# Caveats – what to beware of

Tony Cahill  
Legal Author and Commentator

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ABOUT THE AUTHOR

Tony Cahill started practice in 1981. After 13 years with a medium-sized city law firm, Tony commenced practice on his own account at Chatswood. In July 2002 Tony commenced a ‘sabbatical’ from private legal practice to concentrate on legal education and writing.

Tony is a member of the Law Society’s Property Law and Environmental, Planning and Development Committees. He has been a member of the Re-Draft Committees for the editions of the Contract for the Sale of Business since 2000, and the Contract for the Sale of Land since the 1992 edition.

Tony was the co-author with Russell Cocks and Paul Gibney of the first NSW edition of 1001 Conveyancing Answers and is currently the co-author with Gary Newton of Conveyancing Service NSW published by LexisNexis (Butterworths).

Tony is a part-time lecturer in the Applied Law Program at the College of Law, Sydney.
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1 Introduction
This session is designed to explore some of the procedural and practical issues arising from the use (and occasional abuse) of caveats, together with a discussion of the more recently created priority notice. Particular reference will be made to the statutory provisions regulating caveats, and some of the practical problems which arise.

2 A caveat is a creature of statute (but beware the common law!)
The provisions regulating caveats are contained mainly, but not entirely, in Part 7A of the Real Property Act 1900. For two examples of classes of caveat falling outside Part 7A, see sections 12(1)(e) and 82(2) and (3) of the Act which respectively provide as follows:

12 (1) (e) The Registrar-General may record in the Register a caveat on behalf of any person under any legal disability or on behalf of Her Majesty to prohibit the transfer or dealing with any land belonging or supposed to belong to any such person as hereinbefore mentioned, and also to prohibit the dealing with any land in any case in which it appears to the Registrar-General that an error has been made by misdescription of such land or otherwise in any folio of the Register or instrument, or for the prevention of any fraud or improper dealing.

82 (2) Trusts may be declared by any instrument, which instrument may include as well lands under the provisions of this Act as land which is not under the provisions thereof: Provided that the description of the several parcels of lands contained in such instrument shall sufficiently distinguish the land which is under the provisions of this Act from the land which is not under the provisions thereof, and a duplicate or an attested copy of such instrument may be deposited with the Registrar-General for safe custody and reference but shall not be registered.

(3) When any such instrument or duplicate or attested copy thereof is so lodged, the Registrar-General shall forthwith record in the Register a caveat forbidding the registration
of any instrument not in accordance with the trusts and provisions therein declared and contained so far as concerns the land affected by such instrument.

The most common forms of caveat are the caveats lodged under section 74F of the Act. That section deals with a variety of caveats. I set out the section below:

**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.

(2) Any registered proprietor of an estate or interest who, because of the loss of a relevant certificate of title or some other instrument relating to the estate or interest or for some other reason, 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.

(3) Any person who claims to be entitled to a legal or equitable estate or interest in land that is or may become the subject of a possessory application may, at any time before such an application is granted, lodge with the Registrar-General a caveat prohibiting the Registrar-General from granting such an application.

(4) Any person who claims to be entitled to a legal or equitable estate or interest in land that is the subject of a delimitation plan lodged in the office of the Registrar-General may, at any time before the plan is registered, lodge with the Registrar-General a caveat prohibiting the registration of the delimitation plan.

(4A) Any person who claims to be entitled to any legal or equitable interest in an easement the recording of which is the subject of an application for cancellation under section 49 may, at any time before the application is granted, lodge with the Registrar-General a caveat prohibiting the Registrar-General from granting the application.

(4B) Any of the following persons may lodge with the Registrar-General a caveat prohibiting the Registrar-General from granting an application to extinguish a restrictive covenant:

(a) a person who has a registered interest in the land to which the benefit of the restrictive covenant is appurtenant,

(b) a person who claims to be entitled to an equitable estate or interest in that land,
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(c) a person who is recorded in the Register as having the right to release, vary or modify the restrictive covenant,

(d) a person who is recorded in the Register as a person whose consent is required to a release, variation or modification of the restrictive covenant.

(4C) A caveat may be lodged under subsection (4B) whether or not the restrictive covenant is already the subject of an application for extinguishment under Part 8A. However, if such an application has been made and a notice in relation to the application has been given under section 81D then, to be effective, the caveat may only be lodged before the end of the period specified in the notice.

(5) A caveat lodged under this section must:

(a) be in the approved form,

(b) specify:

(i) the name of the caveator,

(ii) where the caveator is not a body corporate—the residential address of the caveator,

(iii) where the caveator is a body corporate—the address of the registered office of the body corporate,

(iv) unless the Registrar-General dispenses with those particulars—the name and address of the registered proprietor concerned,

(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,

(vi) the current reference allocated by the Registrar-General to the folio of the Register, or, as the case may be, the lease, mortgage or charge, to which the caveat relates,

(vii) where the caveat relates only to part of the land described in a folio of the Register or a current lease—a description of that part in the form or manner prescribed, and

(viii) an address in New South Wales at which notices may be served on the caveator (and, if that address is a box at a document exchange, an alternative address in New South Wales that is not such a box),

(c) be verified by statutory declaration or, in the case of a caveat lodged by means of an Electronic Lodgment Network, 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.

(6) On the lodgment 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 by post 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,

unless the consent of the registered proprietor is endorsed on the caveat.

(7) In subsection (6), a reference to the registered proprietor in relation to an estate or interest referred to in that subsection includes a reference to a person who claims to be entitled to such an estate or interest under a dealing lodged in the office of the Registrar-General for recording in the Register.

(8) On the lodgment of a caveat under subsection (3), the Registrar-General shall, if a possessory application referred to in that subsection has been lodged in the office of the Registrar-General, give notice in writing of the lodgment of the caveat to the possessory applicant concerned.

(9) On the lodgment of a caveat under subsection (4), the Registrar-General shall give notice in writing of the lodgment of the caveat to the registered proprietor of the estate or interest affected by the caveat.

(10) On the lodgment of a caveat under subsection (4A) in relation to an easement, the Registrar-General must, if an application for cancellation of the recording of the easement has been lodged in the office of the Registrar-General, give notice in writing of the lodgment of the caveat to the applicant concerned.

(11) On the lodgment of a caveat under subsection (4B) in relation to a restrictive covenant, the Registrar-General must, if an application for extinguishment of the restrictive covenant has been lodged in the office of the Registrar-General, or is later lodged, give notice in writing of the lodgment of the caveat to the applicant concerned.

So, this section covers not only the most common form of caveat (a caveat against dealings), but also a caveat lodged by a registered proprietor (subsection 2), a caveat against the granting of a possessory application (subsection 3), and so on.

Part 7A of the Act contains considerable detail about the law of caveats (sections 74A to 74R inclusive). However, the Act does not codify the law of caveats – practitioners will need to refer to the common law as well as the Act in order to advise their clients. Perhaps the clearest example of that is the references throughout the section to a “legal or equitable estate or interest in land” (what is commonly referred to as a “caveatable interest”) –
whether or not such an interest exists will be usually determined by reference to judicial authority.

3 **Beware the loose claim of a ‘caveatable interest’**

There are numerous court cases which have considered whether or not an interest claimed under a caveat is in fact sufficient to support a caveat. Some clear examples of legal or equitable interests sufficient to ground a caveat include:

➢ The interest of a purchaser under a contract for sale of land – even, it is now clear, a contract conditional on an event which had not yet occurred such as a subdivision of a Ministerial consent (*Jessica Holdings Pty Ltd v Anglican Property Trust Diocese of Sydney* (1992) 27 NSWLR 140).

➢ The interest of a mortgagee (including where the mortgage is created by deposit of title deeds) – *Re Elliot* (1886) 7 LR (NSW) 271.

➢ The interest of a lessee, or of a future lessee under an agreement to lease.

➢ The interest of a grantee of an option to purchase (*Mackay v Wilson* (1947) 47 SR (NSW) 315.

On the other hand, a mere contractual right (for example, for payment of a debt) does not in itself create a caveatable interest, since the debt does not, without more, give rise to a legal or equitable interest in the land.

When drafting a form of caveat, the interest on which the caveat is based needs to be particularised. A statement of the interest as an equitable interest, without more, will not suffice. A caveat which does no more than describe the interest of the caveator as an “equitable interest” will not suffice. A caveat in that form was held to be “inadequate to specify the interest claimed” in *Hanson Construction Materials Pty Ltd v Vimwise Civil Engineering Pty Ltd* [2005] NSWSC 880. The inadequacy is so fundamental that it “... is not susceptible of being cured under section 74L” of the RPA (*Warden v Mortgage House No. 1 Pty Ltd* [2006] NSWSC 1462; BC200611297 at [15]). This observation was cited with approval in *Choy v Hoang* [2007] NSWSC 390; BC200703369.

Why beware? Because of the consequences of lodging a caveat without cause. Section 74P provides:
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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 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.

4 Beware the builder’s caveat

What right does a builder have to lodge a caveat to protect amounts owing under a building agreement?

The right of a builder to lodge a caveat under a contract which created a charge over land to secure repayments is well recognised – see Griffith v Hodge (1979) 2 BPR 9474; Ring Developments Pty Ltd v Hoskins (1996) 39 NSWLR 157.

However, that right must be read subject to the provisions of the Home Building Act 1989 as regards work and contracts to which the Act applies. Section 7D of the Act provides:

7D Interests in land under contract

(1) A contract does not give the holder of a contractor licence or any other person a legal or equitable estate or interest in any land, and a provision in a contract or other agreement is void to the extent that it purports to create such an estate or interest.

(2) Accordingly, the holder of a contractor licence or any other person may not lodge a caveat under the Real Property Act 1900 in respect of an estate or interest prohibited by subsection (1).

(3) However, subsection (1) does not apply to a provision in a contract that creates a charge over land if:

   (a) the land the subject of the charge is land on which the contract work is, or is to be, carried out, and
(b) the charge is in favour of the holder of a contractor licence who is a party to the contract, and

(c) the charge is created to secure the payment to the holder of the contractor licence by another party to the contract of money due under the contract, but only if a court or tribunal has made an order or judgment that such payment be made, and

(d) in the case of a charge over land under the Real Property Act 1900 — the party to the contract against whom the judgment or order is made is the registered proprietor of the land.

(4) A charge referred to in subsection (3) over land under the Real Property Act 1900 ceases to operate if the party to the contract against whom the judgment or order is made ceases to be the registered proprietor of the land.

