SUPREME COURT OF QUEENSLAND

CITATION:	*Thompson DK Properties Pty Ltd A.C.N. 162 632 957 as trustee for the Thompson DK Discretionary Trust No 7 v Brown* [2018] QSC 19
PARTIES:	**THOMPSON DK PROPERTIES PTY LTD A.C.N. 162 632 957 AS TRUSTEE FOR THE THOMPSON DK DISCRETIONARY TRUST NO 7** (applicant) **v** **AARON MICHAEL BROWN** (respondent)
FILE NO/S:	No 9238 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 February 2018
DELIVERED AT:	Brisbane
HEARING DATE:	9 January 2018
JUDGE:	Brown J
ORDER:	**The order of the Court is that:** **1. Caveat number 718241059 lodged on 29 August 2017 over real property situated at 11 Oleander Street, Daisy Hill, Queensland, more particularly described as Lot 27, Registered Plan 113835, Title Reference 14053137 is declared to have lapsed on 29 November 2017;** **2. Caveat number 718241059 lodged on 29 August 2017 over real property situated at 11 Oleander Street, Daisy Hill, Queensland, more particularly described as Lot 27, Registered Plan 113835, Title Reference 14053137 be removed;** **3. The respondent pay the applicant's costs of and incidental to the application incurred after 29 November 2017.**
CATCHWORDS:	REAL PROPERTY – TORRENS TITLE – CAVEATS AGAINST DEALINGS – LAPSE – where the applicant seeks an order to remove a caveat over real property pursuant

to the *Land Titles Act* 1994 (Qld) ("the Act") – where the applicant is the owner and developer of the relevant property – where the respondent was engaged to construct residences at the relevant property – whether the respondent has started proceedings in a court of competent jurisdiction to establish the interest claimed in the caveat pursuant to s 126(4) of the Act – whether the caveat has lapsed pursuant to s 126(5) of the Act – whether there is a serious question to be tried – whether the balance of convenience favours the removal of the caveat

Land Title Act 1994 (Qld), ss 126(4), 126(5)
Queensland Building and Construction Commission Act 1991 (Qld), s 42(3)

Black t/as Greg Black Constructions v Toowoomba Resort Pty Ltd [2005] 1 Qd R 577
C & E Pty Ltd v CMC Brisbane Pty Ltd [2004] 2 Qd R 244
Cousins Securities Pty Ltd v CEC Group Limited [2007] 2 Qd R 520
Re South Brisbane Motors Pty Ltd's Caveat [1981] Qd R 416
Re Ocean Downs Pty Ltd (in liq) Caveat [1989] 1 Qd R 648

COUNSEL: M F Wilson for the applicant
The respondent appeared on his own behalf

SOLICITORS: Cranston McEachern for the applicant
The respondent appeared on his own behalf

The Application

[1] The applicant seeks an order to remove a caveat number 718241059 lodged on 29 August 2017 (**the Caveat**) over property situated at 11 Oleander Street, Daisy Hill, Queensland
(**the Property**). The applicant also seeks other incidental orders.

[2] The applicant is the owner and developer of a property at Oleander Street, Daisy Hill. The respondent was engaged to construct a number of duplexes and a triplex. The respondent lodged the Caveat on the basis that he claims a charge over the Property pursuant to a charging clause in the construction contract pursuant to which he was engaged.

[3] The basis upon which the applicant seeks the removal of the Caveat is:

(a) That pursuant to s 126(5) of the *Land Title Act* 1994 (**the Act**), the Caveat has lapsed;

(b) That the contractor was not licensed pursuant to the *Queensland Building and Construction Commission Act* 1991 (**the QBCC Act**) and pursuant to s 42(3) is not entitled to any monetary or any other consideration for any building work,

with the effect that there are no monies which can be payable under the contract to support the charge;

(c) That there are no monies that are payable or may become payable to the respondent by virtue of the contract;

(d) That the balance of convenience favours the removal of the Caveat.

[4] The respondent claims that he is owed money by the applicant and he is entitled to maintain the Caveat to protect his position.

