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# To have your caveat and claim it, too

Steps to take to protect an interest  
in land or water allocation.

*Kylie Downes SC and Ben McEniery  
explain the principles behind lodging  
a caveat against dealings.*

Your client has signed a contract of sale for the purchase of a house and land. She has paid a deposit. The contract has not settled, but no settlement notice has been lodged. She is worried because she heard a rumour that the vendor has just signed a contract with another purchaser for a higher amount.

Another client has agreed to lend money to the owner of land in exchange for a mortgage over its land. Your client's mortgage has been lodged but not registered because of an error in the documents which has been the subject of a requisition. Your client has just discovered that the owner has borrowed from another lender subsequently who has also obtained the right to register a mortgage.

Yet another client, a plumber who did some work at a house and remains unpaid for that work, claims an interest in the land pursuant to a charge created by the express terms of his written contract with the owner of the house and land. He sees a 'for sale' sign erected on his client's property. He is worried that if the land is sold, he will lose any security he holds for the debt he is owed.

Clients such as these require urgent protection of their unregistered interests. The lodgement of a caveat can provide the immediate protection required by freezing the register; but, despite the urgency which may be involved, care must be taken in drafting the document.

A caveat is a notice about land or a water allocation which is given in a prescribed form



by Kylie Downes SC and Ben McEniery

to the Registrar of Titles. Its purpose is to protect the caveator's<sup>1</sup> claimed interest in that land or water allocation.

While the caveat remains in force, it prevents the registration of an instrument affecting the interest claimed by the caveator from the date and time it was lodged.<sup>2</sup> Lodging a caveat creates a temporary statutory injunction that 'freezes' the register and gives the caveator time to bring an action to enforce or protect an interest.

Caveats also enable the holder of an unregistered interest to give notice of the existence and nature of that interest to the world at large. Lodging a caveat will give actual, constructive or imputed notice of the existence of an unregistered interest to anyone who searches, or ought to search, the register.<sup>3</sup> If a caveat has been lodged to give notice of an unregistered interest, the caveat will be relevant in determining a priority dispute between competing unregistered interests. In some circumstances, a failure to lodge a caveat may amount to disentitling conduct, which will result in the claimant's equitable interest being postponed in favour of a competing interest.<sup>4</sup>

Caveats must be used only in appropriate circumstances. Lodging a caveat is only justified to protect an existing interest in land. Caveats cannot be used for an ulterior purpose, such as obtaining a commercial advantage by preventing a registered owner dealing with land. While an appropriately deployed caveat can prevent the caveator suffering serious prejudice, one employed without reasonable cause can prejudice others, which in turn can lead to significant adverse consequences to the caveator. A caveator who improperly lodges a caveat may be liable to have the caveat removed pursuant to an order of the Supreme Court,<sup>5</sup> be the subject of a claim for compensation,<sup>6</sup> and be the recipient of an adverse costs order, possibly on an indemnity basis.

When considering whether to lodge a caveat, it is important to note that there is often a delay between an instrument being lodged for registration and actual registration. A caveat lodged after an instrument has been lodged for registration, but before it is registered, will prevent the instrument being registered for as long as the caveat remains in force.

## Lapsing and non-lapsing caveats

There are two types of caveat – lapsing and non-lapsing caveats.

A caveat will be a lapsing caveat unless it is lodged by or with the consent of the

registered owner, by the Registrar under s17 or by a purchaser under an instalment contract for the sale of land under s74 of the *Property Law Act 1974* (Qld).<sup>7</sup>

A lapsing caveat will lapse either three months after it is lodged or, if the caveatee serves a notice under s126(2) on the caveator, 14 days from the date of service of the notice.<sup>8</sup>

A caveator can avoid a caveat lapsing by bringing proceedings before the caveat lapses. Once a caveat has lapsed, it cannot ordinarily be replaced with another caveat since a further caveat cannot be lodged on the same or similar grounds as an earlier caveat without leave of the court.<sup>9</sup>

## Lodging a caveat does not create an interest in land

A caveat merely serves to protect the existing rights of the caveator. Lodging a caveat confers no interest in the land whatsoever, and nor does it transform an interest claimed into something that can be registered or otherwise enlarge the caveator's rights.<sup>10</sup>