For a judicial analysis of the operation of the caveat provisions, see Thomas Hughes Homes Pty Ltd v Newland [1999] NSWSC 894; (1999) NSW ConvR ¶55-918, and, more recently, Kell & Rigby Pty Ltd v Flurrie Pty Ltd [2006] NSWSC 906. The latter case contains a helpful method of analysing the operation of section 7D (at [15]):

15 The scheme of s 7D is to provide, first, that a provision in a contract or other agreement (“a contractual provision”) does not give the holder of a contractor licence a legal or equitable estate or interest in any land (except where subs (3) is attracted) [s 7D(1)]; secondly, that a contractual provision which purports, contrary to the express words of s 7D(1), to create such an interest in land is void to the extent that it purports to achieve that effect [s 7D(1)]; thirdly, that the holder of a contractor licence may not lodge a caveat in respect of an interest prohibited by subs (1) [s 7D(2)]; but fourthly, that subs (1) does not apply to a contractual provision if the requirements of subs (3) are satisfied. The effect of subs (3) is that, despite subs (1), a contractual provision that creates a charge in favour of the holder of a contractor licence is not void, if the requirements referred to in that subs (3) are satisfied. And because in those circumstances such a charge is not prohibited by subs (1), it is permissible to lodge a caveat in respect of an interest so created.

5 Beware the caveat lodged by a purchaser in an off the plan transaction

Most contracts for the sale of a lot in an unregistered plan contain a provision forbidding the lodgement of a caveat by a purchaser. From the vendor’s point of view, such caveats (especially if widely drawn) may impede registration of the subdivision plan, and therefore delay settlement. A further problem is that there is authority for the proposition that where a
caveat is lodged over land that is subsequently subdivided, the caveat operates over the subdivided parts – *Lintel Pines Pty Ltd v Nixon* [1991] 1 VR 287.

Does such a clause preclude a purchaser from lodging a caveat?

The short answer is, no.

A contractual promise not to caveat is the sort of promise which a court would, in an appropriate case, enforce by injunction, and will be relevant in proceedings to remove or extend a caveat (and, of course, will give rise to an action for breach of contract). For a useful discussion of the principles in the context of an off the plan purchase see *Australian Property & Management Pty Ltd v Devefi Pty Ltd* (1997) 7 BPR 15,255 and *Forder v Cemcorp Pty Ltd* [2001] NSWSC 281; (2001) 10 BPR 18,615; (2001) ANZ Conv R 391; (2001) NSW Conv R ¶55-966 – the latter case confirming that the grantee of an option to purchase a lot in an unregistered strata plan has a caveatable interest.

Whatever may be the basis of restricting caveats by purchasers prior to registration of a plan of subdivision, it is hard to find any justification in doing so once the plan is registered. A reasonably drafted additional provision would, I suggest, expressly confirm this right.

A recent case considering the appropriate precautions to take in purchasing off the plan, and the possible consequences for the lender to the developer, is *Broster v Brueckner* [2003] NSWCA 281.

In July 1997 the respondent entered into contracts to purchase two home units from The Satellite Group (Ultimo) Pty Limited (‘Satellite Ultimo’). The purchase was made “off the plan”. He paid the whole of the purchase price to Satellite Ultimo (thereby obtaining the benefit of a much lower price for the unit). At the time of entering those contracts, he obtained a guarantee of performance from the directors and secretary of Satellite Ultimo (one of whom was the appellant in the Court of Appeal).

The contract for sale was in the usual 1996 edition of the Standard Form Contract of the Law Society and the Real Estate Institute of New South Wales. Clause 2.8 of the contract provided:

> If any of the deposit or of the balance of the price is paid before completion to the vendor or as the vendor directs, it is a charge on the land in favour of the purchaser until termination by the vendor or completion”.
The contract also contained a number of special conditions including Special Condition 5, which provided:

It is an essential condition of this contract that the Purchaser shall not lodge any caveat over any part of the title to the land comprising the Site which shall, or may have the effect, of preventing or delaying the registration of the consolidated plan of subdivision, the strata plan of subdivision, the strata plans of subdivision, the cancellation, release or registration of any 88B instrument or easement or any right or restriction referred to in or contemplated by this Contract, or which might otherwise prevent the registration of any mortgage, discharge of mortgage, or variation of mortgage to which the vendor is a party and which mortgage is, or was associated with, the funding of the acquisition of the site, or the construction on the site of the Building by or on behalf of the Vendor.

Satellite Ultimo subsequently mortgaged the land on which it was proposed to build the home units, to the Westpac. Before Westpac took its mortgage, it was informed that the respondent (and numerous other people) had entered into contracts to purchase identified home units in the building.

Satellite Ultimo encountered financial problems, and a receiver was appointed to it soon after the building was completed. Westpac has exercised a mortgagee’s power of sale in relation to the two units which Satellite Ultimo had contracted to sell to the respondent.

The respondent had failed to protect its security in the units by caveat. The expert evidence on that issue was instructive (at [8]):

... it is the usual practice of ... a solicitor to cause a caveat under the Real Property Act 1900 to be lodged to protect the purchaser’s interest under a contract for sale when there is a delayed settlement, release of the deposit, or a perceived unusual risk. He also says it is the usual practice of such a solicitor to lodge a caveat where a purchaser is acquiring a property, “off the plan”, and for such a caveat to be lodged immediately after exchange of contracts.

The trial judge found that a prudent purchaser would have lodged a caveat (at [9]).

Evidence was given on behalf of Westpac that “... if there had been a caveat of any description on the property at the time of Westpac making its advance. ... if [the respondent] had lodged a caveat, Westpac would have required it to be removed before any money was advanced, but in consequence of the lodgement of a caveat Westpac would have had clear actual notice of [the respondent’s] rights.” (at [12]).
As the respondent did not lodge a caveat the trial judge found, and this was not challenged on the appeal, that Westpac was not bound by any personal equity that required it to recognise the respondent’s interest in the two units. Accordingly, Westpac held title free of the respondent's interest.

The issue on the appeal was whether the trial judge was correct in finding that the damages to which the respondent was entitled was the amount of damages his Honour awarded against Satellite Ultimo ($579,000), less the contract price of the two units ($275,000), being $304,000. The appeal was dismissed.

The lodging of a purchaser’s caveat in the face of a contractual prohibition will need further consideration in the light of the High Court decision of Black v Garnock [2007] HCA 31, discussed in more detail below.

6 Beware the unstamped contract

Section 304 of the Duties Act 1997 provides:

304 Receipt of instruments in evidence

(1) An instrument that effects a dutiable transaction or is chargeable with duty under this Act is not available for use in law or equity for any purpose and may not be presented in evidence in a court or tribunal exercising civil jurisdiction unless:

(a) it is duly stamped, or

(b) it is stamped by the Chief Commissioner or in a manner approved by the Chief Commissioner.

(2) A court or tribunal may admit in evidence an instrument that effects a dutiable transaction, or is chargeable with duty in accordance with the provisions of this Act, and that does not comply with subsection (1):

(a) if the instrument is after its admission transmitted to the Chief Commissioner in accordance with arrangements approved by the court or tribunal, or

(b) if (where the person who produces the instrument is not the person liable to pay the duty) the name and address of the person so liable is forwarded, together with the instrument, to the Chief Commissioner in accordance with arrangements approved by the court or tribunal.

(3) A court or tribunal may admit in evidence an unexecuted copy of an instrument that effects a dutiable transaction, or is chargeable with duty in accordance with the provisions of this Act, if the court or tribunal is satisfied that:
Due to the operation of section 304(1) of the current Act (formerly 29(1) of the *Stamp Duties Act* 1920), the conventional wisdom is that no legal or equitable interest (and therefore no caveatable interest) arises under an unstamped contract – *Ash Street Properties Pty Ltd v Pollnow* (1987) 9 NSWLR 82. That conventional wisdom is not entirely free from doubt – see the decision of Campbell J in *Weston & Cusson (Liquidators) v Metro Apartments Pty Ltd* [2002] NSWSC 682 (NSWSC 22/7/02, noted at (2002) 76 ALJ 667) which suggests a difference in the wording of the respective statutes may be significant).

Whatever may be the position regarding the caveat, the underlying document which supports the caveat will need to be stamped if the caveat leads to litigation.

### 7 Beware the assumption that a caveat ‘freezes’ the Register

A caveat has been variously described as operating as a statutory injunction (*J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546 – but note the comments of Callinan J in *Black v Garnock* [2007] HCA 31, discussed below), or as freezing the Register to preserve the status quo (*Miller v Minister for Mines* [1963] AC 484). Both caveators and registered proprietors should note subsections (4) and (5) of 74H of the Act:

(4) Where, at the time when a caveat is lodged under section 74F to protect a particular legal or equitable estate or interest in land, a dealing which relates to the same land has been lodged for recording in the Register and is in registrable form, the caveat does not prohibit the recording in the Register of that dealing.

(5) Except in so far as it otherwise specifies, a caveat lodged under section 74F to protect a particular legal or equitable estate or interest in land, or a particular right arising out of a restrictive covenant, does not prohibit the Registrar-General from recording in the Register with respect to the same land:

(a) an application made under section 93 by an executor, administrator or trustee in respect of the estate or interest of a deceased registered proprietor,
(b) an application under section 12 of the *Trustee Act 1925* or an order of a court or dealing which, in the opinion of the Registrar-General, effects or evidences a replacement of existing trustees or the appointment of new or additional trustees,

(c) an application under section 101,

(d) a recording under section 46C,

(e) a resumption application within the meaning of Part 5A,

(f) a writ or the cancellation of the recording of a writ in accordance with section 105D,

(g) in relation to a mortgage, charge or covenant charge recorded or lodged in registrable form before the lodgment of the caveat—a dealing effected by the mortgagee, chargee or covenant chargee in the exercise of a power of sale or other power or a right conferred by the mortgage, charge or covenant charge or by or under law,

(h) in relation to a lease recorded or lodged in registrable form before the lodgment of the caveat—a dealing effected by the lessee pursuant to a right conferred by the lease or by or under law,

(i) in relation to a mortgage, charge, covenant charge or lease to the recording of which the caveator has consented or in respect of the recording of which the caveat has lapsed—a dealing effected by the mortgagee, chargee, covenant chargee or lessee, including a dealing effected in the exercise of a power of sale or other power or right conferred by the mortgage, charge, covenant charge or lease or by or under law,

(j) a vesting or dealing effected in accordance with:

   (i) an order of a court, or

   (ii) a provision of an enactment of this State or the Commonwealth,

   being an order or enactment which, expressly or by implication, requires or permits a recording to be made in the Register, notwithstanding that the caveat has not ceased to have effect,

(k) except where the caveator claims to be entitled to a subsisting interest within the meaning of section 28A—the cancellation of a caution,

(l) a change in, or a correction to, the name of a proprietor,

(m) easements, profits à prendre, restrictions on the use of land or positive covenants created by section 88B (3) of the *Conveyancing Act 1919*,

(m1) an easement created by a dealing if the caveat is noted on the folio for the land benefited by the easement,
(m2) a positive covenant created pursuant to section 88BA of the *Conveyancing Act 1919* for maintenance or repair, or maintenance and repair, of land that is the site of an easement or other land that is subject to the burden of the easement (or both),

(n) an order, memorandum or other instrument pursuant to section 88D, 88E, 89 or 98 of the *Conveyancing Act 1919*,

(o) a dealing varying, releasing or cancelling an easement, the abandonment of an easement or the effect of an instrument under section 88B of the *Conveyancing Act 1919* releasing an easement, if the caveat is noted on the folio for the land burdened by the easement,

(p) a dealing releasing or varying a covenant referred to in paragraph (m2),

(q) a notation or an application for notation of the existence of a cross-easement for party walls created by the operation of section 88BB or 181B of the *Conveyancing Act 1919*,

(r) a dealing releasing, extinguishing or varying a restriction on the use of land,

(s) a change in the address of a body corporate,

(t) an application under section 74I (1) or (2), 74J (1) or 74JA (2) for the preparation of a lapsing notice,

(u) an application for the issue of:

(i) a consolidated certificate of title, or

(ii) separate certificates of title where there is more than one registered proprietor for land or for an estate or interest in land,

(v) an application under section 12 or 136 for the exercise of the Registrar-General’s power to compel the production of a certificate of title or other instrument,

(w) an application under section 135B for the determination of a boundary by the Registrar-General,

(x) a dealing by one or more joint tenants the sole purpose of which is to effect a severance of a joint tenancy,

(y) a dealing by a lessor or sub-lessee recording the determination of a lease or sublease if the caveat is not recorded against the lease or sublease that is the subject of the determination, or

(z) a dealing recording the bankruptcy of a registered proprietor.

It follows that if the caveator intends to preclude registration of a category of dealing in subsection 5, the caveat would expressly need to identify that class of dealing.
Paragraph (f) of section 74(5) has taken on a particular significance in the light of *Black v Garnock* [2007] HCA 31.

8  **Beware the all-embracing caveat**

If a caveat purports to forbid registration of a category of dealings wider than what is necessary to protect the interest claimed by the caveator then it is likely that the caveat will be struck down rather than read down – *Vandyke v Vandyke* (1976) 12 ALR 621.

9  **Beware the agreement to lodge a caveat**

The last twenty years or so has seen a rise in popularity of provisions in agreements which purport to authorise a party to lodge a caveat over the property of another party to the agreement. The practice was popularised by the Court of Appeal decision of *Troncone v Aliperti* (1994) 6 BPR 13,291. In that case a borrower made an agreement with his creditors that, in respect of each loan, the creditors were authorised to lodge a caveat on any property owned by the debtor to protect their interests. Mahoney JA held (at 13,292-3):

“*It is a fundamental principle of construction that “Whoever grants a thing is deemed also to grant that without which the grant itself would be of no effect. ….. A caveat cannot be entered against a land unless the caveator has the relevant proprietary interest in the land: see Real Property Act 1900, s 74F(1) (“a legal or equitable estate or interest in land”). Therefore, unless there be evident an intention to the contrary, the grant to the creditors of an authority to lodge a caveat on the relevant property carried with it by implication such an estate or interest in land as was necessary to enable that authority to be exercised. There was, in the present case, no intention to the contrary. ….. In order to determine the present appeal, it is not necessary to determine what is the precise nature of the interest in the land which, by this implied grant, was passed to the creditors. It is, in my opinion, sufficient to conclude that it was an interest which, within the Real Property Act, would support the lodgment of the caveat. However, three things may be said about it. First, the interest would, of necessity, be an equitable and not a legal interest…… Second, there is in my opinion no rule of law which prevents the creation of a limited equitable interest of this*
kind. Thus, if the registered proprietor of land covenants by deed that, until a loan be repaid, he will not sell or deal with the land, that covenant would, in my opinion, create in favour of the covenantee an interest in the land to the extent at least that an injunction would go to restrain the covenantor from dealing with the land in a manner inconsistent with the covenant. It is not necessary for this purpose to pursue the nature of the estates or interests in land which, under the conventional law of real property, it was or is possible to create. Nor is it necessary to distinguish between an estate and an interest in land. The right, by the enforcement of an express or an implied negative covenant, to restrain a dealing with land is in my opinion an interest in land within this branch of the law. Accordingly, such an interest would, in my opinion, be within the words “a legal or equitable estate or interest in land” within s 74F(1). There is accordingly nothing to prevent the implication from the terms of cl5 of the grant of an interest sufficient to support such a caveat as was contemplated by cl5. …..

The broad interpretation given by some commentators to *Troncone v Aliperti* has been questioned.

In *Redglove Projects v Ngunnawal Local Aboriginal Council* [2004] NSWSC 880, White J attempted to identify the *ratio decidendi* of the Court of Appeal in *Troncone* in the context of a deed establishing a joint venture agreement. The agreement did not contain any charge over the land; nor did it declare a trust. The clauses on which the caveator relied are noted in the judgment at [6]:

By clause 6.4 the plaintiff and the first defendant agreed that, except in defined circumstances, neither of them would do various things, such as making loans, giving guarantees, or acquiring capital assets. The clause prohibits the first defendant, without the plaintiff’s approval, from encumbering the land or disposing or agreeing to dispose of the land except in the course of the development or management of the land by the joint venture in accordance with the terms of the deed. By clause 8(a) the first defendant covenanted that it would enter into lending and mortgage arrangements on security of the land to raise funds for the purposes of the joint venture. The plaintiff does not suggest that the first defendant promised to enter into any lending or mortgage arrangements of the kind referred to in clause 8(a) with it. By clause 8(e), the first defendant again covenanted not to encumber or dispose of the land other than for the purposes of the joint venture.
The caveator submitted that White J was bound by *Troncone v Aliperti* to find that the agreement grounded a caveatable interest. His Honour rejected that submission. The reasoning is worth setting out in detail (at [20] to [30]):

20 In my view the ratio decidendi of *Troncone v Aliperti* is that on the proper construction of the agreement that the creditors could lodge caveats on the debtors’ property, the debtor impliedly granted an equitable charge to the creditors. That was the view of Meagher JA. It appears from Priestley JA’s reference to *Murphy v Wright* and the difference in the language of the agreements under consideration in each case that Priestley JA also regarded the case as one in which an equitable charge was granted.

21 In later cases *Troncone v Aliperti* has mostly been characterized as a case of an implied charge. (*Townsend v Coyne* (1995) 6 BPR 13,935 at 13,940; *Chiodo v Murphy & Doherty* [1996] ANZ ConvR 160 at 162; *Go-Tell Nominees Pty Ltd v Nichols* (7 February 1997, Supreme Court of Victoria, Cummins J, unreported, BC9700713 at 6; *Neoform Developments & Interiors Pty Ltd v Town & Country Marketing Pty Ltd* (2002) 49 ATR 625 at 627 [21]; *Brandling v Weir* [2003] NSWSC 723 at [53]).

22 Mahoney JA did not decide that the clause in question created an equitable charge. His Honour’s first finding was that by applying the principle of construction that there is an implied grant of all that is necessary to make an express grant effectual, the agreement in question created by implication whatever interest was sufficient to create an equitable estate or interest in land, without deciding what that estate or interest was. (See *Jones v Baker* (2002) 10 BPR 19,115 at [89]-[90]; *Thu Ha Nguyen v Larry Quoc Huy On & Ors* (2004) NSW ConvR 56-065 at [19], [22]; *Brandling v Weir* at [53]; [2004] NSWSC 142 at [9]). That finding has no implication for the present case. Mahoney JA expressly said that it was unnecessary to determine the precise nature of interest that was impliedly granted.

23 Although his Honour went on to say that the right to enforce by injunction an express or implied negative covenant to restrain a dealing with the land was an interest in land for the purposes of this branch of the law, I do not think that this was part of the ratio of his Honour’s decision, let alone part of the ratio of the Court’s decision. Neither Priestley JA nor Meagher JA endorsed that reasoning. Priestley JA clearly did not do so. Although Meagher JA at one point agreed with the reasons of Mahoney JA, he later gave reasons of his own which were inconsistent with such a view of the law.

24 In *Composite Buyers Ltd v Soong*, Hodgson J said (at 288-289):

“The view that the important requirement is that the interest be one in respect of which the Equity Court will give specific relief against the land is supported by the judgment of Mahoney JA in *Troncone v Aliperti*, where he goes to the extent of saying in a covenant by deed by the registered proprietor that until a loan be repaid he will not sell or deal with the land would, if the Court would enforce that covenant by injunction, give rise to a legal or equitable estate or interest in land within s 74F.”
Caveats – what to beware of

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Hodgson J did not suggest that this was the ratio of Troncone v Aliperti.

25 I do not accept the submission for the plaintiff that I am bound to follow the reasoning of Mahoney JA that a person who is entitled to enforce an express or implied negative covenant to restrain a dealing with land has a legal or equitable estate or interest in land within s 74F(1). That is not to say, however, that I should not follow it, even though not bound to do so.

26 However Mahoney JA cited no authority and gave no reason for this part of his judgment. With respect, I do not think it is correct. There have been numerous instances where the Courts have held that no equitable estate or interest in land is created by an express or implied promise not to deal with the land except in conformity with a contract. The fact that equity will enforce the negative promise by injunction does not transmute a purely personal claim into a proprietary interest. Equity does “nothing more than give the sanction of the process of the Court to that which is already in the contract between the parties” (Doherty v Allman (1878) 3 App Cas 709 at 720).

27 An injunction operates in personam. The grant of an injunction does not create an equitable interest which does not otherwise exist. (Craftsman Colour Newcastle Pty Ltd v Scotman McLelland CJ in Eq, 6 September 1993, unreported, p 2). If the right created by contract is merely personal, the fact that a breach may be restrained by injunction and does not sound only in damages cannot convert a personal right into a proprietary interest.