[5] The application was adjourned from 15 September 2017 following an agreement being reached between the parties. No orders were made on that day save that the application was adjourned to a date to be fixed. Draft orders were however signed by both parties. The parties were to reduce their agreement at least partly reflected in the draft orders to a written agreement. An agreement dated 4 October 2017 was executed by the parties. The applicant terminated the 4 October 2017 agreement on 19 December 2017. There is some dispute as to whether the parties contemplated an order also being made by consent in this Court which I will address subsequently.

The interest claimed

[6] The respondent registered the caveat claiming an equitable share or interest as chargee of an estate in fee simple pursuant to cl 39.9 of the building contract entered into by the applicant on 29 May 2015 which was assigned to the respondent.

[7] Clause 39.9 of the building contract provides, inter alia:-

> "The Principal hereby charges the land referred to in item 39 with due payment to the *Contractor* of all moneys that are payable or may become payable to the *Contractor* by virtue of the Contract".

[8] There have been several Deeds of Assignment and Variation of the building contract entered into between the applicant and respondent and there is a dispute as to its precise terms. However, the Court was not required to determine any issue in this regard for the purpose of this application. In particular, it was conceded that there is a triable issue as to whether there was an operative liquidated damages clause.

Has the contract lapsed pursuant to s 126(5) of the Act?

[9] A caveat lapses if a caveator does not comply with s 126(4) of the Act. Section 126(4) relevantly provides that if a caveator does not want a caveat to lapse, a caveator must start proceedings in a Court of competent jurisdiction to establish the interest claimed under the caveat, within three months after the lodgement of the caveat.

[10] The respondent delivered a draft statement of claim to the applicant on 13 October 2017 but it was not filed. That draft statement of claim set out the claims pursuant to which money was payable or may become payable under the contract and which supported the Caveat. The three month period for starting a proceeding ended on 29 November 2017. The applicant submitted that no proceeding has been started and the Caveat has lapsed.

[11] A search by the solicitors for the applicant of the Land Titles Register disclosed that on 24 November 2017, the respondent lodged under dealing number 718421602 a general request giving notice to the Registrar of Titles that proceedings had been started to establish the interest claimed under the Caveat. However, attached to the general request was a copy of the originating application filed by the applicant in these proceedings seeking, inter alia, the removal of the Caveat.[1]

[12] The applicant lodged a request for the removal of the Caveat on the grounds it had lapsed on 28 November 2017, informing the Registrar that the proceedings which were the subject of the notice by the respondent to the Registrar were not proceedings started by the respondent but was rather the originating application was filed by the applicant for the removal of the caveat. A search on 11 December 2017 indicated that the dealing was the subject of requisition to which the respondent was to respond and the applicant was informed by the Titles Registry on 18 December 2017 that the practice of the Titles Registry was to allow time for a respondent to respond to the requisition and that if the applicant required a decision prior to that, then the matter should be listed before this Court for urgent determination.

[13] The respondent contends that he attempted to file the statement of claim but could not file the draft statement of claim because no orders had been made on 15 September 2017, save that the matter be adjourned. He contends that a formal order was to be made by consent which would have provided for the lodgement of a statement of claim and that it had been agreed between the parties that that should occur, but no steps were taken in that regard.

[14] A draft order was signed by the counsel for both parties on 15 September 2017 (the **Draft Order**). It contained a number of orders. Paragraph 12 of the Draft Order provided that the originating application was to proceed as if started by claim with the respondent being the plaintiff. Paragraph 1 of the Draft Order provided that the respondent was to file and serve a statement of claim to establish the interest claimed in the caveat number 718241059 within 28 days.

[15] Paragraph 5 of the Draft Order provided that the Caveat was to remain registered over the parcel subject to the following orders. Paragraphs 8 to 11 made provision for the respondent to provide a consent for a survey plan to be registered and for requests for withdrawals of caveats to be given in relation to the 9 development lots with the last two not to be lodged until confirmation was received that a direction has been given by the applicant to deposit 50 percent of the retention sum (as defined) into their solicitor's trust account from the settlement of each of those sales. According to the applicant the matter was adjourned on 15 September 2017 so an agreement could be prepared to deal with the matters in paragraphs 8 to 11 of the Draft Orders. An agreement was executed between the parties on 4 October 2017. The applicant contends that the 4 October agreement governed the position between the parties and no orders were required to be taken out.