## Caveats do not prevent registration of some instruments

Lodging a caveat does not prevent registration of:

- an instrument specified in the caveat as an instrument to which the caveat does not apply
- an instrument which the caveator consents to being registered
- an instrument executed by a mortgagee whose interest was registered before lodgment of the caveat, where the mortgagee has power under the mortgage to execute the instrument, and the caveator claims an interest in the lot as security
- a transfer of mortgage executed by a mortgagee whose interest was registered before lodgment of the caveat, and
- another interest, that if registered, will not affect the interest claimed by the caveator.<sup>11</sup>

## Who may lodge a caveat?

The registered owner of a lot may lodge a caveat.<sup>12</sup> A caveat lodged by the registered owner of a lot will be a non-lapsing caveat.<sup>13</sup> This, however, does not entitle a registered owner to lodge a caveat without reasonable grounds to support it.<sup>14</sup>

Among other eligible persons, s122 permits "a person claiming an interest in a lot" to lodge a caveat. Section 122 replaced s98 of the *Real Property Act 1861*, which provided that a person with "an estate or interest in any land" could lodge a caveat.

The term 'interest' is defined in s36 of the *Acts Interpretation Act 1954*, in regard to land or other property, to mean:

- a legal or equitable interest in the land or other property, or
- a right, power or privilege over, or in relation to, the land or other property.

Cases that interpret s98 of the *Real Property Act 1861* are of assistance when interpreting s122(1)(a) of the *Land Title Act 1994*. In short, it is enough for the purpose of satisfying s122(1)(a) that the caveator has a legal or equitable interest or right in respect of the land.<sup>15</sup>

The interests that are sufficient to establish a caveatable interest are many and varied. The following are a few examples, but are by no means an exhaustive list:

- the interest of a purchaser under an unconditional contract of sale for the purchase of land<sup>16</sup>
- the interest of a purchaser under a conditional contract of sale for the purchase of land (provided equitable relief is available to protect that interest, whether by way of injunction or other remedy)<sup>17</sup>
- the interest of a purchaser under an option to purchase land<sup>18</sup>
- an option to purchase a lot in an unregistered strata plan<sup>19</sup>
- the interest of a purchaser under a rescinded contract who has an equitable lien in respect of the deposit and other money paid pursuant to the contract<sup>20</sup>
- the beneficial interest of a *cestui que trust*<sup>21</sup>
- a mortgagee's interest,<sup>22</sup> and
- a right to a profit à prendre.<sup>23</sup>

Furthermore, s74 of the *Property Law Act 1974* (Qld) specifically provides that a purchaser under an instalment contract for the sale of land may lodge a caveat.

The registered owner purporting to grant a right to lodge a caveat, or consenting to a caveat being lodged, without more, will not be sufficient to create a caveatable interest.<sup>24</sup>

## Completing the form

A caveat must specify a number of particulars. The approved form is a Form 11 Caveat. Here are some points to be aware of when completing the form.

Firstly, the fields in which data can be entered are small. A Form 20 Enlarged Panel should be annexed and used if the form provides insufficient space. This form, along with others, can be downloaded free from the website of the relevant department (currently the Department of Environment and Resource Management).<sup>25</sup>

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### Item 1

Item 1 of the form seeks the caveator's full name and address for service,<sup>26</sup> along with the name, address and phone number of the person lodging the caveat. If there is more than one caveator, all addresses should be listed.

### Item 2

Where freehold land is concerned, item 2 requires the lot on plan description, county, parish, and title reference number to identify the registered interest affected by the caveat.<sup>27</sup> This information can be gathered from the results of a title search of the lot in question.

The description of the relevant lot or lots should be in the form: 'Lot [number] on SP/RP/BUP/GTP [plan reference]'. Plan references must contain the appropriate prefix ('SP' for a survey plan, 'RP' for a registered plan, 'BUP' for a building units plan, 'GTP' for a group titles plan, or other prefixes for Crown plans).

If a caveat is sought over multiple lots, it is not necessary or desirable to lodge a separate caveat for each lot. All affected lots should be listed on a single form.