28 A party who is given a right of first refusal to buy land can enforce a contractual claim to restrain a dealing with land, but before the conditions for the exercise of the right have been satisfied, he has no equitable interest in the land. In Mackay v Wilson (1947) 47 SR (NSW) 315 Street J said (at 325):

“But an agreement to give ‘the first refusal’ or ‘a right of pre-emption’ confers no immediate right upon the prospective purchaser. It imposes a negative obligation on the possible vendor requiring him to refrain from selling the land to any other person without giving to the holder of the right of first refusal the opportunity of purchasing in preference to any other buyer. It is not an offer and in itself it imposes no obligation on the owner of the land to sell the same. He may do so or not as he wishes. But if he does decide to sell, then the holder of the right of first refusal has the right to receive the first offer, which he also may accept or not as he wishes. The right is merely contractual and no equitable interest in the land is created by the agreement.”

29 When the conditions for the exercise of the right of first refusal have been satisfied then the mere contractual right to enforce the right of first refusal by restraining a dealing in land can be transmuted into an equitable interest in the land. (See the cases reviewed by Campbell J in Sahade v BP Australia Pty Ltd [2004] NSWSC 512 at [41]-[43]). But before then, it is clear that the mere contractual right as described by Street J does not create an equitable interest in the land which is the subject of the right of first refusal.

30 Another example is the case of a shareholder in a company which owns a block of units and whose shares confer a contractual licence on
him to occupy a unit in the building. Such a shareholder would have the right to restrain the company from dealing with the unit in breach of its contract with the shareholder embodied in the Articles of Association. However, such a shareholder does not hold any estate or equitable interest in the unit owned by the company. (Tittman v Traill (1957) 74 WN (NSW) 284 at 287; H H Halls Ltd v Lepouris (1964) 65 SR (NSW) 181 at 191-192, 194).

At [35] White J concluded:

35 Accordingly I respectfully dissent from the views of Mahoney JA in Troncone v Aliperti in the passages underlined in para 17. A person may make a contract as to how he will exercise or not exercise his rights to deal with property, without conferring a proprietary interest on another.

In Iaconis v Lazar [2007] NSWSC 1103 Young CJ in Eq was considering on an interlocutory basis an application to remove two caveats. The background to the dispute is set out at paragraphs [3] to [6]:

3 The document entitled “Exclusive Mandate to Act” bearing date 23 January 2007, was made between the second defendant, Business Acquisitions Australia Pty Ltd, of the one part and Dominic David Jackson and the first plaintiff of the other. Mr Jackson is not a party to these proceedings. There are three plaintiffs, Francesco Batolomeo Iaconis, Raffaele Iaconis and Angelina Iaconis.

4 The exclusive mandate describes the second defendant as “BAA” and provides, so far as relevant, as follows:

“This Exclusive Mandate confirms that BAA has been appointed as an exclusive agent for the Owner to (a) arrange approval of a commercial loan as detailed in Schedule A hereto (‘Loan’) on reasonable terms and conditions from a willing lender(s) and to provide ancillary and incidental services …

6. In consideration of the services to be performed by BAA pursuant to this Mandate:

(a) The Owner is liable to BAA for a Brokerage fee as referred to as Item 7 in Schedule A (‘Brokerage Fee’) and Application Fee as referred to as Item 8 in Schedule A (‘Application Fee’) plus any specific out-of-pocket disbursements incurred (‘Disbursements’) plus all applicable GST thereon to be paid upon BAA notifying the Owner or the Owner’s representative in writing that an approval/s have been prospectively issued by a potential lender in respect of the sought loan and provides the Owner with details of the substance of the terms advised by such potential lender.

(b) A tax invoice for all fees due and payable in accordance with Paragraph 6(a) herein will be delivered to the Owner when the prospective approval indication is accepted.

(c) It is acknowledged and agreed by the Owner that once the prospective approval indication is accepted by the Owner the Brokerage fee and Application Fee and disbursements are payable regardless of whether the loan proceeds or not …

7. In the event of default of payment of brokerage fee, application fee, management fee and/or disbursements by the Owner to BAA, the
Owner hereby charges the land listed in the schedule (‘the Land’) of which the Owner is the registered proprietor/registered owner and all the estate and interest of the Owner of that land and all other land of which the Owner is the registered proprietor/registered owner with the payment to BAA of all ... “.

5 I have left the quote of paragraph 7 incomplete because whilst it might appear that there was a page 3 of the original document, despite my remarking on it, no page 3 was ever tendered.

6 A number of matters should be noted before I pass on. First, it should be noted that in clause 7 “brokerage fee, application fee, management fee or disbursements” do not have a capital letter whereas they do everywhere else in the document. Secondly, “owner” is defined as Mr Jackson and Mr Francesco Iaconis. Thirdly, the loan was for $1,550,000, the indicative interest was 60% per annum (described as 5% per month), the term was for six months, the brokerage fee $60,000 (plus GST) and the application fee a further $60,000 (plus GST). The purpose of the loan was to pay out the original BAA loan and to provide working capital.

As is clear from the flavour of the extract, His Honour had some concerns about aspects of the transaction, although His Honour took pains not to say too much about the case generally lest it prejudice the final hearing. However, for our purposes the following extract is relevant (at [21] to [27]):

...I should record Mr Allan’s submission that the scheme of the Real Property Act is that caveats are temporary. He says that it is an abuse of the processes of the Torrens System for people to take the view that they can enter into a commercial contract of adhesion in which there is a clause either prominent, or more usually buried away, which claims to impose a charge on all of the borrower’s property and then to lodge a caveat never ever seeking to do anything else, at least until default.

22 I consider there is a fair degree of substance in that submission. A caveat should only remain on the title pending the application by the person claiming the equitable or other interest to commence a suit for specific performance or otherwise to vindicate that equitable interest. Indeed, the standard order when a caveat was challenged was that the caveat be removed in any event unless within a month the caveator commenced a suit and then, and only then, was the caveat to be extended until the hearing of the suit; see eg Ex parte Muston (1903) 3 SR (NSW) 663.

23 The current commercial enthusiasm for this sort of clause in a contract and for lodging a caveat was given a great boost by the decision of the Court of Appeal in Troncone v Aliperti (1994) 6 BPR 13,291. This decision has often been interpreted by persons seeking charges as meaning that every time there is an agreement that X can lodge a caveat over any property Y may own, that an equitable charge is created. It should be remembered, as McLelland CJ in Eq said in Coleman v Bone (1996) 9 BPR 16,235 at 16, 239, that the true principle is that “Where the authority to lodge a caveat is given in connection with an obligation by A to pay money to B, and there is no sufficient indication to the contrary, the implication is that the estate or interest granted is an equitable charge to secure payment to B of that money.”
24 The probabilities would be that if the facts show that there is a pro forma document and a person of limited commercial experience has signed it without evidence being proffered by the lender that the clause has been properly explained to the person who is said to have given the charge by or on behalf of the person providing the financial benefit, that the court may very well come to the conclusion that the former person never intended to give a charge notwithstanding the words used in the document.

25 I should also note, whilst endeavouring to clarify the position in equity of the sort of clause in question in the instant case, that whilst this court has said that the court will not set aside a transaction merely because a very high interest is charged, that does not mean that the court will take no cognizance at all of the interest rate.

26 There are situations where people with appropriate commercial expertise consider that they are going to make a profit from a venture and desperately need short term finance to finish that venture where the court may very well not have any qualms about enforcing a contract with a high interest rate.

27 However, where one finds a small businessman or developer, or even worse, a person in neither of those categories, who is paying more than 48% per year or 4% per month (being the amount which was fixed by many Australian States under the Moneylending legislation as being the top rate) then the court is very likely to look quite closely at all the facts and circumstances of the transaction.

10 Removing caveats

There are three methods of removing a caveat:

➢ Lapsing notice following lodgement of a dealing – section 74I
➢ Lapsing notice without a dealing – section 74J
➢ Application to the Supreme Court – section 74MA.

Those provisions are set out below.

74I Lapse of caveat where dealing etc subsequently lodged for recording

(1) Whenever:

(a) a dealing or delimitation plan is lodged with the Registrar-General for recording or registration, and

(b) the recording of the dealing or, as the case may be, the registration of the plan is prohibited by a caveat that has been lodged under section 74F,

the Registrar-General shall, on an application being made in the approved form by the registered proprietor, by a judgment creditor under any writ that cannot be recorded because of the caveat or by any person who is or claims to be entitled to an estate or interest in the land to which the dealing or plan relates, prepare for service on the caveator a notice to the effect that the dealing or plan has been lodged for recording or registration and that, unless,
before the expiry of 21 days after the date of service of the notice, the caveator has:

(c) obtained from the Supreme Court an order extending the operation of the caveat for such further period as is specified in the order or until the further order of that Court, and

(d) lodged with the Registrar-General the order or an office copy of the order,

the caveat will (subject to evidence of due service of the notice on the caveator) lapse in accordance with subsection (5) and the dealing or plan will be recorded or registered.

(2) Whenever a possessory application has been made to the Registrar-General and a caveat prohibiting the granting of such an application has, either before or after the making of the possessory application, been lodged under section 74F, the Registrar-General shall, on an application being made in the approved form by the possessory applicant, prepare for service on the caveator a notice to the effect that the possessory application has been made and that, unless, before the expiry of 21 days after the date on which the notice is served, the caveator has:

(a) obtained from the Supreme Court an order extending the operation of the caveat for such further period as is specified in the order or until the further order of that Court, and

(b) lodged with the Registrar-General the order or an office copy of the order,

the caveat will (subject to evidence of due service of the notice on the caveator) lapse in accordance with subsection (5) and the possessory application may be granted.

(3) The applicant must, within 4 weeks after the issue of the notice, lodge with the Registrar-General, in the form of a statutory declaration or such other form as the Registrar-General may accept, evidence of the due service of the notice on the caveator.

(4) If the applicant does not comply with subsection (3), the Registrar-General:

(a) may refuse to take any further action in connection with the notice prepared under subsection (1) or (2) (as relevant), or

(b) may serve on the applicant a notice allowing a further 4 weeks from the date of issue of that notice for lodgment of the evidence and, if the evidence is not lodged within the further period, may refuse to take any further action in connection with the notice prepared under subsection (1) or (2) (as relevant).

(5) If:

(a) the evidence required by subsection (3) is lodged within the time permitted by this section, and
(b) the caveator has not lodged with the Registrar-General the order or office copy of the order referred to in subsection (1) or (2) (as the case may require) in accordance with the relevant subsection,

the Registrar-General is to make a recording in the Register to the effect that the caveat has, to the extent that it would prohibit the recording of the dealing or the registration of the delimitation plan, or the granting of the possessory application, lapsed, and the caveat so lapses on the making of that recording.