[16] The recital of the 4 October 2017 agreement states that "The Parties have agreed to deal with the Caveat upon the terms contained in this Agreement." The "Draft Court Order" is defined to mean the Draft Order executed by the parties on 15 September 2017 and attached as Annexure A but there is no operative clause in the agreement with respect to

[1] Affidavit of B McGowan, CFI 6 at [29].

the Draft Order. No provision is made in the agreement for the lodgement of any statement of claim by the respondent. The maintenance of the Caveat was not specifically addressed. The 4 October 2017 agreement provided, inter alia, that the respondent was to provide to applicant's solicitors a Form 18 General Consent to allow the principal (the applicant) to lodge a survey plan which upon registration would subdivide the parcel into development lots and secondly, a Request for Withdrawals of the Caveat in Form 14 in order for settlement of all of the development lots to proceed. It further provided that in relation to the sale proceeds of the eighth and ninth development lot, the principal had to cause its solicitors to give notice to the respondent not less than three days prior to settlement that it held an irrevocable direction from the principal to deposit into the trust account an amount equivalent to 50 per cent of the retention sum which was a sum of $606,993.00 as defined in the agreement. That retention sum was to be retained by the applicant's solicitors pending mutual agreement or until further Court Order.

[17] The respondent did not sign the documents submitted to him on 9 October 2017. The respondent did not return the documents submitted to him on 9 October 2017 as provided for by cl 3.1 of the 4 October 2017 agreement. The respondent states that he did not receive the letter of 9 October 2017. The applicant's solicitors referred to the signed consent and requests for withdrawal and requested their return on at least two subsequent occasions in October and November 2017. On 3 November 2017, the applicant's solicitors wrote an email to the respondent saying that they would have to press on with the litigation given the respondent had not responded to the offer for settlement. The letter stated inter alia that the statement of claim would have to be filed and paragraph 12 of the Draft Order would have to be made before the filing could be achieved and stated the consent for the lodgement of the survey plan and the requests for the withdrawal of the caveats had not been returned. The respondent on 21 November 2017 stated "I'll send through the signed Consents and Withdrawals as soon as the order is in place". It therefore appears that at least by that time he had the documents.

[18] The applicant contends that the respondent by his conduct repudiated the 4 October 2017 agreement and that the applicant by letter dated 19 December 2017 terminated the 4 October 2017 agreement.

[19] The respondent states his limited understanding was that paragraphs 8 to 11 of the Order were to be reduced into a letter form so that they would be enforced at a later time and the remaining parts of the Draft Order would be made as formal orders. He also stated that he believed he could not be required to comply with the 4 October 2017 agreement as the order had not been made, particularly paragraph 5. There is some support for the respondent's understanding that the remaining part of the order was to be formalised in so far as no provision was made as to how the dispute between the parties was to proceed which was addressed in paragraphs 1 to 4 and paragraph 12 of the Draft Order. However there is no provision in the 4 October 2017 agreement requiring that the Draft Order be formalised before the respondent had to comply with his obligations under the 4 October 2017 agreement.

[20] The 4 October 2017 agreement provided for the progressive withdrawal of the Caveat to allow for the settlement of all development lots, but did not refer to the maintenance of the Caveat although it was arguably implicit in the agreement insofar as it provided for a progressive withdrawal.