It is sometimes necessary to lodge a caveat only involving a part of a lot. If the interest claimed relates to only a part of a lot, a description that clearly identifies the affected part is to be included.<sup>28</sup> This would ordinarily require the annexure of a sketch plan. If a caveat is unjustifiably lodged in respect of the whole of a lot to protect an interest in respect of only part of the lot, the caveat may be liable to be removed and the caveatee may be entitled to compensation. However, there may be circumstances where it is appropriate and necessary to caveat over the whole of the lot to legitimately protect the caveator's interest.<sup>29</sup>

A water allocation is identified as a 'Water Allocation', 'Allocation' or simply 'WA' in the lot description. Since a water allocation does not exist in a county or parish, these fields at item 4 are not completed. All plans referring to

water allocations are Administrative Plans, and use AP as the prefix to the plan description.

Thus, the lot on plan description for a water allocation would be expressed as: 'WA [number] on AP [number]'. Once again, all the information needed to complete item 2 can be gathered from the results of a search, in this instance, of the water allocation title.

If a caveat relates only to part of a water allocation, that part must be described by indicating the volume affected in megalitres.

### Item 3

The caveator must state the interest being claimed at item 3.<sup>31</sup> The claim must specify the nature of the estate or interest in the lot with particularity. It is not sufficient to merely describe the interest claimed as an 'equitable interest'.<sup>31</sup> What must be particularised is a specific type of recognised interest. Examples include the following:

- in the case of a purchaser under a contract of sale: "an equitable share or interest as purchaser of an estate in fee simple" or "an equitable estate in fee simple"; and
- in the case of a mortgagee: "an equitable interest as mortgagee of an estate in fee simple", or "an interest as registered mortgagee".

### Item 4

Item 4 requires a statement of the grounds upon which the interest described in item 3 is claimed.<sup>32</sup> This should, where possible, be supported by reference to documentary evidence, for example, the contract, mortgage, or charge by which the interest arose.

Where the caveator is a purchaser of the equitable fee simple, the wording at item 4 might be expressed as: "pursuant to a contract in writing dated [date] between [registered owner] as seller and [caveator] as buyer".<sup>33</sup>

Where the caveator is an equitable mortgagee, the notation might read: "pursuant to an unregistered mortgage in registrable form dated [date] executed by [registered proprietor] to secure to [caveator]

the money therein stated"; or "pursuant to clause [number] in agreement dated [date] charging the property to secure to [caveator] the money therein stated".<sup>34</sup> Where a mortgage is concerned, there is no need to state the amount of the debt.<sup>35</sup>

In the case of a caveator claiming under a constructive trust, a variation of the following words may be used: "as beneficiary under a constructive trust or otherwise by operation of law, pursuant to the unconditional obligation assumed by the registered owner under clause [number] of a written contract dated [date] between the registered owner and [caveator]".<sup>36</sup>

### Items 5 and 6

Items 5 and 6 call for the names and addresses of the registered owner and any other parties having the right to deal with the lot affected by the caveat (such as mortgagees).<sup>37</sup>

### Item 7

Item 7 seeks the nature of the protection sought under the caveat and is completed by deleting the paragraphs and sentences that are not applicable. A caveat must be signed at item 7 by or for the caveator.<sup>38</sup>

### Conclusion

Caveats serve an important function but must be used only in appropriate circumstances. Misuse of a caveat for other than the protection of an existing interest in land can lead to significant adverse consequences for the caveator. Care must be taken when drafting a caveat to ensure that the interest claimed, and the grounds on which it is claimed, are described properly in the approved form. If a caveator is not willing to prosecute a claim in court, the caveat will lapse and the contents of any instrument in registrable form in the queue for registration will be entered on the register and gain the benefits of indefeasibility.<sup>39</sup>

