

- Reserve priority for the dealings set out in the Priority Notice;
- Notify parties searching the Title of the pending lodgement of dealings;
- Assist in fraud prevention, as the early notification of pending transactions will increase the likelihood of a fraudulent conveyancing transaction being detected; and
- Improve the accuracy of title searches, as currently there is no record of the lodgement of a dealing on the Title until the LTO has processed the dealing and updated the Register Book.⁴⁰

Lodgment of Priority Notices

The lodgement of Priority Notices are optional and can be lodged by any person who intends to lodge a dealing or dealings in the LTO for the purposes of giving priority to one or more instruments relevant to the same conveyancing transaction.⁴¹

They will be lodged online through the South Australian Integrated Land Information System (SAILIS), either by SAILIS account holders (legal practitioners, conveyancers and mortgagees) or by registration counter staff members (on behalf of self-represented parties).

Section 154A(2) of the Act provides that a priority notice must:

³⁹ Land Services Group, 'Notice to Lodging Parties #177 – Introduction to Priority Notices' (24 April 2015) <http://www.sa.gov.au/__data/assets/pdf_file/0010/158527/Introduction-of-Priority-Notices.pdf>.

⁴⁰ *Ibid.*

⁴¹ Section 154A(1) of the Act.

- (a) be in the appropriate form; and*
- (b) identify the instruments to which priority is to be given; and*
- (c) specify the order in which priority is to be given to the instruments identified in the notice; and*
- (d) identify the land to which the notice relates; and*
- (e) include any other information, or be accompanied by any other document, required by the Registrar-General.*

A Priority Notice may be lodged in relation to land wholly comprised in a single certificate of title, land comprised in more than one certificate of title or a portion of the land comprised in a certificate of title: section 154A(14) of the Act.

Effect of Priority Notices and Dealings that can be Registered when there is an Active Priority Notice

Section 154B(1) of the Act provides as follows:

If an instrument affecting land is lodged in the Lands Titles Registration Office or served on the Registrar-General while a priority notice is in force in relation to the land, the instrument may not be registered or recorded in the Register Book or the Register of Crown Leases until the priority notice ceases to have effect.

However, Priority Notices will not prevent the registration of caveats, Court Orders or other instruments⁴² listed in section 154(B)(2) of the Act, specifically:

- (a) an instrument identified in the priority notice as an instrument to which priority is to be given (provided the instruments identified in the notice are lodged in accordance with section 154A(4));

⁴² "Instrument" is defined in section 154 of the Act as:

any document capable of registration in the Lands Titles Registration Office, or in respect of which a record is under an Act directed, required, or permitted to be made in the Register Book, and includes a document that may be registered or recorded in the Register of Crown Leases under section 93.

- (b) any other instrument with the written consent of the person who lodged the priority notice;
- (c) the receipt, removal, extension or withdrawal of a caveat;
- (d) a statutory order or the cancellation of a statutory order;
- (e) a statutory authorisation or the cancellation of a statutory authorisation;
- (f) an order of a court;
- (g) a warrant of sale;
- (h) a transfer consequential on a statutory charge, order or authorisation, a warrant of sale or the exercise of a statutory power of sale by a statutory body or officer;
- (i) an instrument lodged by the Crown;
- (j) an instrument relating to an interest in land that, in the opinion of the Registrar-General, would not affect the interest to which the priority notice relates;
- (k) a statutory charge or the discharge, removal or cancellation of a statutory charge;
- (l) a heritage agreement, or the variation or termination of a heritage agreement, under the *Heritage Places Act 1993* or the *Native Vegetation Act 1991*;
- (m) an agreement, or the rescission or amendment of an agreement, under Part 5 of the *Development Act 1993*;
- (n) an alteration to the South Australian Heritage Register under the *Heritage Places Act 1993*;
- (o) a worker's lien, or the cessation or withdrawal of a worker's lien, under the *Worker's Liens Act 1893*;
- (p) a notice or acquisition under the *Land Acquisition Act 1969*;
- (q) an environment performance agreement, or the termination of an environment performance agreement, under the *Environment Protection Act 1993*;
- (r) an Aboriginal heritage agreement, or an agreement varying or terminating an Aboriginal heritage agreement, entered into under the *Aboriginal Heritage Act 1988*;

- (s) an access agreement, or the variation of an access agreement, entered into under the *Recreational Greenways Act 2000*;
- (t) a management agreement, or the rescission or amendment of a management agreement, entered into under the *River Murray Act 2003*;
- (u) the amendment or rescission of, or any other dealing with, a statutory encumbrance (within the meaning of Part 19AB) not otherwise mentioned in this subsection;
- (v) an application under this Act by a person to whom land has been transmitted for registration as proprietor of the land;
- (w) any other prescribed instrument, order, agreement or matter or instrument, order, agreement or matter of a prescribed class.