[21] There was correspondence about the orders needing to be finalised in order for the statement of claim to be filed by the solicitors for the applicant in an exchange of emails about the matter being listed to do so on 31 October 2017 and 3 November 2017. I have referred to relevant terms of the 3 November 2017 email above. In an email of 31 October 2017, the applicant's solicitor indicated that their counsel had advised:

> "… that before we can prepare and file a defence, your statement of claim will have to be formally filed. To do this we need the orders agreed to on 15 September to be made by the Court. This will involve re-listing the application once these orders can be made by consent…"

[22] On 16 November 2017, the respondent indicated that his counsel was free to appear on almost any day so that the orders could be made, but that he thought the Registrar could accept the order without the need for a further appearance. On 21 November 2017, the applicant's solicitors indicated to the respondent in an email that there were a number of matters which may give rise to the need to file additional material in particular: the matters set out in the draft statement of claim, the contract termination, the respondent's licence suspension and the respondent's ability to address defects. The email stated that their client was considering its position. The respondent referred to having conversations with his counsel about the 4 October 2017 agreement and later the need to relist the matter for orders to be made in correspondence to the applicant in October and November 2017.

[23] The respondent asked on 1 December 2017 as to the status of filing of the orders, stating, "As you are aware, we attempted to file but were not permitted as the orders had not been filed by yourselves".

[24] Decisions of this Court have evinced a liberal approach to the question of what constitutes the starting of proceedings to establish an interest as required by s 126(4) of the Act.[2] It does appear that the parties did contemplate that the originating application was to be treated as a claim and the respondent as the plaintiff.[3] That was not, however, done. However even if that had been the case, without a statement of claim being filed, or the originating application being amended, there would have been a real question as to whether the respondent had started a proceeding "to establish the interest claimed under the caveat". Given that neither occurred, the originating application of itself could not be treated as a proceeding for the purposes of s 126(4) since it sought to set the Caveat aside. The fact is that there was no proceeding started to establish the interest claimed in the Caveat as contemplated by s 126(4) of the Act.

[25] The respondent, who is the caveator, has not started a proceeding in a Court of competent jurisdiction to establish the interest claimed within the three month time period. Even if the respondent understood that the applicant was formalising the filing of the orders, he was aware from the exchange of the correspondence that it was intended to be done by relisting the matter for the orders to be made and was not a matter for which the applicant had represented it was solely responsible for taking the appropriate steps to have the order formalised. He had discussed the availability of his counsel and notified the applicant of that fact and his counsel's availability. Further, by the email sent on 21 November 2017, the applicant was considering its position given a

---

[2] *Cousins Securities Pty Ltd v CEC Group Limited* [2007] 2 Qd R 520 at [35] – [37].
[3] I have assumed the rules are broad enough to permit this to be done.

number of factors, including whether it filed further material, rather than stating it was taking steps to relist the matter. As such there is nothing to suggest any estoppel arises in the respondent's favour. There was still a week before the time expired for the proceedings to be started before the Caveat lapsed. The Act places the onus on the caveator to start those proceedings. The orders did not have to be made in order for the respondent to start the relevant proceedings. In the absence of the orders being finalised, the respondent should have lodged a claim and statement of claim himself, which he could have done independently of any such orders being finalised. That would have protected his interest, so as to avoid the caveat lapsing.

[26] The respondent as caveator has taken no steps to make good the interest he claims by starting proceedings by which his interest may be defined. Where no such proceedings have been commenced, s 126(5) of the Act operates automatically to cause the caveat to lapse and there is no occasion for the exercise of any discretion.[4] It should be said, that by the email of 21 November 2017 from the applicant's solicitors to the respondent, it was evident that the applicant was not indicating that they were proceeding with the formalisation of the orders but rather were considering their position. That was 8 days prior to the time at which the Caveat lapsed, which would have given the respondent sufficient time to take steps himself.

[27] Given the Caveat has lapsed, the appropriate order would be one by way of a declaration rather than for its removal. The Registrar has the power to remove a lapsed caveat under s 126(7) of the Act. However, given the response of the Titles Registry, I will order the removal of the caveat consequential upon that declaration.[5]

The applicant also submits that the caveat should be removed on the basis that there is no serious question to be tried and that even if there was, the balance of convenience favours the removal of the caveat. Although I have found that the Caveat has lapsed, I will still address the further grounds upon which the applicant sought to have the Caveat removed.

Removal under s 127 of the Act

[28] The Act provides that:

> "(1) A caveatee may at any time apply to the Supreme Court for an order that a caveat be removed.
>
> (2) The Supreme Court may make the order whether or not the caveator has been served with the application, and may make the order on the terms it considers appropriate."