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## Notes

- <sup>1</sup> A caveator, for a lot over which a caveat has been lodged, means a person in whose favour the caveat is lodged: *Land Title Act 1994* (Qld), Schedule 2.
- <sup>2</sup> *Land Title Act 1994* (Qld) s124(1).
- <sup>3</sup> *J & H Just (Holdings) Pty Ltd v Bank of NSW* (1971) 125 CLR 546.
- <sup>4</sup> *Heid v Reliance Finance Pty Ltd* (1983) 154 CLR 326 at 342.
- <sup>5</sup> *Land Title Act 1994* (Qld) s127.
- <sup>6</sup> *Land Title Act 1994* (Qld) s130.
- <sup>7</sup> *Land Title Act 1994* (Qld) s126(1).
- <sup>8</sup> *Land Title Act 1994* (Qld) s126.
- <sup>9</sup> *Land Title Act 1994* (Qld) s129.
- <sup>10</sup> *Butler v Fairclough* (1917) 23 CLR 78 at 84.
- <sup>11</sup> *Land Title Act 1994* (Qld) s124(2).
- <sup>12</sup> *Land Title Act 1994* (Qld) s122(1)(c).
- <sup>13</sup> *Land Title Act 1994* (Qld) s126(1)(a).
- <sup>14</sup> *Sinclair v Hope Investments Pty Ltd* [1982] 2 NSWLR 870.
- <sup>15</sup> *Mijo Developments Pty Ltd v Royal Agnes Waters Pty Ltd* [2007] NSWSC 199 at [34]; *Qld Estates Pty Ltd v Collas* [1971] Qd R 75.
- <sup>16</sup> *Re Oil Tool Sales Pty Ltd* [1966] QWN 11.
- <sup>17</sup> *Re Henderson's Caveat* [1998] 1 Qd R 362; *Cousins Securities Pty Ltd v CEC Group Ltd* [2007] 2 Qd R 520.
- <sup>18</sup> *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57.
- <sup>19</sup> *Forder v Cemcorp Pty Ltd* (2001) 51 NSWLR 486.
- <sup>20</sup> *Ex parte Lord* [1985] 2 Qd R 198.
- <sup>21</sup> *Re Peycher's Caveat* [1954] NZLR 285.
- <sup>22</sup> *Re Dixon's Caveat* (1922) 39 WN (NSW) 89. Under s22(2) of the *Land Title Act 1994* (Qld), an equitable mortgagee can only lodge a lapsing caveat.
- <sup>23</sup> *Connolly v Noone* [1912] St R Qd 70.
- <sup>24</sup> *Queensland Estates Pty Ltd v Collas* [1971] Qd R 75 at 79.
- <sup>25</sup> At present, the form can be downloaded at [derm.qld.gov.au/property/titles/forms.html](http://derm.qld.gov.au/property/titles/forms.html).
- <sup>26</sup> *Land Title Act 1994* (Qld) s121(2)(a).
- <sup>27</sup> *Land Title Act 1994* (Qld) s121(2)(d).
- <sup>28</sup> *Land Title Act 1994* (Qld) s121(2)(e).
- <sup>29</sup> *Powell's Caveat* [1966] QWN 9; *Re Henderson's Caveat* [1998] 1 Qd R 362.
- <sup>30</sup> *Land Title Act 1994* (Qld) s121(2)(f).
- <sup>31</sup> *Hanson Construction Materials Pty Ltd v Vimwise Civil Engineering Pty Ltd* [2005] NSWSC 880.
- <sup>32</sup> *Land Title Act 1994* (Qld) s121(2)(g).
- <sup>33</sup> Department of Environment and Resource Management, *Land Title Practice Manual* (Queensland), Part 11—Caveat.
- <sup>34</sup> Department of Environment and Resource Management, *Land Title Practice Manual* (Queensland), Part 11—Caveat.
- <sup>35</sup> *Leros Pty Ltd v Terara Pty Ltd* (1992) 174 CLR 407 at 422 to 423 (Mason CJ, Dawson and McHugh JJ).
- <sup>36</sup> *Cousins Securities Pty Ltd v CEC Group Ltd* [2007] 2 Qd R 520.
- <sup>37</sup> *Land Title Act 1994* (Qld) s121(2)(b).
- <sup>38</sup> *Land Title Act 1994* (Qld) s121(1).
- <sup>39</sup> For more reading, see MacDonald, McCrimmon, Wallace, Weir, *Real Property Law in Queensland*, 3rd Edition, (2010), Law Book Co.

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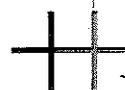
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