74J Lapse of caveat on application of proprietor of estate or interest

(1) Where a caveat lodged under section 74F remains in force, the Registrar-General shall, on an application being made in the approved form by the registered proprietor of an estate or interest in the land described in the caveat, prepare for service on the caveator a notice to the effect that, unless the caveator has, before the expiry of 21 days after the date of service of the notice:

(a) obtained from the Supreme Court an order extending the operation of the caveat for such further period as is specified in the order or until the further order of that Court, and

(b) lodged with the Registrar-General the order or an office copy of the order,

the caveat will (subject to evidence of due service of the notice on the caveator) lapse in accordance with subsection (4).

(2) The applicant must, within 4 weeks after the issue of the notice, lodge with the Registrar-General, in the form of a statutory declaration or such other form as the Registrar-General may accept, evidence of the due service of the notice on the caveator.

(3) If the applicant does not comply with subsection (2), the Registrar-General:

(a) may refuse to take any further action in connection with the notice prepared under subsection (1), or

(b) may serve on the applicant a notice allowing a further 4 weeks from the date of issue of that notice for lodgment of the evidence and, if the evidence is not lodged within the further period, may refuse to take any further action in connection with the notice prepared under subsection (1).

(4) If:

(a) the evidence required by subsection (2) is lodged within the time permitted by this section, and

(b) the caveator has not lodged with the Registrar-General the order or office copy of the order referred to in subsection (1) (as the case may require) in accordance with that subsection,

the Registrar-General is to make a recording in the Register to the effect that the caveat has lapsed, and the caveat so lapses on the making of that recording.
74MA  Application to Court for withdrawal of caveat

(1) Any person who is or claims to be entitled to an estate or interest in the land described in a caveat lodged under section 74B or 74F may apply to the Supreme Court for an order that the caveat be withdrawn by the caveator or another person who by virtue of section 74M is authorised to withdraw the caveat.

(2) After being satisfied that a copy of the application has been served on the person who would be required to withdraw the caveat if the order sought were made or after having made an order dispensing with service, the Supreme Court may:

(a) order the caveator or another person, who by virtue of section 74M is authorised to withdraw the caveat to which the proceedings relate, to withdraw the caveat within a specified time, and

(b) make such other or further orders as it thinks fit.

(3) If an order for the withdrawal of a caveat is made under subsection (2) and a withdrawal of the caveat is not, within the time limited by the order, lodged with the Registrar-General, the caveat lapses when an office copy of the order is lodged with the Registrar-General after that time expires.

The Statute Law (Miscellaneous Provisions) Act (No 2) 2002 amended, and the Statute Law (Miscellaneous Provisions) Act 2003 further amended, the lapsing notice provisions in the Real Property Act 1900 so that there is now a statutory time limit for filing proof of service of a lapsing notice.

11  Beware the undertaking as to damages

Where proceedings are commenced for the extension of a caveat, a court will frequently consider issues akin to whether an injunction should be granted or extended. An impecunious caveator who is unable to give the undertaking as to damages (or if the undertaking has no worth or meaning) may find the court will not grant the extension, even if the caveator has a caveatable interest – Thompson v White; White v Thompson [2006] NSWSC 110. The interest in that case arose out of declarations made in earlier proceedings about a failed joint venture.

An interesting recent case considering the consequences of maintenance of a caveat without reasonable cause is Marinkovic v Pat McGrath Engineering Pty Ltd [2004] NSWSC 571 (10/6/04 per Palmer J).

The subject matter of the sale was a factory. The building itself was council approved, but a mezzanine level constructed about two years after
completion of the building proper was not approved. Some months after the mezzanine was built, Council wrote to the owner demanding the work be removed within 30 days. The owner wrote to Council stating he was unaware that approval was needed, apologising, and indicating he had ordered a stairway to provide fire safety access as advised by a named council officer. Council subsequently wrote to the owner in these terms.

Council has decided to take no further action in regard to the unauthorised construction of the timber/metal framed storage area within the existing warehouse, subject to satisfactory construction of the egress stairs in accordance with the requirements of ordinance 70 and a satisfactory inspection by Council’s district building surveyor.

The inspection took place, and the owner heard nothing further.

Eight years later, the owner exchanged contracts. The deposit was released to the vendor pursuant to a special condition in the contract. After exchange, the purchaser made inquiries of the Council about what consents existed. This led to correspondence as set out in the judgment (at [11]-[12]):

11 On 31 January 2001 the solicitors for the defendant wrote to the solicitors for the plaintiff saying that the mezzanine floor level of the property did not appear to have any record of approval at Randwick Council for construction. The letter said that there had been a pre-contractual representation by the plaintiff that the total area of useable space in the property was 850 square metres, and that the apparently unauthorised construction of the mezzanine floor severely impacted on the character and value of the improvements. The letter continued:

We would be pleased if you could urgently provide details of both development approval and building approval for construction of the mezzanine floor level, the availability of which floor space was central to the decision of our client to enter into the contract.

We are further instructed that in the absence of evidence of such approvals being produced within seven days of the date of this letter, the instructions of our client are to rescind the contract for breach of an essential pre-contractual condition upon the basis of which our client entered into the contract. Our client also reserves the right to seek damages.

Defendant’s Enquiries Re Approval of Mezzanine Level

12 There appears to have been no response by the plaintiff’s solicitor to the letter of 31 January 2001. On 14 February 2001 the solicitor for the defendant wrote again to the solicitor for the plaintiff, saying:
Further to our letter of 31 January 2001, our client has made independent inquiries at Randwick Council and has been advised that the mezzanine floor level of the above property has been constructed without development approval from the Council. In these circumstances, there has not only been a breach of a pre-contractual representation by the vendor, but there is also a breach of the implied warranty contained in section 52A of the Conveyancing Act and in accordance with instructions from our client we enclose herewith notice of rescission and we require immediate return of a cheque for $79,000 in favour of our clients in return of the deposit.

That letter enclosed a Notice of Rescission. There has been no criticism of the legal adequacy of the wording of the Notice.

In March 2001, the purchaser lodged a caveat, claiming an interest as purchaser under the contract.

In August 2001, each party applied (apparently on the same day) for a building certificate. After requesting and obtaining certification as to fire safety, the Council issued building certificates in November 2001.

On 7 December 2001, the vendor entered into a contract to resell the property. The vendor’s solicitors informed the purchaser under the first contract of this development, and sought removal of the caveat. The purchaser wrote to the vendor agreeing to remove the caveat upon payment of the deposit by bank cheque either at or before settlement of the second sale. The subsequent correspondence was interesting (at [26] to [31]):

26 There was no response to that letter until 18 January 2002, when the solicitors for the plaintiff wrote to the solicitors for the defendant, saying that the new sale of the property would settle on 21 January 2002 at 2 pm. Again, the solicitors for the plaintiff threatened that unless they received a Withdrawal of Caveat proceedings would be commenced for removal of the caveat.

27 By letter of 22 January 2002, the solicitors for the plaintiff wrote to the solicitors for the defendant again, saying that settlement had now been fixed for that afternoon at 2 pm. They said:

We confirm we are instructed that an amount of $79,000 shall be held in trust and request that you immediately prepare a withdrawal of caveat as it is required by this afternoon at 2 pm.

The letter said that if the matter did not settle, they would commence proceedings for withdrawal of the caveat.

28 Then occurred a strange piece of correspondence. On 22 January 2002, the solicitors for the defendant faxed to the solicitors for the plaintiff a document which starts like a letter, under which they put forward a proposal that the amount of $79,000 be retained by
the plaintiff on terms that it be held in a controlled moneys
account, and paid out only on a joint authority from the clients, or
an order of the Court determining the ownership of the funds. The
faxed letter becomes blank part-way down the page. This
happened because it was a mistake on the part of the solicitors for
the defendant to send that letter at all, and they must have realised
the mistake in the middle of transmitting the fax, and stopped the
transmission.

29 On 22 January 2002, the solicitors for the defendant wrote to the
solicitors for the plaintiff saying:

We are unable to obtain any additional instructions from
our client, which would allow us to provide a withdrawal
of caveat on the basis suggested by your firm. We note that
the deposit moneys were paid by our client and released to
your client, who has used them to his advantage. As our
client claims that it validly rescinded the contract for sale,
it maintains a claim for the return of the deposit.

Your firm has threatened to take proceedings to seek orders
for the requirement of the removal of the caveat. On the
present evidence available, your client has no proper
grounds to obtain such orders. The true issues in this matter
can only be resolved by determining the validity or
otherwise, of the notice of rescission.

Accordingly, we must advise that our client is not prepared
to withdraw its caveat.

30 The letter foreshadowed that different instructions might be
obtained, but that was the position for the moment. Another letter
of 22 January 2002 explained that the earlier facsimile (see para
[28] above) had been sent in error, and that it had been intended to
be viewed by the defendant for the purpose of instructions.

31 On 23 January 2002 the defendant’s solicitors wrote a further
letter, saying that their client was prepared to withdraw the caveat
on the basis that the clients entered into a Deed of Release where
each party gave up any claims against the other, whereby $70,000
was to be paid to the defendant, and $9,000 paid to or kept by the
plaintiff, and that some District Court proceedings, which the
defendants were threatening, would not be brought.

The withdrawal of caveat was not forthcoming. The re-sale contract was
ultimately terminated by the purchaser. The termination was disputed,
litigated, and settled on terms favourable to the purchaser.

The first issue considered by Campbell J was whether the purchaser was
entitled to rescind (at [45] to [51]):

45 In the present case, the existence of the mezzanine floor was, in
my view, a matter that would justify the making of an upgrading
or demolition order. It had that characteristic even though the
Council, in its 1992 letter, had stated an intention to do nothing
about the matter. The Council has statutory responsibilities, which
it cannot prevent itself from exercising by any estoppel: *The New South Wales Trotting Club Limited v The Council of the Municipality of Glebe* (1937) 37 SR (NSW) 288; *Attorney-General for the State of New South Wales v Quin* (1990) 170 CLR 1. Thus, even if that letter had been acted upon by the plaintiff, it could not estop the Council from later deciding that it should require the removal of the structure which had been erected without consent. If the Council issues a building certificate, however, it does so under statutory authority, and with the consequences which section 149E *Environmental Planning and Assessment Act 1979* lays down so far as fettering its future discretions is concerned.

