

SUPREME COURT OF QUEENSLAND

CITATION: *Re Brooks' Caveat* [2014] QSC 76

PARTIES: **DOROTHY IRENE BROOKS AND STEPHEN THOMAS TODD (AS EXECUTORS AND TRUSTEES OF THE WILL OF VICTOR PATRICK BROOKS, DECEASED)**
(applicant)
v
DAVINA LINDA BROOKS
(respondent)

FILE NO/S: 132 of 2014

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: 24 April 2014

DELIVERED AT: Cairns

HEARING DATE: 9 April 2014

JUDGES: Henry J

ORDERS: **1. Application dismissed.**
2. The applicant pay 80 per cent of the respondent's costs to be assessed on the standard basis.

CATCHWORDS: REAL PROPERTY – TORRENS TITLE – CAVEATS AGAINST DEALINGS – WHO MAY LODGE AND WHAT INTEREST SUFFICIENT – OTHER CASES – where the applicant sought orders for removal of a caveat – where the applicant sought compensation and indemnity costs from the respondent – whether the respondent ought be ordered to pay compensation to the applicant pursuant to s 130 of the *Land Title Act* 1994 (Qld) for loss suffered as a result of the alleged lodging and continuation of the caveat without reasonable cause

Acts Interpretation Act 1954 (Qld) s 35C, Sch 1
Land Title Act 1994 (Qld) s 122(1), s 124(1), s 130, s 130(3)
Real Property Act 1861 (Qld) s 98
Trusts Act 1973 (Qld) s 31, s 32, s 98

Bedford Properties Pty Ltd v Surgo Pty Ltd [1981] 1 NSWLR 106, applied
Brogue Tableau Pty Ltd v Binningup Nominees Pty Ltd [2007] WASCA 179, considered

Farvet Pty Ltd v Frost [1997] 2 Qd R 39, considered
Legione v Hateley (1983) 153 CLR 406, cited
Mijo Developments Pty Ltd v Royal Agnes Waters Pty Ltd
 (2007) 1 LT(A)R 187; [2007] NSWCA 199, considered
Re CM Group Pty Ltd's Caveat [1986] Qd R 381, considered
Re Henderson's Caveat [1998] 1 Qd R 632, cited
Re Pile's Caveats [1981] Qd R 81, distinguished

COUNSEL: GR Dickson for the applicant
 RM Sweet for the respondent

SOLICITORS: Vandeleur & Todd for the applicant
 Stojanovic Solicitors for the respondent

- [1] In an application filed on 25 March 2014 the applicant sought orders for the removal of a caveat over a commercial and residential property at 45 Porter Promenade, Mission Beach (“the property”) and for the payment of compensation.
- [2] As at the time of the hearing of the application there was no longer a caveat over the property and the pivotal question was whether the respondent ought be ordered to pay compensation to the applicant for loss suffered as a result of the alleged lodging and continuation of the caveat without reasonable cause.

Background

- [3] The applicant trustees are the two executors of the will, dated 19 March 2003, of Victor Patrick Brooks who died on 1 June 2006. Probate was granted on 9 October 2006.
- [4] The will provided for the property to be held on trust for the lifetime of the applicant executor, Dorothy Brooks, and upon her death to be held on trusts in shares including a half share to give to the deceased’s daughter from a previous marriage, Davina Brooks, upon her attaining the age of 30 years. Davina Brooks is still only 27 years old. The terms of the trust upon which the executors hold the property for Dorothy Brooks during her lifetime entitle her to reside in the property and receive all income from it.
- [5] The relevant provisions, contained in clause 3 of the will, are:
 - “3. My executors shall hold my estate on trust to pay my just debts, funeral and testamentary expenses, and to hold the residue of my estate upon the following trusts:-
 - (1) (a) to hold the property described as Lot 47 on Registered Plan 712080 in the County of Nares Parish of Hull contained in Certificate of Title Reference 20417087 (which includes my principal residence) (“the property”) on trust for my wife DOROTHY IRENE BROOKS during her lifetime, she being entitled to reside in the property and receive all income from the property subject to her being responsible for paying all

rates and taxes and keeping the property insured against loss and damage from fire, cyclone, storm and tempest in an amount, and in an insured office, approved by my executor, maintaining it in a state similar to that in which it is at my death;

...

(2) upon the death of my wife DOROTHY IRENE BROOKS the property shall be held upon the following trusts:-

...

(c) as to a one-half share (½) to give to my daughter DAVINA LINDA BROOKS upon her attaining the age of thirty (30) years..."