[29] In determining whether the Caveat should be removed, the onus is on the caveator to satisfy the Court, as in the case of an injunction, that:

(a) there is a serious question to be tried which involves the caveator showing "a sufficient likelihood of success to justify in the circumstances the preservation of the status quo"; and

---

[4] *Cousins Securities Pty Ltd & others v CEC Group Limited* [2007] 2 Qd R 520.
[5] See *Re Ocean Downs Pty Ltd (in liq) Caveat* [1989] 1 Qd R 648 at 652

(b) the balance of convenience favours the maintenance of the status quo and thus the retention of the caveat on the title. [6]

[30] The applicant contends that there is no serious question to be tried in the present case because:

(a) The respondent was not licensed to carry out the work under the QBCC Act and under s 42(3) of that Act is not entitled to any monetary or any other consideration for any building work such that there are no monies payable under the contract to support the charge;

(b) The variations claimed by the respondent were not claimed in accordance with the contract and the estimate of the cost of rectification of defects in the work carried out by the respondent was significantly greater than the amount the respondent contended was owed to him

Was the respondent licenced to undertake the works?

[31] It is contended by the applicant that the respondent did not hold a licence by which he could perform the work for which he had contracted in relation to the property. His licence was in relation to "domestic building construction work only". Pursuant to the QBCC Act, "domestic building construction work" is undefined but "domestic building work" in s 4(1) of schedule 1B is relevantly limited to "the erection or construction of a detached dwelling". Section 4(1)(b) refers to "the renovation, alteration, extension, improvement or repair of a home" and s 4(1)(d) refers to "the installation of a kit home at a building site". A "detached dwelling" is defined to mean a single detached dwelling or a duplex.

[32] In the present case the project consists of more than one detached dwelling, being three duplexes and a triplex. It appears on the evidence that they are to be used as places of residence.

[33] The applicant contends that the building work is not domestic building construction work. The respondent contends that he had clarified that the building work which he had carried out which was within the terms of his licence by confirming with the licencing division of the Queensland Building and Construction Commission (QBCC) that he could carry out the work within the terms of his licence. The Commission's response to the respondent in an email of 18 September 2017, which is an exhibit, supported that fact, although of course that is only a matter of opinion of the Assessment Officer who responded to his inquiry. The applicant relied on the definitions in the Act and contended that to the extent the QBCC licence division had advised the respondent that he could carry out the work they were incorrect. I was not referred to any case law in this regard.

[34] In *C & E Pty Ltd v CMC Brisbane Pty Ltd*,[7] it was held that the construction of 10 houses under a contract constituted a domestic building contract, notwithstanding it was a development for more than a single detached dwelling or duplex. On the proper

---

6 *Cousins Securities Pty Ltd v CEC Group Limited* [2007] 2 Qd R 520 at [38].
7 [2004] 2 Qd R 244.

construction of "domestic building work" McMurdo J[8] found that each detached dwelling was domestic building contract work. McPherson JA considered that "detached dwelling" was to be interpreted as including the plural "detached dwellings". His Honour did however comment that the definition of domestic building work may have been to exclude what was described as a "triplex" or a row of terrace houses.[9] In *Black t/as Greg Black Constructions v Toowoomba Resort Pty Ltd,*[10] McMurdo J was considering whether development of a property which consisted of a number of single storey buildings separated by driveways, with each building consisting of two or three semi-detached units, constituted domestic building work. In that case the parties have contracted for the applicant to construct units to be used as residences within stage two, which consisted of the construction of five buildings, being four duplexes and a triplex. McMurdo J stated that the dwellings were suitable as a place of residence. He stated that the work involves or does not involve the construction of a dwelling according to the character of what is being constructed, as that character objectively appears from the material which defines what is to be constructed such as the contract documents, plans and drawings. He considered that a triplex is not within the definition of "detached dwelling", although it does contain three dwellings. But his Honour, looking at what appears in the plans and drawings, considered the four buildings containing the other eight units to be plainly detached dwellings.[11]

[35] In the present case therefore, while the triplex, assuming it is accurately described, would prima facie fall outside the definition of domestic building work, the same could not be said in relation to the three duplexes. As such, the submission of the applicant, that the respondent was not entitled to any monetary or other consideration for any building work, cannot be accepted. Thus the contention that cl 39.9 of the contract is not enlivened is not established, as it appears the three duplexes would constitute domestic building work, which the respondent was licensed to carry out, even if the triplex was excluded. There is therefore a serious question to be tried in this regard.

