

Practice Issues Relating to Caveats

The decision of Flanagan J in *Miller v Loel* [2016] QSC 289 represented the culmination of a considerable saga arising from a joint venture where the relationship between the joint venture parties had markedly deteriorated over time. Among the main issues for consideration in this case was whether a caveat lodged on behalf of one of the parties to the joint venture by their solicitor had been lodged or continued without reasonable cause and, if so, had the plaintiffs established that they suffered loss or damage as a result so as to be entitled to compensation under s 130 of the *Land Title Act 1994* (Qld). In the result, Flanagan J held that the caveat had been lodged and continued with reasonable cause and the plaintiffs' claim was dismissed. The decision is noteworthy in that it raises two (2) issues of considerable practical relevance.

First Issue - Proof of Absence of Improper Purpose?

The heading to s 130 of the *Land Title Act 1994* (Qld) is 'Compensation for Improper Caveat'. However, the wording of s 130(1) contains no reference to 'improper' with the provision stating:

A person who lodges or continues a caveat without reasonable cause must compensate anyone else who suffers loss or damage as a result.

Unfortunately, this has resulted in a difference of judicial opinion concerning the operation of the provision. In *Farvet Pty Ltd v Frost* [1997] 2 Qd R 39 ('*Farvet*'), Demack J had regard to the heading to s 130 in reaching the conclusion that if compensation is to be payable under s 130, not only must the caveat have been lodged or continued without reasonable cause, it must be shown that the caveat was lodged or continued for an improper purpose.

A contrary view to that expressed by Demack J was expressed more recently by Henry J in *Re Brooks' Caveat* [2014] QSC 76. It was this more recent view of Henry J that was preferred by Flanagan J (at [53]):

Farvet has stood as authority for the proposition that to succeed under s 130 it was necessary for the caveatee to establish that the caveator did not have an honest belief based on reasonable grounds that it had a caveatable interest and that the caveator lodged and maintained the caveat for an improper purpose. Following the decision in *Farvet* s 130 was amended in terms of the present s 130(3) thereby reversing the onus and placing it on the caveator to establish reasonable grounds. The defendants submit that *Farvet* should still be considered good law, such that whilst the caveator must now establish reasonable grounds, the person seeking compensation continues to have to establish improper purpose. This submission should be rejected for the reasons identified by Henry J in *Re Brooks' Caveat* which I adopt:

"Given the onus now falls to the caveator to prove reasonable cause, the question arises whether it is appropriate to apply the reasoning in *Farvet Pty Ltd v Frost* in reverse, so as to require the caveator to prove the caveat was lodged and continued both with reasonable cause and without any improper purpose. I would not adopt such a test. Section s 130(3) takes the exceptional course of specifically imposing a presumption that a caveator has acted without reasonable cause. I interpret the reference to impropriety in the section's heading as being no more than short form reflection of that adverse presumption. It would be contrary to the words of sub-s (3) to cast the onus upon the caveator of proving anything more than what the sub-section requires. Thus a caveator must only prove the caveat was lodged or continued with reasonable cause." (Citations omitted).

With respect, it seems that the approach of Henry J, as endorsed by Flanagan J, is eminently sensible. However, unfortunately until such time as *Farvet* falls for consideration by other than a single judge, this issue remains unresolved. In the meantime, it may be appropriate to heed the commentary contained in *Land Titles Law and Practice* (Christensen, Dixon and Wallace, Thomson Reuters) (at [7.5110]) as follows:

Until such time as the matter is definitively determined, a caveator, faced with a claim for compensation under s 130, will remain well advised to be in a position to demonstrate that the caveat was not lodged or continued with an improper purpose as well as demonstrating reasonable cause. While this may not be strictly necessary as a statutory requirement, if Henry J's views are preferred, it may nevertheless assist a caveator to discharge the presumption imposed by s 130(3). ... Similarly, in relation to pleadings, until the conflict between the two competing views is resolved, as noted by Mullins J (at [14]) in *Miller v Loel* [2016] QSC 135 it may be prudent if a pleading based on s 130(1) alleges improper purpose, in addition to lodgment or continuance of the caveat without reasonable cause.

Second Issue - A Person who Lodges or Continues a Caveat

The second issue having implications for practice is whether a person other than the caveator may be required to pay compensation under s 130(1). In particular, as a solicitor may lodge a caveat the possibility arises of compensation being sought from the solicitor. Once again, this is an issue upon which persuasive authority is divided.

In *Gordon v Treadwell Stacey Smith* [1996] 3 NZLR 281, the New Zealand Court of Appeal (Thomas, Blanchard and Doogue JJ) considered if the words 'any person lodging a caveat' as contained in s 146 of the *Land Transfer Act 1952* (NZ) would extend to a solicitor lodging a caveat on behalf of a client. The Court of Appeal held that the statutory wording was not restricted to the caveator and made solicitors or other agents responsible for their actions in lodging a caveat if they acted dishonestly or without reasonable cause. There is at least some support for this view in Queensland with Mullins J noting (at [18]) in *Miller v Loel* [2016] QSC 135, 'it is arguable that a solicitor who lodges a caveat where it is shown to be done without reasonable cause cannot necessarily hide behind instructions received from the client to lodge the caveat.'

A contrary approach was adopted by Young AJA in *Windlock Pty Ltd v Davidovic* [2014] NSWSC 269 where his Honour was not inclined to follow the New Zealand Court of Appeal decision as a guide to the construction of the comparable New South Wales legislation.

In the present litigation it was unnecessary for Flanagan J to resolve any conflict between these authorities as it was conceded on behalf of Mr Loel that, for the purposes of s 130(1), he was a person who both lodged and continued the caveat.

While different views have been expressed on this particular issue, it would be prudent for any solicitor who lodges a caveat on behalf of a client to operate on the assumption that there is potential for the solicitor to be liable to pay compensation under s 130(1). Where a solicitor may entertain doubt about whether a caveat may be properly lodged, the observations (at [p 289]) of Blanchard J of the New Zealand Court of Appeal are instructive:

The client can be advised of the doubt and, if still instructed to lodge a caveat, the solicitor can record the advice in writing and seek an indemnity. If that is not thought appropriate and the client wants to proceed, the solicitor can always prepare the document for personal signature and personal lodgment by the client. A solicitor who does so could not be described as a person lodging the caveat.

Before leaving discussion of this issue, it is appropriate to make mention of an amendment proposed to the *Land Title Act 1994* (Qld). Clause 36 of the Land and other Legislation Amendment Bill 2016 (Qld) provides for the amendment of s 130 to replace the references to 'a person who lodged or continued' with reference to a 'caveator'. As noted in the explanatory notes accompanying the Bill:

Clause 36 amends section 130 to clarify that the caveator is liable to pay compensation for lodging or continuing an improper caveat, rather than the person who lodges the caveat, which could be a legal practitioner or lodging agent

Should this legislative amendment proceed to be enacted, it will provide welcome clarity for legal practitioners. In the meantime, practitioners should continue to exercise caution in a manner consistent with the previous observations of Blanchard J.

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