[6] Clause 4 of the will confers broad powers upon the trustees, namely:

"4. My trustees may in their discretion:

(3) exercise any powers given to them by law; and

(4) expend, pay, or apply capital money and income from my estate subject to the trusts hereby created for any purpose or in any manner..."

[7] Unfortunately the property was damaged by Cyclone Larry in 2006, two and a-half months prior to Mr Brooks' death. It was not insured at that time. In the ensuing years, Dorothy Brooks expended a significant amount of money to restore the property and paid the insurance and rates on the property. Insurance costs and rates in respect of the property have increased significantly. The rent derived from the property, which has both commercial and residential tenancies, significantly decreased. After receiving financial advice, Dorothy Brooks determined she was no longer able to maintain the property and the respondent was informed of that via a letter to her former solicitor on 5 February 2014.¹

[8] Dorothy Brooks and her co-executor and co-trustee, a solicitor, resolved to sell the property pursuant to their powers under ss 31 and 32 of the *Trusts Act 1973* (Qld) and to reinvest the proceeds of the sale of the property pursuant to Pt 3 of that Act, "Investments". On 5 February 2014 the applicant's solicitor wrote to the former solicitor of the respondent advising:

"[T]he executors after taking advice from...counsel are now taking steps to sell the property at Mission Beach by auction and then propose to acquire an alternate residential property elsewhere for the life tenant to reside in and allow the life tenant the benefit of the income from any remaining capital from the sale of the Mission Beach property.

The executors consider that they are not required to and do not intend to seek the consent of the beneficiaries or an order of the Court before taking such action..."²

¹ Affidavit of Dorothy Brooks DIB-16.

² Ibid DIB-14.

- [9] The curt tone of this communication may be the product of a history of earlier tension between the players which is not in evidence. However, the letter's absence of reassurance of the respondent about how the trustees proposed to protect her significant future beneficial interest in a property they intended to sell would have done little to assuage her inevitable concern.
- [10] It is against that background the applicant executors initiated arrangements for the marketing and proposed sale of the property at an auction to occur on 22 March 2014 and the respondent lodged a caveat against the property.
- [11] As a result of the respondent not withdrawing the caveat, the auction was cancelled. The applicant seeks compensation pursuant to s 130 of the *Land Title Act* 1994 (Qld) for money thrown away in consequence of the cancellation in the amount of \$3,232.20.

Meaning of s 130 *Land Title Act*

- [12] Section 130 of the *Land Title Act* relevantly provides:
- “Compensation for improper caveat**
- (1) A person who lodges or continues a caveat without reasonable cause must compensate anyone else who suffers loss or damage as a result.
- ...
- (3) In a proceeding for compensation under subsection (1), it must be presumed that the caveat was lodged or continued without reasonable cause unless the person who lodged or continued it proves that it was lodged or continued with reasonable cause.”
- [13] In *Bedford Properties Pty Ltd v Surgo Pty Ltd*³ Wooten J observed of the meaning of “reasonable cause” in a New South Wales legislative provision similar to s 130:
- “I think the foundation for reasonable cause must be, not the actual possession of a caveatable interest, but an honest belief based on reasonable grounds that the caveator has such an interest.” (“the *Bedford Properties* test”)
- Wooten J went on to explain proof of an honest belief based on reasonable grounds may not always be enough, citing *Young v Rydalmere Credits Pty Ltd*.⁴ There, despite the caveator having a caveatable interest, the caveator was found to have acted without reasonable cause because he lodged the caveat not to protect his interest but for an ulterior motive and without regard to its effect on transactions to which the caveator had agreed.
- [14] The *Bedford Properties* test was approved in Victoria by Hayne J in *Commonwealth Bank of Australia v Baranyay*⁵ and in New South Wales by the New South Wales Court of Appeal in *Beca Developments v Idameneo (No 92) Pty Ltd*.⁶

³ [1981] 1 NSWLR 106, 108.

⁴ (1963) 80 WN (NSW) 1463.

⁵ [1993] 1 VR 589, 600.

⁶ (1990) 21 NSWLR 459, 474, 479.

