Key:

- Orange = Caselaw
- Green = Legislation
- Blue = Rule

Caveats	
Key Principles	❖ **Caveat: Akin to a statutory injunction** – an injunction against the registration of an inconsistent dealing otherwise than in accordance w. the caveat; ***Leros Pty Ltd v Terara Pty Ltd* [1992] HCA 22**, see **s 74F RPA** ➢ **Caveator can lodge a caveat of title** ➢ **Primary function of a caveat is protective NOT notice** ▪ Necessary protection for equitable interests (BB under trust, holder of unregistered interest) ➢ Caveat is NOT an interest in land it is an unregistered interest that can be protected ❖ **General Principle:** Any person claiming an estate or interest in land under any unregistered instrument or otherwise may lodge a caveat with the Registrar forbidding the registration of any person as transferee, or proprietor, or of any instrument affecting the estate or interest ➢ **Remedy: Memorandum of caveat** entered into relevant Crown grant, COT or folio of register ▪ Notice given to RP who may secure proceedings to remove caveat ❖ **Procedural Requirement:** ➢ When transfer of dealing is lodged for registration, Registrar must **notify caveator** – then has specified period to consent to take proceedings to show cause why dealing should be registered ▪ If the **caveator takes no action w/n this time** the **caveat lapses** and the Registrar must register the dealing ▪ **Lapsed caveat cannot be renewed** ➢ Typically, in NSW caveator does not have to begin proceedings until some dealing which would defeat the claim is lodged for registration
Step 1: Who can lodge a caveat?	❖ **Who can lodge a caveat: s 74F(1) RPA** ❖ Legal or equitable estate or interest in that parcel of land for which your estate stems ➢ **(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. ➢ **(2)** Any **registered proprietor of an estate or interest who fears an improper dealing with the estate or interest by another person** may lodge with the Registrar-General a caveat prohibiting the recording of any dealing affecting the estate or interest. ❖ RP's of land can lodge a caveat **on their own land** where they fear an improper dealing; **s 74F(2) RPA**
Step 2: Is there a caveatable interest?	❖ **Caveat may only be lodged in respect of an estate or interest in land:** ***Valerica Pty Ltd v Global Minerals* (2001) NSW ConvR ¶55-963** ➢ **Need not be registrable interest** or one giving holder a right to compel the RP to deliver a registrable interest so long as equity will give specific relief; ***Composite Buyers Ltd v Soong* (1995) 38 NSWLR 286 at 287** ❖ **Caselaw on interest that will support caveat:** ➢ Purchaser under sale contract that's **not yet been registered** ➢ Paid 30% of deposit but not on title – purchaser money RT ➢ Interest of purchaser under a conditional sale caveatable if the court would protect by injunction; ***Jessica Holdings v Anglican Property Trust* (1992) 27 NSWLR 140**

