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## **The Requirement to “Start a Proceeding” to Prevent the Lapse of a Caveat**

Section 126 of the *Land Title Act 1994* (Qld) regulates whether, and if so, when a caveat will lapse. While certain caveats will not lapse due to the operation of s 126(1), if a caveator does not wish a caveat to which the section applies to lapse, the caveator must start a proceeding in a court of competent jurisdiction to establish the interest claimed under the caveat within the time limits specified in, and otherwise comply with the obligations imposed by, s 126(4).

The requirement, in s 126(4), to “start a proceeding” was the subject of judicial examination by the Court of Appeal (McMurdo P, Holmes JA and MacKenzie J) in *Cousins Securities Pty Ltd v CEC Group Ltd* [2007] QCA 192.

The facts may be stated briefly. A caveat was lodged over specified land on 23 June 2006. On 1 August 2006, the caveators filed a claim and statement of claim in the Supreme Court. Neither the claim nor the statement of claim pleaded a claim for relief involving any interest in the land the subject of the caveat, although the statement of claim did plead the facts establishing the equitable interest in the land claimed under the caveat by the caveators. An amended statement of claim, filed on 14 August 2006, included the caveators’ claim for relief for a declaration that they held an equitable interest in the land the subject of the caveat. On 20 October 2006, the primary judge granted the caveators’ application to amend the claim itself in the terms of the relief sought in the amended statement of claim of 14 August 2006.

For the appellant it was contended that to start a proceeding under s 126(4) of the *Land Title Act 1994*, the *Uniform Civil Procedure Rules 1999* (Qld) (‘UCPR’) require that the relief sought must be stated in the claim itself and not merely in the statement of claim. In the appellant’s view, the claim was the document which started the proceeding while the statement of claim was a mere attachment setting out the factual basis for the claim. As the claim had not when filed, or at any stage in the ensuing three months, sought to establish the caveators’ interest, the appellant contended that s 126(4) had the effect that the caveat lapsed.

The appellant’s submission was not accepted by the Court of Appeal. Examining the judgments in turn:

### **McMurdo P**

In relation to the relevant provisions contained in the UCPR, McMurdo P noted that rule 22 provides that a plaintiff must state briefly in the claim the nature of the claim made or relief sought in the proceeding and attach a statement of claim to the claim. McMurdo P noted that the use of the disjunctive “or” meant that rule 22 did not require the claim itself to state the relief sought.

McMurdo then considered the operation of rule 149 which requires that each “pleading” must “state specifically any relief the party claims”. Having regard to the definition of “pleading” contained in the UCPR dictionary, McMurdo P opined that “pleading” for this purpose included both the claim and the statement of claim attached to it. Accordingly, to comply with rule 149, it was sufficient if the relief sought was included in the statement of claim attached to the claim.

Although neither the claim nor the statement of claim (in its original form) claimed relief involving an interest in the land the subject of the caveat, McMurdo P noted that the statement of claim pleaded the facts establishing the interest claimed by the caveators. McMurdo P opined that this was sufficient to start a proceeding to establish the interest claimed under the caveat for the purposes of s 126(4). Further, the amended statement of claim filed on 14 August 2006 included the caveators’ claim for relief for a declaration that they held an equitable estate in the land the subject of the caveat. On this basis, McMurdo P observed:

In terms of UCPR r 149, the ... pleadings then claimed relief including an equitable estate in the land the subject of the caveat. Certainly by 14 August 2006, within three months of lodging the caveat, the [caveators] had started a proceeding to establish their interest claimed under the caveat so that the caveat did not lapse under s 126(4). (at [10])

#### **Holmes JA (with whom MacKenzie J agreed)**

Holmes JA noted that both *Re Hardy’s Caveat* [1969] QWN 4 and *Re Burman* (Unreported, Lee J, OS No 211 of 1991, 16 April 1991) (being previous decisions made under the equivalent provision of the repealed *Real Property Act 1877* (Qld)) evinced a liberal approach to the question of what constituted a taking of proceedings to establish title, a concept not relevantly different from starting proceedings to establish an interest. Holmes JA expressed some doubt whether proceedings that incidentally asserted the existence of an interest, or the conditions necessary to creation of the interest, were necessarily proceedings *to establish* that interest. However, it was not necessary to reach a concluded view on this issue, as, in this instance, the claim to relief in respect of the equitable interest was made explicit by the amendment to the statement of claim on 14 August 2006.

Holmes JA did not accept the contention that an amendment to proceedings could not amount to starting proceedings for the purposes of s 126(4)(a) of the *Land Title Act 1994*. Holmes JA opined that the requirement of starting a proceeding to establish the interest must be considered in the context of the *Land Title Act 1994*:

The object of the Land Title Act is “to consolidate and reform the law about the registration of freehold land and interests in freehold land” (s 3), a particular aspect of that being “to define the rights of persons with an interest in registered freehold land” (s 3(a)). Section 126(4), conformably with that object, requires the caveator to take steps to make good the interest he claims; to start the process by which his rights and those of the caveatee may be defined. It can make no difference in that process whether the

claim is made by filing the necessary document or by amendment of it. In my view, the requirement in s 126(4) that proceedings be started to establish the interest claimed in the caveat is met once the appropriate proceedings are put on foot, whether that be by commencement or amendment. That occurred in this case by amendment of the statement of claim in August 2006. (at [37]) (section references in italics added)

### **Comment**

Although this decision signals a relatively liberal judicial construction of the statutory requirement to “start a proceeding” it is noteworthy that this litigation arose from an oversight. The oversight was that the documents filed did not reflect the final version settled by counsel, which included a claim for a declaration that the caveators held an equitable estate in the land the subject of the caveat. Notwithstanding the result in this instance, it may usually be regarded as prudent for the relief sought be stated in the claim itself.

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