- [15] However, *Beca Developments* did not approve of the reasoning in *Young v Rydalmere Credits Pty Ltd* which was cited by Wooten J in *Bedford Properties*.⁷ Clarke JA asserted in *Beca Developments* that the existence of an ulterior motive on the part of a person with a caveatable interest does not remove the existence of reasonable cause, in that the existence of the interest provides the reasonable cause.⁸ On the other hand, in *Baranyay* Hayne J did not express similar disapproval and nor did Malcolm CJ in the Western Australian case of *Kuper v Keywest Constructions Pty Ltd*.⁹
- [16] The most authoritative Queensland authority in respect of the meaning of s 130 is the decision of Demack J in *Farvet Pty Ltd v Frost*.¹⁰ His Honour there cited the *Bedford Properties* test with approval. However, Demack J regarded the use of the word “improper” in the heading to s 130, which forms part of the section by reason of s 35C *Acts Interpretation Act 1954* (Qld), as introducing an additional requirement. His Honour also regarded the then wording of s 130 as placing the onus of proof upon the person claiming compensation. Thus his Honour found that a claimant under s 130 needed to prove that the caveat was lodged and continued both improperly and without reasonable cause.
- [17] Subsequent to the decision in *Farvet Pty Ltd v Frost*, s 130 was amended so that the words of s 130(3) unequivocally cast the onus upon the person who lodges or continues the caveat to prove it was lodged or continued with reasonable cause. The section’s heading, and its reference to an “improper caveat”, remains the same. Given the onus now falls to the caveator to prove reasonable cause, the question arises whether it is appropriate to apply the reasoning in *Farvet Pty Ltd v Frost* in reverse, so as to require the caveator to prove the caveat was lodged and continued both with reasonable cause and without any improper purpose. I would not adopt such a test. Section 130(3) takes the exceptional course¹¹ of specifically imposing a presumption that a caveator has acted without reasonable cause. I interpret the reference to impropriety in the section’s heading as being no more than a short form reflection of that adverse presumption. It would be contrary to the words of sub-s (3) to cast the onus upon the caveator of proving anything more than what the subsection requires. Thus a caveator must only prove the caveat was lodged or continued with reasonable cause.
- [18] It will likely be an incident of such proof that it is also proved the caveat was lodged or continued without any improper purpose,¹² but proof of absence of improper purpose is not of itself a requirement of s 130(3). Similarly, where a caveator has no caveatable interest, proof that the caveator held an honest belief based on reasonable grounds that the caveator had such an interest - the *Bedford Properties* test - will be the most likely means of proving the caveat was lodged or continued with reasonable cause. However, the potential circumstances of cases involving the

⁷ Ibid 475, 479.

⁸ (1990) 21 NSWLR 459, 475.

⁹ (1990) 3 WAR 419, 434; discussed in *Brogue Tableau Pty Ltd v Binningup Nominees Pty Ltd* [2007] WASC 179, [84].

¹⁰ [1997] 2 Qd R 39.

¹¹ A course described as potentially having an “undesirable chilling effect” by Kirby P in *Beca Developments* (1990) 21 NSWLR 459, 463 and Demack J in *Farvet Pty Ltd v Frost* [1997] 2 Qd R 39, 46.

¹² *Brogue Tableau Pty Ltd v Binningup Nominees Pty Ltd* [2007] WASC 179, [109].

lodging of caveats are so varied that it cannot be assumed proof which meets the *Bedford Properties* test will always meet, or be the only means of meeting, the test imposed by s 130(3). The *Bedford Properties* test provides useful guidance but it does not prescribe the circumstances under which a caveator without a caveatable interest may be able to discharge the onus imposed by s 130(3). The only prescription is that imposed by the statute, namely that the caveator must prove the caveat was lodged or continued with reasonable cause.¹³

- [19] The same consideration means it is unnecessary to resolve the above discussed divergence of views in other states as to whether the existence of a caveatable interest of itself provides proof of reasonable cause or whether, even if a caveator has a caveatable interest, the caveator will not have acted with reasonable cause if motivated by an ulterior or improper purpose. Both views introduce absolute assumptions which are not warranted by the relevant Queensland provision. The question pursuant to s 130(3) is not whether the caveator had a caveatable interest but whether it has been proved the caveator had reasonable cause for lodging or continuing the caveat. The existence of a caveatable interest may often afford proof of reasonable cause but, again, the circumstances of individual cases are potentially so variable that it cannot be assumed proof of a caveatable interest will of itself always be sufficient to prove reasonable cause. In the same vein, the presence of an ulterior or improper purpose on the part of the caveator with a caveatable interest may bespeak an absence of reasonable cause but whether it in fact does so is dependent upon the individual circumstances of the case, particularly if it is a case where a caveator has a mixture of motivating purposes.