	➢ The interest of a builder during construction on the land if the contract provides for a charge; ***Rising Developments Pty Ltd v Hoskins* (1996) 39 NSWLR 157** ➢ An unregistered profit à prendre; ***Permanent Trustee Aust Ltd v Shand* (1992) 27 NSWLR 426** ➢ Protection of option to acquire lot in unregistered strata plan; ***Jessica Holdings Pty Ltd v Anglican Property Trust Diocese of Sydney* (1992) 27 NSWLR 140** ❖ **Caselaw on interests that WON'T support caveat:** ➢ Tina owes you money and refuses to pay. You hear she is about to sell her house & go overseas – **personal claim** ➢ Claim for a property settlement under the Family Law Act 1975 or the Property (Relationships) Act 1984 (NSW) is not an interest in land so is not caveatable until an order is made; ***Ryan v Kalocsay* [2009] NSWSC 1009** ▪ E.g., Malcolm has a claim regarding his estranged wife's property under FLA including her two investment properties ➢ Claim to an interest as a result of carrying out work on the land; ***Dolroy Pty Ltd v Civilco Constructions Pty Ltd* [2007] NSWSC 1263** ➢ Claim to set aside a transfer on ground of fraud – claim in personam which may result in proprietary interest but isn't caveatable until such claim is successfully established; ***Valerica Pty Ltd v Global Minerals Australia Pty Ltd* [2000] NSWSC 1144**
Does an RP have a caveatable interest?	❖ **NSW permits RP to have caveatable interest** where **RP fears an improper dealing** because of the loss of a COT or for some other reason: **NSW, s 74F(2)** ➢ Alternatively, registrar may be willing to enter a caveat on behalf of the Crown to prevent fraud or improper dealing with the title ❖ Where mortgagee exercised power of sale fraudulently or breach of statute, the **mortgagor has an equity to set aside the sale** – equity affords a caveatable interest; ***Sinclair v Hope Investments Pty Ltd* [1983] 2 NSWLR 870** ➢ Mortgagors may also apply for an interlocutory injunction to restrain a voidable sale: see ***Forsyth v Blundell* (1973) 129 CLR 477**
Step 3: Requirements for caveats	❖ **Key Requirements: Caveats must specify:** ➢ **1)** The **nature of the estate or interest** claimed in the land ➢ **2)** A **description of the land** & the facts on which the claim is based ➢ **3)** Quantum of the estate claimed by the caveator and the facts on which the claim is founded + verified by statutory declaration; **s 74F(5) RPA**; ***Kerabee Park Pty Ltd v Daley* [1978] 2 NSWLR 222** ❖ **Where RP applies for caveat to be removed:** ➢ **Caveator to show cause** why the caveat should not be removed or to commence a proceeding to substantiate the clam in the caveat ❖ **Notice requirement of the RG in writing to RP; s 74F(6) RPA** ➢ **(6)** On the lodgement of a caveat under subsection (1), the Registrar-General must give notice in writing of the lodgment of the caveat to the registered proprietor of the estate or interest affected by the caveat by— ▪ **(a)** sending the notice in the approved way to the address of the registered proprietor specified in the caveat, or ▪ **(b)** giving the notice in such other manner, whether by advertisement or otherwise, as the Registrar-General considers appropriate.
Step 4: Application for removal of caveat	❖ **Step 1:** Any person who claims an estate or interest in land to apply directly to the Supreme Court for an order that a caveat be withdrawn; **s 74MA RPA (NSW)** ❖ **Step 2: Grounds for removal:**

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<tr><td>By lapsing

By withdrawal</td><td colspan="2">

2.1 Bad Form: Prohibition on registration of dealings is stated too widely – Consider whether claimed interest would not entitle caveator to the assistance of the court – enforceable

Where caveat prohibits all dealings; Kerabee Park
Where caveator claimed ‘equitable interest in the land’ but no particulars were included; Choi v Kim [2013] NSWSC 1774
Claimed ‘equitable interest’ was alleged to originate in ‘property purchase payment deposit and lease’; Perpetual Trustee Company Ltd v English [2011] NSWSC 264
<u>Question of caveat form in legal proceedings</u>: If, in any legal proceedings, a question as to the form of a caveat is raised, the court shall disregard any failure of the caveator to comply strictly with the formal requirements; 74L RPA

<u>2.2 Two key thresholds:</u> Eng Mee Yong v Letchumanan [1980] AC 331

2.2.1 Limb 1: Whether there is a serious question to be tried
An applicant must show a <u>prima facie case</u> i.e., Sufficient likelihood of success to justify, on the present state of the evidence, the preservation of its right to a caveatable interest in order to preserve that status quo pending the trial; ABC v O’Neill (2006) 227 CLR 57
2.2.2 Limb 2: Whether the balance of convenience favours the removal of the caveat

Step 3: If claim defective, may be possible for caveator to gain leave to amend caveat; Schibaia v Elias [2013] NSWSC 1485
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<tr><td>Unenforceable caveat – prohibiting ‘all dealings in land’</td><td>Facts: Second mortgagee lodged a caveat which purported to forbid registration of any dealing - caveator had no right to prevent the registration of a transfer by the registered mortgagee to a purchaser where the registered mortgagee’s power of sale had been properly exercised</td><td>Kerabee Park Pty Ltd v Daley [1978] 2 NSWLR 222</td></tr>
<tr><td>Step 5: Has a caveat been lodged without reasonable cause?</td><td colspan="2">