No monies are payable by virtue of the contract

[36] The applicant contends that the money which the respondent has claimed as money owing pursuant to the contract under the draft statement of claim in the sum of $154,393.22[12] for an amount of variations are not recoverable pursuant to cl 36.1 of the general conditions of contract unless they are directed by the superintendent. It contends that that has not been satisfied and further includes claims for works which have not been carried out and which are now being carried out by the applicant, as well as payment of unpaid suppliers.[13] It also relies on the fact that there is no provision in the contract for the variations to be requested by the contractor; clause 36.3 which otherwise would have permitted a contractor initiated variation was deleted from the contract. Pursuant to cl 2.1 it is a fixed sum contract and there is only an obligation to pay "any additions or deductions strictly pursuant to the contract". The applicant contends that none of the claimed variations were ordered by the superintendent. It

---

8 As His Honour then was.
9 See [18].
10 [2005] 1 Qd R 577.
11 See [25].
12 Which is said to be the subject of progress claim of 26 September 2017.
13 Which was not disputed by the respondent save that he stated he would be amending his draft statement of claim: see affidavit of A Brown, CFI 10 at [20]-[23].

further states that the invoice of 26 September 2017 was not accompanied, as required by cl 37.1 of the contract, by a conforming declaration that all employees, workers, subcontractors and suppliers had not been paid. Therefore even if it was a valid invoice there would be no requirement to pay by the applicant. According to the affidavit of Mr Moore, the respondent was not expressly directed in writing to undertake all of the variations claimed and insufficient information has been provided to determine what, if any, variations are liable to be approved. Mr Moore further stated that notwithstanding that the applicant did not concede any liability to make any payment on account of the variations claim, it was prepared to accept variations in the variation claim in the amount of $12,783.45 plus an amount of $28,000.00 for air conditioning units when those units were purchased,[14] although he later refers to a figure of $70,000 being the total amount of completed works that can be attributed to the variation claim,[15] even if the respondent could overcome the contractual requirements as to variations.

[37] The respondent, however, contends that the matters raised by Mr Moore merely raised the substance of the dispute between the applicant and respondent of payment obligations under the contract. He also claims that other monies are the subject of the caveatable interest which are the costs to complete the work and undertake additional works due under the assigned contract. The money to complete the works and the additional works are contended by the respondent to represent money that is payable and may become payable to the contractor by virtue of the contract and therefore encompassed by the charge under cl 39.9. In terms of the argument about the variations, the respondent contends that the works were requested by the applicant. He has not provided any evidence that they have been requested in writing as required under the contractual clause. Liability for the variation could only arise if there is some waiver or estoppel in relation to the operation of cl 36.1 of the contract. On the present state of the evidence as unsatisfactory as it is, I cannot conclude that such an argument may not be available to the respondent, given there is evidence, even from the applicant that some work has been carried out which could be claimable as a variation (although with no concession it can now be claimed). I consider that there is a serious question to be tried in this regard.

[38] As to the claim by respondent that he will be entitled to claim monies for the further work that the respondent contends is to be carried out to complete the contract and the additional works that have been requested to be carried out which he contends is the subject of the claim under his charge,[16] the difficulty in that regard is that the applicant purported to terminate the contract on 18 October 2017 and further contends that prior to termination the respondent had not performed any work on site between 29 August 2017 and the date of termination on 18 October 2017. The failure by the respondent to return to the site and carry out the works despite requests to do so and alleged false declarations which were said to accompany progress claims made by the respondent (which he denies) formed the basis upon which the contract was terminated. Further, the respondent's licence was suspended on 23 October 2017 and cancelled on 6 December 2017, as a result, according to the respondent, of not being able to meet audit requirements. In those circumstances, the respondent cannot return to complete the building works under the contract or rectify the defects. An alternative builder has been engaged to carry out the works. The applicant therefore contends that there is no