Caveat Lodged

- [20] It is a threshold requirement of s 130 that the respondent lodged a caveat.
- [21] It is clear on the evidence that in response to the letter of 5 February 2014 sent by the applicant's solicitor advising of the intention to sell the property the respondent took legal advice and eventually resolved to lodge a caveat.
- [22] On 28 February 2014 a letter from the respondent's new solicitor to the applicant's solicitor noted the trust under which Dorothy Brooks was entitled to reside in and receive all income from the property during her lifetime was subject to conditions. The letter accused Dorothy Brooks of not giving priority to her responsibility to pay outgoing in respect of the property and engineering a situation whereby she could sell the property. It requested confirmation by 4:00 p.m. on 3 March 2014 that the property had been withdrawn from sale and said:
- “Given that my client clearly has an equitable interest in the land, consisting of the subject property, I hereby give you notice that it is proposed to lodge a Caveat on the title of that property and that I will advise you when that Caveat has been registered.”¹⁴
- The letter also requested a copy of the advice the applicant had obtained from counsel. A copy of that advice was not forthcoming.

¹³ As was emphasised by Devereaux DCJ in *Jiminez & Anor v Bugg* [2011] QDC 142, [43].

¹⁴ Affidavit of Dorothy Brooks DIB-16.

- [23] On the same date the respondent's Sydney based solicitor executed and forwarded a caveat and associated payments to a Queensland solicitor for lodgement in respect of the property.¹⁵
- [24] According to the Registrar of Titles' subsequent endorsement on the caveat it was lodged at 2:54pm on 4 March 2014.¹⁶ Pursuant to s 124(1) of the *Land Title Act* the caveat had effect from that time.
- [25] The lodging of the caveat was also recorded on the property's title as follows:
 "UNREGISTERED DEALINGS

Dealing	Type	Lodgement Date	Status
715633827	CAVEAT	04/03/2014 14:54	UNVERIFIED" ¹⁷

 The fact the caveat was recorded as an unregistered dealing is irrelevant to the issues here. The application of s 130 is attracted by the lodging of a caveat, not its registration.
- [26] A caveat was clearly lodged by the respondent. Did she have reasonable cause for doing so?

Reasonable cause for lodging a caveat

- [27] The applicant submits the respondent was not entitled to lodge the caveat because she did not have a caveatable interest. The respondent submits she did have a caveatable interest but in any event emphasises the question is not whether she did so but whether she had reasonable cause to lodge the caveat. In the circumstances of the present case it is unnecessary to finally determine whether the respondent in fact had a caveatable interest and I will refrain from doing so. However, the force of the argument whether the respondent had a caveatable interest informs the assessment of whether she had reasonable cause to lodge the caveat.
- [28] It is in that sense the *Bedford Properties* test provides useful guidance. The applicant contends in essence that even if the respondent honestly believed she had a caveatable interest that belief was not based on reasonable grounds because it is so clear as a matter of law that the respondent could not have had a caveatable interest. Is the law so clearly against the existence of a caveatable interest here or is it sufficiently arguable to provide reasonable grounds for the respondent believing she had a caveatable interest and thus reasonable cause for lodging the caveat?
- [29] Section 122(1) of the *Land Title Act* stipulates who may lodge a caveat. Insofar as is presently relevant it provides:
"122 Lodging a caveat
 (1) A caveat may be lodged by any of the following—
 (a) a person claiming an interest in a lot..."
- [30] What is meant by an "interest" in s 122(1)(a)? Schedule 1 of the *Acts Interpretation Act* provides:

¹⁵ Affidavit of Steven Stojanovic C.

¹⁶ Affidavit of Dorothy Brooks DIB-03.

¹⁷ Ibid DIB-18.

“**interest**, in relation to land or other property, means –

- (a) a legal or equitable estate in the land or other property; or
- (b) a right, power or privilege over, or in relation to, the land or other property.”

[31] The second limb of that definition, with its reference to an interest that is “over, or in relation to” the land does not fit cleanly with s 122(1)(a)’s reference to an interest that is “in” the lot. However, the description an “interest in a lot”, appearing in s 122(1)(a), is consistent with the description an “interest, in relation to land” appearing in the introductory words of the definition of interest and it is thus reasonably arguable that it attracts the application of both limbs thereafter appearing in the definition of “interest”. It is therefore reasonably arguable that a person with a right, power or privilege over or in relation to land has an “interest in a lot” within the meaning of s 122(1)(a).