46 In construing the warranty, it is appropriate to bear in mind the purpose for which the legislation was introduced. It was introduced in 1988, motivated by a desire on the part of the legislators to promote candour on the part of vendors. The means that was chosen to deal with that problem was to require the vendor of property to make extensive disclosure of matters relating to the property. The vendor doing this would speed up the conveyancing process and give a purchaser a greater degree of assurance, at the time of contracting, that he or she knew the information about the property which a purchaser would wish to know. In *Timanu Pty Ltd v Clurstock Pty Ltd* (1988) 15 NSWLR 338 at 339-40 Kirby P said:

The plain object of the legislation is to reduce disputes concerning representations about the land which are made by the vendor to the purchaser, to facilitate a proper judgment about the bargain at the time of the signing of the contract and to provide, at that time, a clear indication of the terms, conditions and warranties upon which the parties agree to contract. Effectively, the new procedure shifts the obligation from the purchaser to the vendor, so that the latter has to supply, rather than the former to discover, certain basic information about the subject land. The provision is clearly a remedial one with a reformatory object. The courts should not frustrate the attainment of that object by a narrow construction of the legislation, and the subordinate regulations made under it. On the contrary, the courts should endeavour to facilitate the attainment of the purpose which clearly emerges from the legislation, understood in the context of the practices which preceded it.

47 I recognise that there is always a discretion in a Council about whether, when the circumstances exist which would entitle it to make an order or make an upgrading or demolition order, it will actually make any such order. When one considers the context in which the warranty implied under section 52A comes to operate in a conveyancing transaction, one should recognise that it could be a serious problem for a purchaser if it had entered a contract to purchase a property concerning which there was a risk that a Council might make such an order.
The purpose of the legislation in implying this warranty is to assist a purchaser in having certainty about what it is that he or she is acquiring. Thus, the expression “matter ... that would justify the making of any upgrading or demolition order” ought be construed, in my view, in a way which applies to any situation where the Council has power, in the exercise of its discretion, to make such an order. The existence of the mezzanine floor was a matter concerning which the Council had that power. It had not been disclosed by the plaintiff prior to contract.

There is express evidence from Ms Seymour [a director of the purchaser under the first contract] that she would not have entered into the contract if she had known that the mezzanine floor might be liable to being demolished. This is consistent with the contemporaneous documentation, and also with her express evidence that the bottom level of the factory was about the same size as the property which she had already sold, and that she was looking for something bigger. I accept Ms Seymour’s evidence. In these circumstances, the defendant was justified in terminating the contract, by reason of breach of the implied warranty.

While a building certificate was obtained later in 2001, that is not something which can retrospectively cure the deficiency or the breach of warranty which existed at the time that the contract was entered into, nor take away the entitlement which the defendant had, at the time the defendant terminated the contract, to do so.

It follows from this that the defendant is entitled to receive back its deposit.

The Court then considered whether the purchaser had wrongfully maintained its caveat, and held this to be the case (at [56] to [62]):

… [T]he Court will not permit a caveat to be used as a device for exerting commercial pressure. In such a case the caveat is legitimately lodged in respect of a disputed claim, but forces the registered proprietor to pay out that claim even though it is disputed. The Court has consistently taken the attitude that where the caveat claims an interest in land as security for the payment of money, if the registered proprietor is prepared to put up an alternative security which is commercially adequate, then it will remove the caveat even though the caveat may be completely valid: Kingstone Constructions Pty Ltd v Crispel Pty Ltd (1991) 5 BPR 11,987 at 11,991; Gibson v Co-ordinated Building Services Pty Ltd (1989) 4 BPR 9630; Australian Property & Management Pty Ltd v Devefi Pty Ltd (1997) 7 BPR 15,255 at 15,257.

It seems to me that similar principles ought apply to the construction of section 74P. After all, section 74MA sets out what is to happen if a person who wishes to have a caveat removed is able to get to Court and have the Court decide whether it should or should not be removed. Section 74P deals with the situation where a person who wishes to have a caveat removed has requested that it be removed, but for one reason or another has not actually gone to Court to seek enforcement of that request. I see
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no reason why the test for whether or not the caveat should be removed ought be different under section 74P to that applied under section 74MA.

58 In the present case, the defendant, once it had rescinded the contract, had a clear entitlement to get its deposit back. That arose under the terms of clause 21 of the 2000 Regulation. Clause 21 of the 2000 Regulation, considered by itself, gave only a personal right of action to recover the deposit.

59 Clause 2.8 of the Contract for Sale between the plaintiff and defendant contained a provision that:

If any deposit ... is paid before completion to the vendor or as the vendor directs, it is a charge on the land in favour of the purchaser until termination by the vendor or completion, subject to any existing right.

That clause covers the present situation, where there has been neither termination by the vendor, nor completion, and confers an equitable charge on the land, for the amount of the deposit. As well, there is a general law doctrine whereby an equitable lien exists for a purchaser’s deposit, where a contract for sale of land goes off without any default on the part of the purchaser: *Francombe v Foster Investments Pty Ltd* [1978] 2 NSWLR 41 at 57; *Whitbread & Co. Limited v Watt* [1902] 1 Ch 835; *Combe v Swaythling (Lord)* [1947] Ch 625. A purchaser’s lien of this kind is a caveatable interest: *Ex parte Lord* [1985] 2 Qd R 198.

60 Here, the interest which was claimed in the caveat was much wider than the interest which the defendant was legitimately entitled to, of a charge or lien to secure repayment of the deposit. That is not something which seems to have produced any particular consequences, however.

61 The course of negotiation between the solicitors which I have outlined shows that the plaintiff had offered, at a comparatively early stage, to place the deposit into a controlled money account, to await a court determination concerning who was entitled to it. The defendant refused to agree to those terms. Instead, the defendant tried to strike a better bargain for itself, under which the defendant would be able to dispense with any argument about who was entitled to the deposit. Its proposal was that it would get back its $79,000 in exchange for a withdrawal of the caveat (on 18 December 2001), or that it would get $70,000 back plus a release (on 23 January 2002). Each of these bargains which the defendant sought to obtain was more than a court would have required if the matter had gone to Court for an order seeking removal of the caveat. This was implicitly recognised by the defendant on 21 February 2002, when it agreed to the caveat being withdrawn on the basis that $79,000 be paid into a controlled moneys account. It was the proposal which the defendant’s solicitor made to the defendant on 22 January 2002, in the letter part of which was mistakenly faxed to the plaintiff’s solicitor. In these circumstances, I am satisfied that the case has been made out that the defendant, without reasonable cause,
refused or failed to withdraw its caveat after being requested to do so.

62 Caveators should be aware that they are playing with fire if they insist on maintaining a caveat when they know that the existence of the caveat is imperilling settlement of a conveyancing transaction, and when they have been offered adequate security for the interest they have in the land.

The purchaser under the first contract was ordered to pay compensation under section 74P of the *Real Property Act* (at [71]). The purchaser received a refund of the deposit plus interest (at [72] to [73]). Each party was required to pay its own costs (at [77]).

12 **Beware the High Court – Black v Garnock**

On 1 August 2007, the High Court delivered judgment in *Black v Garnock* [2007] HCA 31. The decision raises important practical issues about the conduct of sales and purchases in New South Wales, including analysis of topics such as the prudence of lodging a caveat on behalf of a purchaser immediately after exchange, the timing of final searches, and the venue for settlement. This section of the paper outlines the facts, the course of litigation, and the key reasoning of the Court, and suggests how the decision may change common conveyancing practice.

On 15 July 2005, contracts were exchanged for the sale of a rural property at a price of $1,000,000 with 10% deposit paid on exchange. The due date for completion was as per the standard form (26 August 2005). The property was encumbered.

The vendor and her husband were in financial difficulties. Judgment had been entered against them in September 2004 for approximately $228,000. Various processes to enforce the judgment had not, as at July 2005, proved successful. The debtors informed the judgment creditors that they proposed to use the proceeds of sale of two properties (including the one the subject of the ultimate litigation) to meet the debt. The solicitors for the debtors informed the solicitors for the judgment creditors of exchange of contracts, and the anticipated settlement date. (That date was brought forward to 24 August 2005.) There was further correspondence from the solicitors for the debtors on 19 August 2005, informing the solicitors for the judgment creditors that funds would not be available to pay their clients in full (it would have become apparent in the course of calculating adjustment
figures that the amount owing to secured creditors was of the order of 90% of the price).

At about 4:53 pm on 23 August 2005, the judgment creditors obtained out of the District Court a writ for levy of property. The relevant law governing writs is found in Part 8 Division 2 of the Civil Procedure Act 2005 (“CPA”) (which had commenced eight days earlier), and sections 105 to 105D of the Real Property Act 1900 (“RPA” – those sections last significantly amended in 1976).

The chronology on 24 August is of crucial significance (times are approximate):

- 8:53 a.m. – final search by solicitors for purchasers disclosed no further encumbrances beyond those known to the purchaser (in particular, no writ);
- prior to 9:30 a.m. – judgment creditors obtained a charging order against the deposit;
- 9:30 a.m. – solicitor for judgment creditors phoned solicitor for purchasers advising he acted for the judgment creditors in relation to the judgment debt, that a bankruptcy notice had been issued against the vendor, that the sale might be set aside if completed, and that the charging order had been obtained. However, the writ was not mentioned;
- 9:48 a.m. – solicitor for the purchaser searched the bankruptcy register – no entry against vendor;
- 10:40 to 11:00 a.m. – solicitor for purchasers sought and obtained a copy of the charging order;
- 11:30 a.m. – writ lodged with the Registrar-General;
- 11:50 a.m. – writ recorded;
- 12:15 p.m. – fax from purchasers’ solicitors to judgment creditors’ solicitors advising that she had instructions to proceed to settlement (delayed from the scheduled time of 11:00 a.m.); and
- 2:00 p.m. – completion of the purchase.

The documents relating to the settlement were received by the law stationer for the purchasers on 26 August 2005 (it appears the purchasers did not have an incoming mortgage). The writ was delivered to the sheriff on the same day. The transfer was unable to be registered in the face of the writ (registration could only have occurred if the writ had been noted on the
transfer as a prior encumbrance). An attempt on behalf of the purchasers to lodge a caveat also failed. On 28 September 2005, the purchasers commenced proceedings in the Equity Division, seeking an injunction preventing execution of the writ and associated declaratory relief.

