

Caveats

- s 42 and s 43 makes unregistered interests vulnerable to defeat by later registered proprietors
- There are some interests in land that cannot be registered e.g. equitable interest under a trust (e.g. Bahrs (above))
- The caveat system protects **valuable interests** in land in the RPA

74F Lodgment of caveats against dealings, possessory applications, plans and applications for cancellation of easements or extinguishment of restrictive covenants

(1) Any person who, by virtue of any unregistered dealing or by devolution of law or otherwise, claims to be entitled to a legal or equitable estate or interest in land under the provisions of this Act may lodge with the Registrar-General a caveat prohibiting the recording of any dealing affecting the estate or interest to which the person claims to be entitled.

- Caveats don't change the nature of the interest the caveator claims, and they don't register it
 - It stops any other registrations which allow the caveator to compete with a later interest as an earlier equitable interest vs. a later equitable interest
 - This is the **4th priority rule** which is still applicable in the Torrens system → the RPA doesn't say anything about priority between unregistered interests so the general law still applies (*Rice v Rice* (1854) 61 ER 646 **when the equities are equal, the first in time prevails**)
 - This rule was applied in *Breskvars v Wall*
 - Note – an earlier equitable interest is likely to win in a competition with a later equitable interest to prevent the strict application of s 42 (registration)
- Other reasons for lodging caveats

Majority of unregistered interests are equitable but there some that are legal because of common law	<ul style="list-style-type: none">• E.g. leases and easements implied by the common law• But they are not enforceable against a RP because s 42 doesn't say anything about being bound by legal interests• <u>Whether legal or equitable, unregistered interests must operate within the ss 42 and 43 framework</u>• So when using the s 74F, a person can lodge a caveat
Caveats can be lodged if there is fear of any	<ul style="list-style-type: none">• It can be done electronically (still requires proper VOI via a professional) under s 74F(5)(b)(v)• Ensure that the client <i>actually has an interest in land</i> e.g.

improper dealings	<ul style="list-style-type: none"> ○ It can't be a right derived from a contract unless that right creates an interest in land ○ Unless a debt is secured by an interest in land like a charge or mortgage, it won't be caveatable
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Lapsing Notices

- The RP will be notified when a caveat is lodged, and if they disagree with it they can apply a 'lapsing notice' under s 74J(1) which
 - Gives the caveat 21 days to apply to the Supreme Court for an order allowing the caveat to remain, or
 - By directly seeking a court order for the removal pursuant to s 74MA(1)
- When deciding whether the caveat should remain, it is a 2-pronged test
 1. Is there a serious question to be tried?
 2. On the balance of convenience should the caveat remain?
- Caveats 'without reasonable cause'
 - It can cause monetary loss to RPs e.g.
 - If a landowner is being prevented to transferring title, they may be liable for damages for breach of contract
 - If a landowner cannot sell their land, they may still be liable to pay mortgage repayments, rates and taxes
 - Where the caveat should not be maintained, s 74P(1) RPA says

74P Compensation payable in certain cases

(1) Any person who, **without reasonable cause**—

- (a) lodges a caveat with the Registrar-General under a provision of this Part,
- (b) procures the lapsing of such a caveat, or
- (c) being the caveat, refuses or fails to withdraw such a caveat after being requested to do so,

is liable to pay to any person who sustains pecuniary loss that is attributable to an act, refusal or failure referred to in paragraph (a), (b) or (c) compensation with respect to that loss.

- Key question: Was the caveat lodged 'without reasonable cause'?
- *Bedford Properties Pty Ltd v Surgo Pty Ltd* [1981] 1 NSWLR 106 stated 'the foundation for reasonable cause must be, not the actual possession of a caveatable interest, but an **honest belief based on reasonable grounds** that the caveat has such an interest'
 - The test has a subjective and objective element
 - e.g. someone might honestly believe someone owes them money (like child support) but there are no reasonable grounds for that belief because the law is clear: caveats must relate to interests in land

New Galaxy Investments Pty Ltd v Thomson [2017] NSWCA 153

- Context: Judges on the Court of Appeal couldn't agree whether there was an equitable, and thus caveatable interest pursuant to a complex, messy payment of \$6 mil by the caveators to the vendors to an alleged right to have a contract of sale novated in the caveator's favour
- **One of the questions:** Did the Caveator have an honest belief on reasonable ground that they had a caveatable interest?
 - It would not always be the case, but in this one, the caveator had relied on legal advice which had been given on the basis of adequate instructions – even if the advice was erroneous – the caveator's belief was reasonable
- Is monetary loss 'attributable' to the lodgement or maintenance of a caveat without reasonable cause? → look at the facts

Guirgis v JEA Developments Pty Ltd [2019] NSWSC 164

- Lodging a caveat has immediate legal effect and can have significant commercial and financial consequences
- Facts
 - Matrimonial dispute between Mr and Mrs Guirgis
 - Mr Guirgis sought orders under ss 74MA and 74P RPA for the removal of the caveat and for compensation against the defendant, Mrs Guirgis (who is the sole director, secretary and shareholder)
 - At the hearing, it was clear she did not have a caveatable interest in the property and knew the whole time → she was ordered to remove it and pay costs
- **Main issue:** The Conveyancer had either acted with reckless disregard for obligations or had failed to meet the standard of care
- s 74F prescribes the persons who are permitted to lodge a caveat in respect of land, s 74F(5) prescribes the procedural requirements that must be satisfied

(v) *the prescribed particulars of the legal or equitable estate or interest, or the right arising out of a restrictive covenant, to which the caveator claims to be entitled...*

(c) *be verified by statutory declaration or, in the case of a caveat lodged electronically, be verified in a way approved by the Registrar-General, and*
(d) *be signed by the caveator or by a solicitor or other agent of the caveator.*

- 'Prescribed particulars' are subject to cl 7 and Sch 3 to the Real Property Regulation 2014 (NSW); matters must be specified are
 1. Particulars of the nature of the estate or interest in land claimed by the cavator
 2. *The facts on which the claim is founded*, including (if appropriate) a statement as to the manner in which the estates or interest claimed is derived from the registered proprietor of the estate or interest or the primary or possessory applicant against which the caveat is to operate