[32] I am fortified in reaching that conclusion by the conclusion of Hammerschlag J in *Mijo Developments Pty Ltd v Royal Agnes Waters Pty Ltd*.¹⁸ That case involved an urgent motion to remove caveats in Queensland (the parties were present in New South Wales and the NSW Supreme Court’s in personam jurisdiction was not in issue). His Honour approached the application as analogous to an application for an interim injunction. In construing the meaning of interest in s 122(1)(a), informed by the definition of interest in the *Acts Interpretation Act*, he gave full effect to the breadth of the words “in relation to” in the second limb of the definition, a limb he described as expanding interest “well beyond legal or equitable interest”.¹⁹ He reasoned the force of the argument that a mere equity was capable of being an interest in land under those provisions was sufficiently strong to overcome the threshold of a serious issue to be tried.

[33] The force of the above reasoning in favour of a broad interpretation of the interest referred to in s 122(1)(a) in turn enhances the force of an argument that a beneficial interest under a trust can be capable of giving rise to a right in relation to land and thus an interest in a lot. Obviously much will turn upon the nature of the beneficial interest in a particular case.

[34] In this particular case the applicant emphasised the beneficial interest is yet to ripen. The applicant submitted that a caveat must be supported by an equitable interest in the land present at the time the caveator lodges the caveat and it is insufficient that the caveator has some potentially enforceable right against the registered proprietor which has not yet ripened into an interest. In support of this submission the applicant placed particular reliance upon *Re Pile’s Caveats*.²⁰ In that case Dunn J observed:

“It is established that, in order to maintain a caveat, a caveator must prove facts that indicate prima facie that he has an estate or interest in the land in respect of which his caveat is lodged... However, the existence of a prima facie equity to relief involving land is not

¹⁸ (2007) 1 LT(A)R 187 [2007] NSWSC 199.

¹⁹ Ibid, 193-194.

²⁰ [1981] Qd R 81.

necessarily the same as the prima facie existence of an interest in the land.”²¹

- [35] His Honour’s reasoning was there referable to s 98 of the *Real Property Act* 1861, which relevantly provided:

“98 Caveat may be lodged

Any person claiming an estate or interest in any land may by a caveat ... forbid the registration of any instrument affecting such land estate or interest.”

- [36] The now applicable legislative provision, s 122(1)(a) of the *Land Title Act*, does not require that the caveator is claiming “an estate or interest in land” but rather requires the caveator is claiming “an interest in a lot”. The second limb of the definition of “interest” in the *Acts Interpretation Act* – a definition which did not exist at the time of *Re Pile’s Caveats* – imports a broader range of potential caveatable interests than existed at the time that case was decided.

- [37] That is not the only shift in the law which diminishes the ongoing relevance of *Re Pile’s Caveats*. More recent cases suggest there has been a shift away from the narrow view that an interest which is only an equity to relief involving land is not a caveatable interest. The broader competing view was commended in obiter dicta by Mason and Deane JJ in *Legione v Hateley*;²² obiter dicta regarded by Dowsett J in *Re CM Group Pty Ltd’s Caveat*²³ as inconsistent with the approach taken by Dunn J in *Re Pile’s Caveats* and also *Re Bosca Land Pty Ltd’s Caveat*²⁴ by which his Honour concluded he was still bound. However since then, as discussed by Malcolm CJ in *Kuper v Keywest Constructions Pty Ltd*,²⁵ the view commended by Mason and Deane JJ in *Legione v Hateley* has gained ascendancy in other decisions of the High Court such as *Stern v McArthur*²⁶ and *Bahr v Nicolay (No 2)*.²⁷ In *Re Henderson’s Caveat*²⁸ Macrossan CJ and Demack J observed of this shift:²⁹

“There is now weighty opinion in the High Court suggesting that an equitable interest in land can exist when a claimant is entitled to something less than a full decree of specific performance ordering conveyance, that is it can exist provided that a claimant is entitled to equitable relief by way of injunction or other remedy to maintain and protect his interest. ... With an expanded view of what constitutes an equitable interest in land, a corresponding wider view of a caveatable interest under s 98 of the *Real Property Act* can apply.”

- [38] The significance of this shift in view is well summarised by the authors of *Real Property Law in Queensland*:³⁰

²¹ Ibid, 83.

²² (1983) 153 CLR 406, 446.

²³ [1986] Qd R 381.

²⁴ [1976] Qd R 119.

²⁵ (1990) 3 WAR 419, 431.

²⁶ (1988) 165 CLR 489.

²⁷ (1998) 164 CLR 604.

²⁸ [1998] 1 Qd R 632.

²⁹ Ibid 637-638.

³⁰ MacDonald, McCrimmon, Wallace and Weir, 3rd edition, 392.