---

14 See Affidavit of E Moore, CFI 5 at [25](c) and (e).
15 See Affidavit of E Moore, CFI 5 at [30] and [37].
16 As set out in [26]-[37] of the draft statement of claim.

possibility that any monies may become payable by virtue of the contract. I accept that that appears to be case, at least in terms of the respondent's claim for works to be completed and additional works requested. That is a different question from whether the respondent has any right to claim damages as a result of the applicant's actions. No such case has been raised by the respondent and in any event such damages would not constitute money payable under the contract.

[39] In relation to the retention sum being held by the applicant in the sum of $82,163.24, the applicant contends that that sum will be not be repayable as the estimated defects costs exceed that amount.

[40] The applicant relies on evidence of Mark Alford,[17] that defects costs have been calculated to be $314,432.00, which far exceeds any amount of money that could be payable under the variations or that could be met by the retention sum held under the contract. That is disputed by the respondent. Further, the applicant also claims liquidated damages of $142,425.00 have been assessed for the period from 13 December 2016 to 18 October 2017, but subsequently accepted that that is a triable issue.

[41] On the basis of the evidence provided by the respondent at best he has a claim for $154,393.22 for variations which could be the subject of the charge under cl 39.9 of the contract, which could constitute a serious question to be tried. On the evidence before me, I consider that it is likely that the claim would in fact be considerably less, given it included a claim for work not yet carried out and for unpaid suppliers. Assuming for present purposes that there is a serious question to be tried, I turn to the question of balance of convenience.

Where does the balance of convenience lie?

[42] In determining whether a caveat should be removed, the Court must determine not only whether there is a serious question to be tried, but also where the balance of convenience lies.[18]

[43] The applicant contends the balance of convenience favours the removal of the Caveat due to a number of matters, namely:-

(a) That the construction is near completion with a new contractor and the applicant cannot settle any sales until the Caveat has been removed;

(b) That the applicant's total debt associated with the project at 8 September 2017 was $2,386,000.00 with interest accruing at approximately $650.00 per day;

(c) That three of the sales contracts have been terminated because of the delays with getting the project finished and 6 contracts remain on foot still;

---

[17] Who was appointed as superintendent under the contract in September 2017.

[18] Which involves the caveator showing "a sufficient likelihood of success to justify in the circumstances preservation of the status quo": *Cousins Securities Pty Ltd v CEC Group Limited* [2007] 2 Qd R 520 at 538, but also the caveator must satisfy the Court that the balance of convenience favours the maintenance of the status quo and thus the retention of the caveat on the title.

[44] The applicant further contends that there is no prejudice to the respondent in that the Caveat only seeks security for monies not an interest in land itself and there has been no argument raised by the respondent that the applicant cannot meet the payment of monies found to be owing, if any, associated with the contract. Indeed the applicant contends that the respondent has conceded it will have plenty of money if the contracts of sale settle.

[45] The evidence shows that there are presently six contracts of sale on foot in relation to the various dwellings with respect to the three separate freestanding duplexes and the three units in the freestanding triplex. Settlement for each contract is specified to be contingent upon the registration of survey plan no. SP280283 and cannot occur until the plan is registered with the Queensland Department of Natural Resources and Mines.[19] The settlement date for four of the contracts has been extended until 30 March 2018.

[46] The respondent contends that he will have nothing to protect any monies owing to him under the contract if the Caveat is removed. He further contends that he would have been happy to allow the progressive sale of the lots as contemplated in the 4 October 2017 agreement but that he had no security. In that regard, the applicant points out that in relation to two contracts, the 4 October 2017 agreement provided for 50 per cent of the sales proceeds to be held in a retention account. The respondent states that he can see no reason why the Draft Order of 15 September 2017 either with the agreement dated 4 October 2017 or modified by the deletion of paragraphs 8 to 11 cannot now be made. The agreement of 4 October 2017 has been terminated. The order contained in paragraph 5 of the draft order was subject to the orders that followed, which were at least in part the subject of the 4 October 2107 agreement.

