SUPREME COURT OF QUEENSLAND

CITATION:	*Miller & Anor v Loel & Anor* [2016] QSC 289
PARTIES:	**PETER JOHN FRANCIS MILLER** (first plaintiff) and **SUSAN MARY MILLER** (second plaintiff) **v** **JAMES BERESFORD LOEL** (first defendant) and **PAUL BERNARD MAHAN** (second defendant)
FILE NO:	BS No 989 of 2016
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 December 2016
DELIVERED AT:	Brisbane
HEARING DATES:	27, 28 & 31 October 2016
JUDGE:	Flanagan J
ORDER:	**The first and second plaintiffs' claim is dismissed** **I will hear the parties as to costs**
CATCHWORDS:	REAL PROPERTY – CAVEATS AGAINST DEALINGS – COMPENSATION FOR LODGING CAVEAT WITHOUT REASONABLE CAUSE – where the first and second plaintiffs were the directors and primary shareholders of Old Coach Developments Pty Ltd – where the first defendant was the solicitor for Devren Pty Ltd – where the second defendant was a director of Devren Pty Ltd – where Old Coach Developments Pty Ltd held the corporate assets of a joint venture between Devren Pty Ltd and other entities wholly owned by the plaintiffs – where the joint venture was established to develop and sell subdivisional land – where a shareholders agreement between the joint venture parties provided that if two specific lots of land, lots 22 and 23, were not sold to third parties, lot 22 would be transferred to the first plaintiff and lot 23 would be transferred to Devren Pty Ltd – where the shareholders agreement was entered into in August 2008 – where the majority of lots were sold in 2009 and 2010 – where lot 22 was

not sold until May 2013 – where the relationship between the joint venture parties deteriorated – where the first defendant lodged a caveat over lot 23 on behalf of Devren Pty Ltd in June 2012 – whether the first defendant lodged the caveat with reasonable cause – whether the first defendant or the second defendant continued the caveat with reasonable cause – whether the plaintiffs suffered loss or damage as a result of the caveat being lodged or continued

Land Title Act 1994 (Qld) s 130

Farvet Pty Ltd v Frost [1997] 2 Qd R 39, considered
Gordon v Treadwell Stacey Smith [1996] 3 NZLR 281, considered
Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Limited (No. 2) [2016] QSC 252, considered
RDN Developments Pty Ltd v Shrambrandt [2011] VSC 130, cited
Re Brooks' Caveat [2015] 1 Qd R 105; [2014] QSC 76, applied
Sellars v Adelaide Petroleum NL & Ors (1994) 179 CLR 332; [1994] HCA 4, cited
Windlock Pty Ltd v Davidovic [2014] NSWSC 269, considered

APPEARANCES: The first plaintiff appeared on their own behalf and on behalf of the second plaintiff
J M Lavercombe, solicitor of Lillas & Loel Lawyers Pty Ltd for the first and second defendants

Introduction

[1] On 27 June 2012 caveat No. 714534244 was lodged on behalf of Devren Pty Ltd over lot 23 on Sealed Plan 218844, Certificate of Title No. 50778917. The caveat was executed by the first defendant, Mr Loel, in his capacity as the sole director of Lillas & Loel Lawyers Pty Ltd. Mr Loel, through Lillas & Loel, had been engaged as the solicitor for Devren.

[2] As at the date of the lodging of the caveat the registered proprietor of lot 23 was Old Coach Developments Pty Ltd. The plaintiffs, Mr and Mrs Miller, were directors and principal shareholders of Old Coach Developments.

[3] Peter Hobson was the sole director of Devren as at the date of the lodging of the caveat. The second defendant, Mr Mahan, was on 27 February 2013 appointed the sole director and secretary of Devren following the bankruptcy of Mr Hobson. Mr Mahan's appointment was arranged by Mr Loel.[1]

[1] Further Re-amended Statement of Claim, [8]; Amended Defence of the First and Second Defendants to the Further Amended Statement of Claim, [8(b)].

[4] The caveat over lot 23 was not removed until 12 July 2015.[2]

[5] The plaintiffs seek compensation pursuant to s 130 of the *Land Title Act* 1994 (Qld) ("the Act"). Section 130 of the Act relevantly provides:

> "**130 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.
>
> (2) In a proceeding for compensation under subsection (1), a court of competent jurisdiction may include in a judgment for compensation a component for exemplary damages.
>
> (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."

By operation of s 130(1) and s 130(3) the onus is on the first and second defendants to prove that the caveat was lodged or continued with reasonable cause. The onus is on the plaintiffs to establish that they suffered loss or damage as a result of the lodgement or continuation of the caveat without reasonable cause.