“In light of the wider view taken of an interest sufficient to support a caveat in *Re Henderson’s Caveat* it is suggested that the better view is that an interest in the nature of a mere equity is sufficient to support a caveat, at least where the facts are such that equity would be prepared to protect the interest by remedies that affect the land in question, such as an injunction restraining a dealing with the land in a manner inconsistent with the rights claimed by the holder of the mere equity.”

- [39] Here the respondent arguably has a right “in relation to” the property within the meaning of the second limb of the definition of “interest”. It is more than a right to pursue the trustees for some breach of trust in connection with their dealing with the property. It is reasonably arguable the respondent has a right under s 98 of the *Trusts Act*, as a person beneficially interested in the property, to apply for an order concerning the property as trust property.
- [40] Under the terms of the will the trustees are specifically obliged to hold “the property” on trust for Dorothy Brooks during her lifetime and upon her death are specifically obliged to hold the property upon trust as to a one-half share to give to the respondent when she turns 30. The respondent’s interest may be yet to ripen but it is no mere interest in a discretionary trust. It is reasonably arguable, notwithstanding that it is an interest in “the property” which will ripen in the future, that it is an interest of sufficient certainty to ground a present right to protect that interest. It is at least reasonably arguable the respondent would have standing to make application for an injunction restraining the sale of the property pending an order under s 98 of the *Trusts Act*. Her reasonably arguable right to protect her interest in that way provides reasonable grounds for a belief that she has a caveatable interest and reasonable cause for lodging the caveat.
- [41] It is not suggested by the applicant that the respondent did not honestly believe in lodging the caveat that she had a caveatable interest. I infer she held such a belief, particularly given she sought legal advice. I infer she acted upon that advice in lodging the caveat.
- [42] The evidence of her solicitor is to the effect that he understood from his own knowledge of and experience in the law and his discussions with two counsel about this case that his client had a caveatable interest. It was submitted the fact the respondent lodged the caveat pursuant to legal advice of itself provided evidence of her having reasonable cause within the meaning of s 130.
- [43] In *Brogue Tableau Pty Ltd v Binningup Nominees Pty Ltd*³¹ the Western Australian Court of Appeal regarded the fact a caveator lodged a caveat in consequence of obtaining legal advice as potentially providing reasonable grounds for a belief the caveator had a caveatable interest. It is unlikely that the giving of legal advice that a caveat should be lodged will always provide evidence of reasonable cause for lodging a caveat but it is here unnecessary to resolve the parameters of the circumstances under which it will do so. I have already found there exists a reasonable argument that the respondent has a caveatable interest and thus reasonable grounds for the respondent’s belief a caveatable interest exists. More

³¹ [2007] WASCA 179.

particularly, the force of that argument is sufficient in the circumstances of this case to prove the caveat was lodged with reasonable cause.

Caveat continued without reasonable cause

- [44] It remains to consider whether, as the applicant submitted, the caveat was continued without reasonable cause. The above reasons for concluding the caveat was lodged with reasonable cause derive from the nature of the respondent's interest. That interest is ongoing. For the above reasons there is therefore satisfactory evidence of reasonable cause for continuing the caveat unless there was some development in the dispute between the parties which detracts from the force of the argument that reasonable cause persisted. There were developments, but none of that nature.
- [45] The Registrar of Titles considered the respondent did not have a caveatable interest and on 5 March 2014 issued a Requisition Notice advising:
 "Examination of the ... document has revealed that it does not meet Land Registry requirements for registration. In order for the document to be registered it will be necessary for you to attend to all of the issues shown below..."

Issues requiring Attention

A beneficiary of a deceased's estate has no interest in the land to sustain the lodgement of a caveat. Such a beneficiary only has right to have an estate duly administered and applied for the benefit of the beneficiaries when the administration is complete.

As this dealing is incapable of registration, a letter from the lodger requesting full withdrawal is required..."³²

- [46] The Registrar categorised the respondent's interest as that of a beneficiary of a deceased's estate. That view was presumably taken because the grounds of claim in the caveat referred to the interest as arising under a trust created by the will. The caveat described the interest being claimed and the grounds of the claim, namely:
- 3. Interest being claimed**
 One-half interest in the land pursuant to an express trust.
- 4. Grounds of claim**
 Legal and/or equitable interest in the land under an express trust created by the will dated 19 March 2003 of Victor Patrick Brooks deceased."³³

- [47] Contrary to the implication of the requisition those grounds did not assert the respondent's interest was as a beneficiary of a deceased's estate. Rather, they indicated it was an interest arising under a trust.
- [48] The fact the trust giving rise to the caveator's alleged interest was a trust created by a valid will, as opposed to some other instrument, was not of itself a disqualifying feature. Nor was the mere fact that the respondent's alleged interest in the land was as a beneficiary under a trust.