[47] For present purposes I assume that monies are owing which could be the subject of a charge pursuant to cl 39.9 and that without the Caveat the respondent will have no security for those monies. However, I find that the balance of convenience favours the removal of the Caveat for the following reasons:

(a) The applicant has a number of contracts of sale with third parties which will be jeopardised if the survey plan cannot be registered and the sales allowed to proceed;

(b) The settlement of those contracts of sale, at least in the case of four of them, is at the end of March 2018. The applicant will suffer a significant cost if those contracts do not settle on the extended date or in fact are terminated;

(c) The applicant is incurring interest at approximately $650 per day.

(d) There is also a real possibility that the monies subject to the claim for variations, even if those variations can be claimed in their entirety in the sum of $154393.22, and the retention sum held under the contract, will be more than set off by the cost of rectification of the alleged defects and completion of the works by the applicant;

(e) While the respondent has raised issues in correspondence as to whether the applicant could meet any payments, he did not assert that to be the case in

[19] Affidavit of G Troedson at [7].

argument and in fact asserted that the applicant should have sufficient monies if the settlements proceeded as contemplated under the 4 October 2017 agreement. That agreement however has been terminated by the applicant due to alleged non-compliance with its terms by the respondent. The applicant deposed to the fact that they had paid all monies owing to the respondent up until the claim for variations which is the subject of dispute.

[48] I raised the question with the respondent of whether he was in a position to provide an undertaking as to damages so the applicant could be protected for any loss that may be suffered by the applicant by the maintenance of the Caveat.[20] He indicated that he is not. As I have stated above, he presently has had his licence cancelled due to the fact that an audit by QBCC shows that he has fallen below the relevant financial threshold, a matter which he says is due to the termination of the building contract with the applicant. That is significant where the respondent's case cannot be regarded as a strong one and may well be exceeded by the amounts the applicant may be able to set off for the rectification of defects and completion of the works.

[49] In the circumstances, weighing all the competing factors where I considered that the case of the respondent and his prospects of successfully claiming monies from the applicant has significant difficulties, that he is unable to provide any undertaking as to damages in circumstances where there is evidence of significant loss being suffered by the applicant and that third parties are affected if the Caveat is not removed, the balance of convenience favours the removal of the Caveat. That is aside from the fact that I have found that the Caveat has lapsed in any event.

[50] The applicant has sought its costs of the application on an indemnity basis and contends that the application was unnecessary because the applicant had offered prior to 15 September 2017 to place sufficient monies from the sale of the properties in the solicitor's trust account as security and that that offer was rejected by the respondent. The agreement reached between the parties on 15 September overtook any such prior offer. The circumstances do not warrant the award of indemnity costs.

[51] However, given that the applicant has been successful, the respondent is ordered to pay the costs of and incidental to the application incurred after 29 November 2017 which is the date the Caveat lapsed.

[52] The applicant seeks an order that, pursuant to s 130 of the Act, compensation be assessed. Section 130 provides for compensation in particular circumstances and not for such a general order. No evidence has been presented supporting the making of any order for compensation. I will not make any order in those terms.

[53] Accordingly:

(a) I declare that caveat number 718241059 lodged on 29 August 2017 over real property situated at 11 Oleander Street, Daisy Hill, Queensland, more particularly described as Lot 27, Registered Plan 113835, Title Reference 14053137 lapsed on 29 November 2017;

---

[20] *Re South Brisbane Motors Pty Ltd's Caveat* [1981] Qd R 416 particularly at 419; *Cousins Securities Pty Ltd v CEC Group Limited* [2007] 2 Qd R 520 at [53].

(b) I order that caveat number 718241059 lodged on 29 August 2017 over real property situated at 11 Oleander Street, Daisy Hill, Queensland, more particularly described as Lot 27, Registered Plan 113835, Title Reference 14053137 be removed;

(c) I order that the respondent pay the applicant's costs of and incidental to the application incurred after 29 November 2017.