[6] The issues in the case are:

1. Did Mr Loel lodge or continue the caveat with reasonable cause?

2. Did Mr Mahan continue the caveat with reasonable cause?

3. If the caveat was lodged or continued by either Mr Loel or Mr Mahan without reasonable cause have the plaintiffs established that they suffered loss or damage as a result?

[7] The resolution of the first two issues requires an analysis of the relevant chronology of events.

Chronology of events

[8] On 2 August 2008 Devren entered into four written agreements to purchase a 50 per cent interest in a joint venture to develop and sell subdivisional land located at Mango Hill from the Peter Miller Family Trust and a company called Tenth Zecore Pty Ltd ("Zecore"). The plaintiffs were directors and principal shareholders of Zecore and were the sole trustees of the Peter Miller Family Trust.[3] To enter the joint venture, Devren was required to pay the sum of $981,415 to the plaintiffs as trustees of the Peter Miller Family Trust. Subsequent to the agreements, Devren owned 50 per cent of the joint venture and

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[2] Affidavit of evidence-in-chief of Peter John Francis Miller, filed 22 September 2016, CF 66 (the Miller Affidavit), Exhibit 5 at [184].

[3] Miller Affidavit, Exhibit 5, [3]-[5]; Further Re-amended Statement of Claim, [2].

the Peter Miller Family Trust and Zecore each owned 25 per cent of the joint venture. Old Coach Developments was the corporate vehicle nominated to hold the assets of the joint venture on behalf of the venturers.[4]

[9] The Joint Venture Agreement provided that the agreement was to continue until:

(a) termination by unanimous agreement of the venturers; or

(b) a venturer became entitled to a participating interest of 100%; or

(c) an event of default by the parties.

[10] At the time of entering into these agreements the directors of Devren were Mr Hobson and Matthew Clair. The joint venture manager was Mr Miller.

[11] In the course of the joint venture the relationship between Mr Miller, Mr Hobson and Mr Clair markedly deteriorated. This resulted in Mr Hobson seeking legal advice. Prior to engaging Mr Loel, Mr Hobson had sought advice from another firm of solicitors and a barrister. Mr Hobson engaged Mr Loel on or about 8 May 2012, which was approximately 50 days prior to the lodging of the caveat.[5]

[12] Mr Loel gave evidence at trial. His evidence primarily constituted his recollection of events as revealed in contemporaneous documents.

[13] Mr Loel has been a solicitor since 4 March 1980 and has provided legal advice in relation to the lodgement of hundreds of caveats.[6] As communicated to Mr Loel, the advice that Mr Hobson had initially received was to apply for a freezing order and to seek to caveat all properties held by the plaintiffs. Mr Loel described Mr Hobson as feeling aggrieved because he had invested almost a million dollars into the joint venture and had been, on his case, improperly excluded from the management and affairs of the joint venture by Mr Miller.[7]

[14] Having considered the material supplied by Mr Hobson, Mr Loel ultimately formed the view that there was little point in proceeding with the freezing application and there was no basis to caveat any property other than lot 23.[8] Before taking any steps Mr Loel undertook an ASIC search to ensure that Mr Hobson was the sole director of Devren.[9] According to Mr Loel, Mr Hobson was insistent that proceedings be issued immediately and that lot 23 be caveated as soon as possible.[10] As matters transpired, it took Mr Loel approximately six weeks before lodging the caveat over lot 23 and commencing

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4 Further Re-Amended Statement of Claim, [12(c)], [14]; Miller Affidavit, Exhibit 5, [5].
5 Defendants' Trial Bundle, Vol 1, tab 1, Exhibit 14.
6 T2-3, lines 9-10 and T2-3, lines 15-20.
7 T2-3, lines 31-45.
8 T2-4, lines 1-15.
9 T2-4, lines 20-26.
10 T2-4, lines 33-38.

proceedings in the Supreme Court. Both these steps were taken on or about the same day.[11]

[15] On 11 May 2012 Mr Loel informed Mr Hobson by email that the only two lots which remained with Old Coach Developments were lots 22 and 23. He stated:

> "When I have read the file I will tell you whether I believe that you can maintain a Caveat."[12]

[16] By letter dated 14 May 2012 Mr Loel referred to the fact that he was awaiting receipt of further information from Mr Hobson. The letter continues: [13]

> "Whilst I am waiting on the above material I advise that I have lodged a caveat over lot 23 pursuant to clause 6.14 of the Shareholders Agreement but do not believe that Devren Pty Ltd has a caveatable interest over Lot 22 because there are fundamental difficulties in holding that a right to share in the proceeds of sale or profits of land constitutes a caveatable interest in that land. First by definition the right relates to money and not to land; it does not come into operation until the land has been sold and the proceeds of sale thereby come into existence."