³² Affidavit of Steven Stojanovic H.

³³ Affidavit of Dorothy Brooks DIB-03.

- [49] By a letter dated 6 March 2014 the Brisbane Titles Registration Office wrote to Dorothy Brooks enclosing the caveat and giving notice that it had been lodged in the Land Registry.³⁴ At 4:44 p.m. on 10 March 2014 an emailed letter by the applicant's solicitors to the respondent's solicitor advised the notice had been received. They indicated if the caveat was not withdrawn by 4:00 p.m. on 14 March 2014 the applicant would apply for removal of the caveat and an order to recover any marketing costs thrown away as a result of the auction being postponed due to the lodgement of the caveat.³⁵
- [50] At 4:45 p.m. on 14 March 2014, the above deadline having passed, the applicant's solicitor wrote to the real estate agent marketing the sale of the property requesting the auction scheduled for 22 March 2014 be postponed pending removal of the caveat.³⁶ It is the continuation of the caveat up to this point in time which attracts the request for compensation in the amount of the costs thrown away. Those costs consisted of an upfront vendor contribution and auction advertising costs already incurred, totalling \$3,232.20.
- [51] Four days earlier on 10 March 2014 the Queensland agents of the respondent's solicitor had written to the respondent's solicitor enclosing the Requisition Notice, issued on 5 March 2014.³⁷ The applicant emphasised in submissions that the respondent did not inform the applicant's solicitor of the Requisition Notice. It is difficult to see what difference it would have made if the applicant was informed of its existence prior to cancelling the auction on 14 March 2014 and incurring the loss now claimed. The applicant would have realised the requisition did not have the effect of removing the caveat. The applicant's own materials show the auction was cancelled because the applicant understood, correctly, that the caveat had not been withdrawn.³⁸
- [52] The caveat was eventually withdrawn. Had it been withdrawn prior to 14 March 2014 the applicant would have proceeded with the auction and not incurred the loss for which it now seeks compensation. However, the mere fact the caveat was eventually withdrawn does not mean it was earlier continued without reasonable cause. Do the circumstances after 14 March 2014, culminating in the caveat's withdrawal, suggest there was any ulterior motive or improper purpose behind it having been continued up until the auction was cancelled?
- [53] On 18 March 2014 the respondent's solicitor, apparently unaware the auction scheduled for 22 March 2014 had been cancelled, wrote to the applicant's solicitor indicating he held counsel's advice that the respondent had a caveatable interest in the property. He reiterated the allegation that Dorothy Brooks had intentionally spent income from the property "on matters other than the outgoings" and disputed the trustees had power to acquire an alternative residence with the proceeds of sale. He advised the respondent had instructed him not to obstruct the forthcoming auction providing that the entire proceeds of the property were invested with the

³⁴ Ibid [28], DIB-19.

³⁵ Affidavit of Emma Louis EYL-01.

³⁶ Ibid EYL-02.

³⁷ Affidavit of Steven Stojanovic G.

³⁸ See, eg, affidavit of Emma Louis EYL-02.

Public Trustee on trust for the remaining beneficiaries.³⁹ Failing the trustees' agreement to do so the letter foreshadowed the respondent would apply for an injunction restraining the trustees from applying the proceeds of sale for the purchase of a new residence for Dorothy Brooks. While the offer not to obstruct the auction was the subject of a condition unrealistically calling for the trustees to in effect abandon their responsibilities to the Public Trustee, the letter's content does not imply the respondent's earlier continuation of the caveat involved any ulterior motive or improper purpose. In fact, while the letter asserted the respondent had a caveatable interest the letter did not refer to the continuing caveat. This may have been because the respondent's solicitor had misunderstood the requisition and perceived the caveat which had been lodged was of no effect because it had not been registered.

- [54] On 25 March 2014, by which time the date previously scheduled for the auction had passed, the respondent's solicitor's Queensland agents wrote to the respondent's solicitor referring to their email of 10 March 2014 and indicating they urgently awaited a letter and associated fee payment from the respondent's solicitor to the Department of Natural Resources and Mines requesting withdrawal of the caveat.⁴⁰ On 28 March 2014 the respondent's solicitor responded to his Queensland agents advising they had misunderstood the letter from the Department of Natural Resources and Mines issued on 5 March 2014 saying:

“Because DNRM took the view that the caveat does not meet Land Registry requirements for registration, I assumed that the caveat was never registered.”