Key Principle: A person who lodges a caveat w/o reasonable cause is liable to pay compensation to another person who suffers loss or damage as a consequence; NSW, s 74P
Onus of Proof: On P to prove that caveator acted without reasonable cause
Establishing “reasonable cause”

Caveator must have believed on reasonable grounds that he or she had the interest claimed
Failure to sustain caveat at full trial ≠ absence of reasonable grounds for lodging caveat in the first place

<u>Caselaw:</u>

No reasonable cause where → Established usually where someone has right to caveat but exercises right for alternative purpose; Bedford Properties Pty Ltd v Surgo Pty Ltd [1981] 1 NSWLR 106
D did not have any reasonable grounds for believing that it had what it claimed in the caveat, namely, an agreement giving it the right to an instrument of mortgage
No reasonable cause where solicitor was neglectful; Lee v Ross (No 2) [2003] NSWSC 507
No test for foreseeability; Lee v Ross (No 2) [2003] NSWSC 507
A caveat lodged in ‘deliberate infringement of the rights of the RP or interested person’ may render the caveator liable: Dykstra v Dykstra (1991) 22 NSWLR 556

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<tr><td>No reasonable cause established

Established usually where someone has</td><td>Facts: D (Surgo Pty Ltd) lodged caveat forbidding rego of any dealing affecting P’s property – P (Bedford) claimed caveat delayed settlement of contract of sale of property resulting in payment of substantial sums in interest to mortgagee of property + additional sums via rates & charges</td><td>Bedford Properties Pty Ltd v Surgo Pty Ltd [1981] 1 NSWLR 106</td></tr>
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right to caveat but exercises right for alternative purpose	❖ **Held:** Contrary to the claim made in the caveat, there had never in fact been any promise or agreement to give a registrable mortgage ❖ **Reasoning:** ➢ **Foundation for reasonable cause:** An honest belief based on reasonable grounds that the caveator has such an interest - may not be enough ➢ On facts, D did not have any reasonable grounds for believing that it had what it claimed in the caveat, namely, an agreement giving it the right to an instrument of mortgage.	
No reasonable cause where solicitor was neglectful **Foreseeability test inapplicable**	❖ **Facts:** Caveator was honest but solicitor was neglectful & lacking in diligence in failing to advise client that vendor's termination of contract for sale of land (alleged caveatable interest) was valid ❖ **Held:** Compensation for wrongful lodgement of a caveat was awarded ❖ **Reasoning:** ➢ Test for foreseeability should NOT be applied in assessing the caveat's role in consequent loss or damage, as a caveator must accept the risk of liability to compensate the registered proprietor for loss realistically attributable to the wrongful lodgment.	***Lee v Ross (No 2)* [2003] NSWSC 507**
Compensation payable in certain situations; s 74P RPA	**(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 caveator, 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. **(2)** Compensation referred to in subsection (1) is recoverable in proceedings taken in a court of competent jurisdiction by the person who claims to have sustained the pecuniary loss. **(3)** A person who is a caveator is not entitled to bring proceedings under subsection (1) (b) if that person, having had an opportunity to do so, has failed to take all reasonable steps to prevent the caveat from lapsing.	
Compensable Loss	❖ Rent payable by vendor who had vacated property, but did not receive the purchase monies until much later because of the delayed sale: ***New Galaxy Investments Pty Ltd v Thomson* [2017] NSWCA 153** ➢ If you go to lawyer & tell them ½ relevant information – not reasonable grounds – not comprehensive and truthful – liable for compensable loss ➢ If you have all information possible – and lawyer tells you to caveat & you caveat – you are protected against loss having sought legal advice in full ❖ Where caveator lodged caveat w. reasonable cause but maintained caveat w/o reasonable cause was compensable; **s 74P RPA [NSW]**	