On 7 October 2005, the purchasers obtained an interlocutory injunction in the Supreme Court (Garnock v Black [2005] NSWSC 1052 per Campbell J). On the final hearing before Lloyd AJ, a preliminary question was identified for separate determination: “Have the plaintiffs [the purchasers] acquired title to the land as defined in paragraph 1 of the amended summons within the meaning of s 112(2) of the Civil Procedure Act 2005 (NSW)?”. That question was determined adversely to the purchaser, because “title” for the purposes of that section was held to be limited to legal title – for Torrens Title land, registered title (Garnock v Black [2005] NSWSC 1217). This led to the dismissal of the proceedings at first instance (Garnock v Black (No 2) [2005] NSWSC 1218).

On 21 December 2005, the purchasers were granted an interlocutory injunction by the Court of Appeal pending final determination of the proceedings (Garnock v Black [2005] NSWCA 475). On 1 June 2006, the Court of Appeal, by majority (Ipp JA, Beazley JA agreeing; Basten JA dissenting), upheld the appeal, declared that the purchasers, as holders of equitable interests in the land, were entitled to priority over any rights to the land that might be held by the judgment creditors, and restrained execution of the writ (Garnock v Black (2006) NSW ConvR ¶56-158; [2006] NSWCA 140).

The key issues in the Court of Appeal were:

➢ whether “title” in s 112(2) of the CPA includes an unregistered interest in land – held to do so;

➢ whether purchasers for valuable consideration, pursuant to a valid sale entered into, but not settled and dealings lodged for registration, prior to the registration of the writ, had a defeasible interest only, contingent upon the Sheriff failing to sell the property under the writ within the protected period – by majority, the Court held that the interests of holders of equitable interests in the land had priority over whatever rights may accrue to judgment creditors upon registration of the writ of fieri facias, and that nothing in the statutory regime under the RPA and CPA prevented the purchasers from asserting their equitable interests.
The High Court by majority (Gummow and Hayne JJ in a joint judgment, and Callinan J in a separate judgment, formed the majority; Gleeson CJ and Crennan J delivered separate, dissenting judgments) upheld the appeal from the Court of Appeal. The Court ordered that there be an inquiry into what damages, if any, were suffered by the judgment creditors by reason of the injunctions granted in the earlier proceedings.

The joint reasons analysed the provisions of the RPA relating to the recording of writs, most particularly sections 105A(2) and 105B(2). The latter subsection provides:

(2) Upon the registration of a transfer referred to in subsection (1), the transferee holds the land transferred free from all estates and interests except such as:

   (a) are recorded in the relevant folio of the Register or on the relevant registered dealing,

   (b) are preserved by section 42, and

   (c) are, in the case of land comprised in a qualified folio of the Register, subsisting interests within the meaning of section 28A.

Registration of a transfer under a writ vests in the transferee “a particular kind of title by registration. In particular, that transferee obtains a title that is not limited to whatever interest the judgment debtor would have been understood to have had in the land if account were to be taken of rights and interests not recorded in the Register and not preserved by the RPA, particularly s 42” (at [29]). Their Honours considered the litigation by the purchasers to be essentially an attempt to prevent section 105B(2) taking effect according to its terms, relying on their equitable interests as purchasers to claim “priority” over any rights to the land that the judgment creditors might hold. The reference to a “priorities” dispute was ill-conceived, since section 105 of the RPA explicitly provides that a writ, whether recorded or not, creates no interest in land (at [32]-[34]).

A critical, albeit hypothetical, issue addressed in the joint reasons is what would have been the effect of the lodging of caveats by the purchasers prior to recording of the writ. Their Honours observed (at [43]-[44]):

43 The first point to notice is that the lodging of caveats and entry of particulars of caveats on the Register would not have prevented the Registrar-General from recording the writ with respect to the land. The second and more directly relevant point is that, if caveats had been lodged and particulars of the caveats entered on the Register, and if the Sheriff then sought to sell the land in
execution of the writ, a purchaser at the Sheriff’s sale would not have been able to obtain registration of a transfer of the land so long as those caveats remained in force. It is necessary to explain the basis for this conclusion.

While a caveat lodged under s 74F remained in force, s 74H precluded the Registrar-General, except with the written consent of the caveator, from recording any dealing in the Register, if it appeared that the recording of the dealing was prohibited by the caveat. It would follow from s 74H, considered in isolation from the provisions of the RP Act which dealt with the recording of a writ (s 105A) and the registration of a transfer given pursuant to a sale under the writ (s 105B) that, if the purchasers in the present matter had lodged caveats over the land, before the writ was recorded, a purchaser at any sale by the Sheriff in execution of the writ could not have obtained a transfer that would be registered. Section 74H would have prohibited registration of a transfer tendered by a person who purchased the land at the Sheriff’s sale.

Nothing in sections 105A and 105B required or permitted a different result. The bare fact of the making of a contract prior to the recording of the writ was insufficient to displace the operation of the RPA (at [50]).

The judgment of Callinan J opened with some observations about conveyancing practice (at [52] to [53]):

It used to be the practice of careful conveyancers, acting for persons acquiring registrable estates or interests in Torrens title land, to lodge with the officials in charge of the Register, a caveat as soon as the agreement for the relevant dealing was made, in pre-emptive protection of their clients’ prospective legal estates or interests pending completion of their agreements and registration of the instruments perfecting them. It was a further practice of those conveyancers to effect the actual settlement of the agreement by the exchange of all relevant instruments and funds at that office, simultaneously with a search of the Register, to verify that no other such caveat or record of dealing had been lodged as might obstruct, delay or detract from the registration of their clients’ instruments to perfect their estates or interests.

The questions raised in this case would be unlikely to have arisen had those salutary practices not fallen into disuse, whether by reason of electronic recording of dealings or otherwise, although it is difficult to understand why some comparable prudent practice could not equally, and perhaps more easily, have been adopted here to accommodate electronic lodgment, searching and recording. The questions are as to the effect of the registration of a writ of execution, and the rights of purchasers whose transfer of Torrens title land was lodged subsequent to that.

His Honour’s reasons trace the history of the Torrens systems, quoting from the Second Reading Speech of Sir Robert Torrens on the original South Australian legislation, and from the Attorney-General at the time of
the original New South Wales statute. His Honour observed that “the principal way in which the legislation has achieved its objects has been the elevation of the Register above all else. The Register has the first and last word on all relevant titles and interests. In general, it operates on the basis of ‘first in first served’” (at [75]).

His Honour considered that the caveat in the Torrens system serves a dual purpose, not only as a statutory injunction forbidding registration, “but also to serve as a notice to anybody interested in the land, and troubling to search the Register, that there was some other dealing or transaction on foot of which any interested person should be aware” (at [76]). His Honour respectfully disagreed with the contrary view expressed by Barwick CJ in *J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546. Callinan J also disagreed with the then Chief Justice’s view, expressed elsewhere in that case, that a failure to caveat will not necessarily involve the loss of priority which the time of the creation of the interest would otherwise give. “The fact that the purchasers might have protected themselves by lodging a caveat here may not be decisive of this case, but that the Act enabled them to do so, and also provided for a comprehensive public register of information relating to the folio to which they could have had timely recourse to protect themselves, are factors relevant to the proper construction and reconciliation of the two enactments governing the respective rights and interest of the parties” (at [84]).

His Honour rejected the purchasers’ contention that the grant of an injunction was equivalent to the lodging of a caveat. The ability to note a caveat on the register, and the role of a caveat as a general notice “to all the sufficiently interested world”, elevates the caveat to a higher plane than an injunction (at [85]).

Crennan J delivered the longer of the two dissenting judgments. Her Honour considered the “protection” provided by section 105A is the potential priority of a purchaser from the Sheriff against any dealings with the land by the judgment debtor; an irrelevancy in this case because the judgment debtor had earlier disposed of the land under a specifically enforceable contract (at [124]). The failures to lodge a caveat or to obtain a second final search were, in her Honour’s view, not relevant for consideration in this case (at [131]). Her Honour also mentioned a final issue (at [133]):
A further matter deserves mention. If s 105A(2) operated to preclude the purchasers from setting up their prior unregistered interest against the judgment creditors during the protected period but prior to a sheriff’s sale, one possible result is that at a sheriff’s sale, during that period, the price achieved for the land would be in the order of the price paid by the purchasers, $1,000,000. The prior encumbrances had all been cleared on completion of the sale to the purchasers on the same day as the recording of the writ. Alterations to the interests of holders of prior encumbrances were able to be recorded on the Register under s 105A(1). The result would be that after a sale, payment of the sheriff’s fees and expenses and payment to the judgment creditors, the sheriff would be obliged to pay the balance to the judgment debtor. Neither the detail of the 1976 provisions nor established principles concerning the Torrens system suggest that the legislature intended that result.

Gleeson CJ agreed with the reasons of Crennan J, and added some further brief comments. The Chief Justice considered that the suggestion that the seeking of an injunction by the purchasers intercepted impermissibly the statutory purpose of the RPA appeared (at [5]-[6]):

... to overstate the purpose and the legal effect of the statutory scheme ... The purpose was not to turn unsecured creditors into secured creditors, or to defeat the interests of people who, to the knowledge of the judgment creditors and the Sheriff, had contracted to buy the land. It was not to require the Sheriff to sell land which the Sheriff knew had already been sold to a bona fide purchaser for full value, conduct that would ordinarily be regarded as improper. Injunctive relief of the kind given by the Court of Appeal did not negate the protection intended to be conferred on a purchaser from the Sheriff; there was no such purchaser.

The Chief Justice also expanded (at [9]) on the incongruous consequences of the majority view referred to at the conclusion of the reasons of Crennan J:

The land was sold by the registered proprietor to the purchasers for $1 million. It was heavily encumbered. Basten JA recorded that, on settlement, “[t]he funds distributed to those persons having secured interests [in the land] ... amounted to a figure in excess of $900,000”. The judgment debtor (the registered proprietor) had very little “equity” in the land, using that term in its colloquial or commercial sense. If the appellants succeed in their arguments, then the practical result appears to be that, at the expense of the purchasers from their debtor, they will have obtained blood from a stone. This incongruous result seems unlikely to reflect any legislative intent.

It is understood that the purchasers are now registered as proprietors (the protected period under the writ having long expired) and the claim arising from the purchasers’ undertakings as to damages has been settled.
What are the practical implications of *Black v Garnock* for conveyancing practice, in general, and the practice relating to caveats, in particular?

1. Purchasers will need to be advised of their entitlement to lodge a caveat following exchange of contracts, and the risk that failure to do so may expose the purchasers to the fate of the purchasers in *Black*.