A letter for forwarding to the Department of Natural Resources and Mines was enclosed. It noted the advice in the Requisition Notice requested full withdrawal of the caveat and enclosed the relevant cheque in payment of the requisition fee.⁴¹

- [55] As mentioned earlier, it is the lodging of a caveat, not the registration of it, which attracts the operation of s 130. That is unremarkable. As the facts show, even though the caveat was unregistered the title nonetheless referred to the fact the caveat had been lodged. That would obviously impair the prospect of a successful auction of the property.
- [56] The apparent misunderstanding of the respondent's solicitor suggests an argument not expressly raised or addressed by the parties to this application, that there was no reasonable cause for continuing the caveat because it was continued in error. Such an argument carries the implication that the respondent agreed with the reasoning of the Registrar and would immediately have withdrawn the caveat had she understood that was what the Registrar wanted. The fact that the respondent, in late March, eventually initiated steps to withdraw the caveat does not mean the respondent agreed with the Registrar's reasoning. It is readily apparent from the letter of the respondent's solicitor to the applicant's solicitor of 18 March 2014 that the respondent continued to assert she had a caveatable interest. This further supports the already obvious conclusion that up to the cancellation of the auction – the event attracting the application for compensation – the respondent continued to believe on the reasonable grounds identified earlier that she had a caveatable interest. Against

³⁹ Affidavit of Emma Louis EJJ-04.

⁴⁰ Affidavit of Steven Stojanovic I.

⁴¹ Ibid K.

that background, even allowing for the confusion of the respondent's solicitor as to the technical significance of non-registration, there existed reasonable cause for the caveat to continue.

- [57] It follows the respondent has discharged her onus under s 130 of proving the caveat was lodged and continued with reasonable cause and the application for compensation must therefore fail.

Costs

- [58] This application, filed on 25 March 2014, sought an order removing the caveat as well as an order for compensation. On 28 March 2014, the date the application was served on the respondent,⁴² the respondent's solicitor wrote to his Queensland agents to initiate the withdrawal of the caveat.
- [59] On 2 April 2014 the respondent's solicitor wrote to the applicant's solicitor referring to the institution of the present application and complained that costs were being incurred unnecessarily because the applicant's solicitors had been advised the respondent had instructed her solicitor not to obstruct the sale of the property and, knowing the respondent's solicitor was acting, did not give the respondent's solicitor an opportunity to withdraw the caveat before instituting proceedings.⁴³ There is no substance to these complaints. The applicant had clearly flagged its intention to make an application for removal of the caveat on 10 March 2014 and as already explained the instructions not to obstruct the sale involved an unrealistic condition. The letter also informed the applicant arrangements were "currently in place" to have the caveat removed but it provided no detail about those arrangements.
- [60] The next day, 3 April 2014, a current title search on behalf of the applicant disclosed the continued presence of the caveat under the heading of "Unregistered Dealings" in the same terms as appeared in the search of 18 March 2014.⁴⁴ It is likely some days were lost between the request made of the respondent's solicitor's agent and the Registrar's eventual implementation of the request for withdrawal. At some point between 3 and 8 April 2014 the caveat was withdrawn.⁴⁵
- [61] Having decided it was withdrawing the caveat on the same day this application was served, the respondent could have taken steps to communicate to the applicant sufficient detail of what was under way in respect of the withdrawal to reassure the applicant the application for withdrawal would not need to be pursued. The respondent's failure to do so likely had the consequence the applicant incurred some costs in unnecessarily preparing for that component of the application seeking an order for removal of the caveat. That said, it is obvious from the filed materials that the preponderance of preparation was in any event required for the application for compensation.

⁴² Affidavit of Dominic Melton.

⁴³ Affidavit of Steven Stojanovic L.

⁴⁴ Affidavit of Emma Louis EJM-06.

⁴⁵ Ibid EJM-07.

[62] The respondent has successfully resisted that aspect of the application which remained live. Costs should follow the event. Having regard to respondent's contribution to the uncertainty surrounding the need for the application for withdrawal to be prepared it is appropriate to discount the costs order I will otherwise make in the respondent's favour by a proportion that is just, namely 20 per cent.

Orders

[63] My orders are:

1. Application dismissed.
2. The applicant pay 80 per cent of the respondent's costs to be assessed on the standard basis.