Period of Effectiveness

Priority Notices will be effective for sixty (60) calendar days from the date of lodgement with an option to extend (once only) for a further period of thirty (30) calendar days.⁴³

Priority Notices will expire once the sixty (60) calendar day period has lapsed (if it has not been extended) and the dealings listed in the Priority Notice have not been lodged. If the Priority Notice has been extended, it will expire at the end of the additional thirty (30) calendar day period.⁴⁴

If the dealings identified in a Priority Notice are all lodged while the Priority Notice is in effect, the Priority Notice will continue to protect their priority until they have each been registered, withdrawn⁴⁵ or rejected by the Registrar-General.⁴⁶

⁴³ Section 154G(5)(6) of the Act.

⁴⁴ Section 154G of the Act.

⁴⁵ Section 154E of the Act.

⁴⁶ Sections 154F and 154G of the Act.

Civil Liability Provisions

Section 154I of the Act introduces a new civil liability provision which provides that an individual who suffers loss due to a wrongful lodgment of a Priority Notice can now claim damages from the lodger.

Section 154I provides as follows:

(1) If—

(a) a person (the *defendant*) lodges a priority notice in the Lands Titles Registration Office; and

(b) another person (the *plaintiff*) suffers loss or damage as a consequence of the notice having been lodged; and

(c) the defendant—

(i) was not entitled to lodge the notice; or

(ii) unreasonably refused or failed to withdraw the notice,

the defendant is liable to compensate the plaintiff for the loss or damage.

(2) The Court may, in proceedings under this section, require the defendant to pay an amount, determined by the Court, in the nature of exemplary damages.

(3) The defendant in proceedings under this section bears the onus of proving that he or she was entitled to lodge the priority notice or that he or she did not unreasonably refuse or fail to withdraw the notice.

Priority Notices vs Caveats

As the name suggest Priority Notices give prior notice to any persons searching the register of a forthcoming dealing or dealings in their order of priority, but unlike a Caveat, does not absolutely prevent any subsequent dealing.

F. CONCLUSION

Caveats are an effective, inexpensive, quick method of protecting and preserving a legal or equitable interest in land and, if implemented properly, should prevent litigation or at least give your client the box seat in any litigation where your client is compelled to bring proceedings to extend a caveat.

If you do not carefully obtain instructions in relation to and properly advise your client around the four W's (who is your client, what is their interest, is it caveatable, what type of caveat should be lodged, why, and when should it be lodged – if not at once), then you may well open your client (and possibly yourself by way of a professional negligence claim) up to expensive and tortuous litigation.

Take detailed written (and signed, if acting as agent) instructions, insist on being provided supporting documentation and be ready to go to Court for your client if the caveat is to be challenged. If the Caveat you have prepared has been properly drafted and supported by an appropriate interest, it will be upheld by the Court as if it was an injunction and protect your client's position until the dispute is settled or tried.

Dino Di Rosa

Di Rosa Lawyers

29 May 2015

(With the valuable assistance of Mr Peter Kassapidis)



Disclaimer

The paper and presentation represent the opinions of the authors and presenters, and not necessarily those of the Law Society of South Australia or its officers, employees or members.

The contents are for general information only. They are not intended as professional advice and should not be relied upon for any purpose. Any specific situation should be analysed and assessed by a suitably skilled and experienced solicitor, barrister or other suitably qualified professional.

The Law Society of South Australia and the authors and presenters of this paper expressly disclaim all liability to any person for any loss or damage however arising in connection with use or reliance upon the content of this paper or the associated presentation.

Copyright

This paper and any associated recording or transmission of the presentation of this paper (any of which is "Material") is subject to copyright. Subject to the limited licence below, no part of the Material may be reproduced or copied or transmitted in any form or by any means (including, without limitation, graphic, electronic, mechanical, including photocopying, recording, taping or information retrieval systems or via the internet) without the prior written permission of the Law Society of South Australia. You must take all reasonable measures to ensure that unauthorised access to and use and copying of the Material cannot occur.

If you have received this paper at a Law Society Continuing Professional Development Seminar, or have purchased the Material from the Law Society, you are granted a limited licence to store and reproduce the Material in an electronic form but only for retrieval, reference and study by you or members or employees of a firm of which you are a member or an employee. You must not make an electronic copy of the Material available on an unsecured website or any other facility which can be accessed by persons other than the members or employees of your firm.



Would you like to follow up legislation, reports, text book
or any other references mentioned in this paper?

Call in or telephone the staff at

THE MURRAY LAW LIBRARY - Tel: 8229 0235