2. That advice should also address the costs of lodging a caveat (not only the fee for lodging the caveat and legal costs associated with the caveat itself, but also amounts payable in relation to any necessary removal – whether a withdrawal of caveat is necessary will depend on the current practice within the Department of Lands regarding registration of dealings in the face of a caveat, and the attitude of any incoming mortgagee).

3. If the purchaser instructs their solicitor to lodge a caveat, the caveat should be drawn carefully.
   - A caveat which does no more than describe the interest of the caveator as an “equitable interest” will not suffice – see the discussion above.
   - Section 74H(1) contemplates that a caveat can be lodged in a form which allows the registration of a dealing referred to in the caveat. If the caveat were to permit expressly the registration of the dealings by which the purchaser is to come onto title, there should be no need for a withdrawal of caveat to be lodged following completion – subject to the matters raised at point 2 above. (It should also be noted that section 74H(1)(a) allows the recording of a dealing with the written consent of the caveator.)
   - As noted in *Black* (at [43] per Gummow and Hayne JJ; [97] per Crennan J), the effect of section 74H(5)(f) is that a caveat drafted in general terms to protect the interests of the purchasers would not have prevented the recording of the writ. These comments provide a salutary reminder of the scope of section 74H(5), discussed above. What is not made clear in the judgments is the opening words of section 74H(5) – “except in so far as [the caveat] otherwise provides”. A caveat which specifically
prohibits the recording of a writ would, it is submitted, take effect in accordance with its terms.

4 If the contract for purchase contains a prohibition against lodging a caveat on behalf of the purchaser (a not uncommon provision in, for example, strata off the plan contracts), the position of the purchaser becomes more problematic. The existence of such a provision will be relevant to, but not determinative of, whether the caveat will survive proceedings for its removal. Indeed, the New South Wales Court of Appeal has held in one case that despite the existence of a contractual prohibition against a purchaser’s caveat, a prudent purchaser would nevertheless have lodged a caveat (*Broster v Brueckner* [2003] NSWCA 281 at [9]). That case is discussed in more detail above.

5 *Black* involved a 42-day contract. Where the contract has a longer settlement period, the lodging of a caveat becomes an even more critical issue for purchasers.

6 It is difficult to identify any features of a transaction which would “flag” to a purchaser the possibility of a writ being recorded on title during the transaction. Nothing on the face of the contract is likely to do so, nor will a special condition in the contract provide any real protection to the purchasers, given that the ultimate contest is likely to be between the purchaser and the judgment creditor (not the vendor). Similarly, the raising of a specific requisition on title (or the making of a pre-contract inquiry) about the financial soundness of the vendor will not bind the judgment creditor.

7 The judgment creditors in *Black* did not advise the purchasers of the intention to record a writ against title (nor, it seems, of the fact that a writ had been recorded). At no stage in the litigation was it alleged that the behaviour of the judgment creditors was unconscientious (Gummow and Hayne JJ at [13], [50]). It may be that if a purchaser (or, for that matter, a vendor) were to obtain (or seek?) confirmation from a judgment creditor that no enforcement action will be taken during the course of the sale without giving prior notice, the taking of such action could be said to ground an estoppel against the judgment creditor, or to be misleading, deceptive, or unconscientious conduct. (Having said that, it may be that mentioning the possibility of recording a writ against land
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raises a thought which would not have otherwise occurred to the judgment creditor.)

8 It is notable that the time between lodging and recording the writ on title was of the order of 20 minutes. It seems that a final search early on the morning of the day of settlement may not provide sufficient protection if the settlement is scheduled to occur hours later.

9 Where the settlement is postponed because of problems with a creditor of the vendor, a second final search at the time of settlement would be prudent.

10 Whether it is necessary to adopt as a matter of routine the “salutary practice” of settling at the office of the Registrar-General (Callinan J at [52]-[53]) is, it is suggested, by no means settled law. The practical implications of routinely settling conveyancing transactions in New South Wales at a single venue would need to be considered.

11 Black did not appear to involve an incoming mortgagee. The position of those taking through the purchaser will need to be considered in the light of the decision. For example, if the purchaser does caveat after exchange, the incoming mortgagee should be put on notice of that step, and any further requirements of the mortgagee (for example, will the mortgagee accept that the way the caveat has been drawn will allow registration of the post-settlement dealings without more, or will a withdrawal of caveat be required?).

12 The decision reinforces the paramount nature of the Register, and the importance of prompt registration, to take advantage of the general principle of “first in, first served”.

13 From a risk management perspective, the advisers to purchasers and lenders should be able to prove the advice given, and the informed consent of the client to the course which is adopted.

14 The providers of title insurance products are now referring to Black v Garnock as part of the promotional material for their products.

15 What would have been the position of the parties if the writ had been recorded after, rather than before, settlement, but prior to registration of the transfer? The joint reasons indicate that, since a
writ creates no interest in land (section 105 RPA), section 43A RPA would not assist the purchasers (at [33]). Section 43A is in these terms:

43A Protection as to notice of person contracting or dealing in respect of land under this Act before registration

(1) For the purpose only of protection against notice, the estate or interest in land under the provisions of this Act, taken by a person under a dealing registrable, or which when appropriately signed by or on behalf of that person would be registrable under this Act shall, before registration of that dealing, be deemed to be a legal estate.

(2) No person contracting or dealing in respect of an estate or interest in land under the provisions of this Act shall be affected by notice of any instrument, fact, or thing merely by omission to search in a register not kept under this Act.

(3) Registration under Division 1 of Part 23 of the Conveyancing Act 1919 shall not of itself affect the rights of any person contracting or dealing in respect of estates or interests in land under the provisions of this Act.

(4) Nothing in subsection (2) or (3) operates to defeat any claim based on a subsisting interest, within the meaning of Part 4A, affecting land comprised in a qualified folio of the Register.

The judgment creditors provided affidavit evidence in the special leave application (Black v Garnock [2006] HCA Trans 619) that some 369 writs are recorded each year in New South Wales. It is understood that only a miniscule proportion of recorded writs proceed to a registered transfer pursuant to a Sheriff’s sale (in a typical year of the order of low single figures).

It is arguable that, when compared with the number of transfers registered in New South Wales annually, the risk of a transaction being intercepted by a writ is extremely slight. However, the success of the judgment creditors, and the consequences for the purchasers, in Black could well increase the popularity of writs against land as a method of enforcement. The significant changes to conveyancing practice (making the process more complex and expensive, and “cluttering” the register with short-term caveats) which are likely to flow from this decision may be considered to be disproportionate, and possibly worthy of law reform. On the other hand, from a purchaser’s perspective, it is better to be safe than sorry.

13 Beware the bankrupt registered proprietor
In *Mango Media Pty Ltd v Velingos* [2008] NSWSC 202 the plaintiff claimed an equitable interest pursuant to a charge created under a written loan procuration agreement. The claim was disputed by the defendant. The plaintiff sought declaratory relief and an order extending the caveat. On return of the summons Counsel appeared for the Official Receiver, and advised the Court that the defendant had become bankrupt some two weeks before the filing of the summons.

Section 58(3) of the *Bankruptcy Act* 1966 provides:

“(3) Except as provided by this Act, after a debtor has become a bankrupt, it is not competent for a creditor:

(a) to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt; or

(b) except with the leave of the Court and on such terms as the Court think fit, to commence any legal proceeding in respect of a provable debt or take any fresh step in such a proceeding.”

Barrett J held that the proceedings before the Court were not caught by section 58(3)(a) (at [5]). However, the more difficult proceedings was whether these proceedings were “in respect of a provable debt” and so caught by section 58(3)(b).

His Honour observed (at [14]-[15]):

14 In the present case, this court is asked to make a binding declaration of right under s 75 of the *Supreme Court Act* 1970 recognising the existence of an interest in property of a bankrupt by way of security for a debt of the bankrupt. Given that the phrase “in respect of” only requires “some discernible and rational link” between the matters in question (*Technical Products Pty Ltd v State Government Insurance Office (Q)* [1989] HCA 24; (1989) 167 CLR 45 at CLR 47), the proceedings advancing the claim to have the court recognise the security for the debt seem to me clearly to be proceedings “in respect of” the debt claimed to be secured by the security. The security interest cannot be found to exist unless the debt is found to exist.

15 The claim for an order extending the caveat stands in the same light. It is a claim based on not only the existence of the interest in the property that is asserted by the plaintiff but also the existence of the debt for which the interest is said to stand as security. If there were no debt, there would be no basis for asserting an interest in the property and, therefore, no basis for attempting to obtain the declaratory relief or seeking to sustain the caveat.

The plaintiff submitted that section 58(5) operated here. That subsection provides:
“Nothing in this section affects the right of a secured creditor to realise or otherwise deal with his or her security.”

Barrett J rejected this submission:

17 I am not satisfied that the plaintiff, by commencing and prosecuting these proceedings, is doing anything within the scope of s 58(5). The plaintiff is not exercising a right “to realise or otherwise deal with” its “security”, where that is understood as a reference to the property interest claimed in the proceedings and in respect of which a caveat has been lodged. Realisation of security entails some step by way of resort to the property over which the security exists, such as by exercise of the power of sale. Nor does a holder of security “deal with” his or her security by seeking a declaratory order as to its existence or an order for the extension of a caveat predicated upon its existence. The making and pursuit of an application for either order does not entail a “dealing” with anything.

The Supreme Court proceedings were stood over to allow the plaintiff, if so minded, to seek leave from an appropriate Court.

14 Priority notices

The Real Property Amendment (Electronic Conveyancing) Act 2015, among other things, facilitates the introduction of priority notices into NSW.

These notices are likely to be most useful in providing an alternative to a “Black v Garnock” caveat. The key differences between a caveat and a priority notice are:

Effect: A priority notice will not “freeze the Register” to the same extent, and across as broad a range of dealings, as a caveat does.

Duration: A priority notice has a fixed duration of 60 days (with the possibility of one extension for a further 30 days). A caveat will remain of indefinite duration.

Fee: The lodgment fee for a priority notice is a fraction of a caveat lodgment fee (and in general, there should be no need for a lodgment fee for a “withdrawal of priority notice”).

PEXA Specific: Caveats can be lodged in both the paper and the PEXA environment. Priority notices, and the associated withdrawals and extensions, are only available via the PEXA platform.
Priority notices and the related dealings are available as from 28 November 2016. They can be lodged against titles which are not able to be transferred in PEXA.

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