The reference to a caveat being lodged over lot 23 as at 14 May 2012 was a mistaken reference as no caveat was lodged until 27 June 2012. Clause 6.14 of the Shareholders Agreement referred to in the letter of 14 May 2012 provided: [14]

> "**What Happens if Proposed Lots 22 and 23 on the Plan are not sold** – If the project cannot be completed because Lots 22 and 23 on the Plan have not been sold to third parties then Lot 22 shall be transferred by the Company free of charge to Peter [Miller] and Lot 23 shall be transferred by the Company free of charge to Devren. Peter [Miller] and Devren shall each pay the respective cost and charges including Stamp Duty and registration fees in respect to those transfers. Once this occurs the project will be completed."

[17] On or about 29 May 2012 Mr Loel engaged counsel Mr McGlade.[15]

[18] On 31 May 2012 Mr Loel sent to Mr McGlade a draft affidavit of Mr Hobson in support of a freezing order which was still then contemplated.[16] The draft affidavit at paragraph 38, referred to a caveat in respect of lot 23. Mr Loel also, by email dated 1 June 2012 at 12.44 pm, sent Mr McGlade a copy of a caveat that Mr Loel intended to lodge that afternoon "unless you tell me I'm mad".[17] The caveatable interest identified by Mr Loel in this draft was:

> "Pursuant to clause 16.14 of a Shareholders Agreement between the caveator and registered owner."

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11 T2-4, line 37.
12 Defendants' Trial Bundle, Vol 1, tab 2, Exhibit 14.
13 Defendants' Trial Bundle, Vol 1, tab 9, Exhibit 14.
14 Plaintiffs' Trial Bundle, Vol 1, tab 3, page 16, Exhibit 1.
15 Defendants' Trial Bundle, Vol 1, tab 11, Exhibit 14; T2-4, lines 45-47.
16 Defendants' Trial Bundle, Vol 1, tab 12, Exhibit 14.
17 Defendants' Trial Bundle, Vol 1, tab 13, Exhibit 14.

[19] Mr McGlade on 1 June 2012 advised Mr Loel to hold back on lodging the caveat for that day: [18]

> "Also, to justify the caveat your client will need to be able to establish that it has some kind of equitable interest over the land which you want to caveat (such as by being able to trace the land). I have not seen the agreement or wholly appraised myself of the facts yet, but if your client has no proprietary rights in the land which it is seeking to caveat (or proprietary rights capable of being granted by judgment) then lodging a caveat will create issues for your client."

[20] On 1 June 2012 Mr Loel sent two emails to Mr McGlade in relation to the proposed caveat. The first was sent at 11.35 am: [19]

> "Have you identified the basis for the Caveat = clause 16.14 of SHA? It's only over 1 of the unencumbered lots left in OCD. If we are not going to proceed with the Mareva I will lodge it in all of our interest."

[21] Mr McGlade responded to this first email on 1 June 2012 at 8.37 pm stating that he had looked at clause 16.14 of the Shareholders Agreement. Mr McGlade continued:

> "It might form a sufficient basis to found a caveat – but let me have a think over it tonight and Monday before we lodge the caveat. I just don't want to lodge an caveat with a non-perfect basis and then have a big caveat removal fight on our hands. But I can see where you are coming from and it does sound like a good idea."[20]

[22] Mr Loel replied by email on 1 June 2012 at 21:24 to Mr McGlade in terms that Mr Loel had "no doubt about the caveatable interest over the nominated lot."[21]

[23] Having considered clause 16.14 Mr McGlade emailed Mr Loel on 4 June 2012 at 8.22 am: [22]

> "I note that cl 16.14 is only triggered by "the Project [not being able to] be completed because Lots 22 and 23 of the Plan have not been sold to third parties.
>
> Presumably this clause is subject to a "reasonable time" or "reasonable attempts" clause – meaning, for example, that it only arises in the event that reasonable attempts have been made to sell the property and it is apparent that the property will not be sold. Are these your instructions or are these matters we are unaware of?"

[24] Mr McGlade was not only engaged by Mr Loel to advise on the caveatable interest but also to settle Mr Hobson's affidavit and a statement of claim.

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[18] Defendants' Trial Bundle, Vol 1, tab 13, Exhibit 14.
[19] Defendants' Trial Bundle, Vol 1, tab 14, Exhibit 14.
[20] Defendants' Trial Bundle, Vol 1, tab 14, Exhibit 14.
[21] Defendants' Trial Bundle, Vol 1, tab 14, Exhibit 14.
[22] Defendants' Trial Bundle, Vol 1, tab 14, Exhibit 14.

[25] On 14 June 2012 at 4.06 pm Mr McGlade sent to Mr Loel a draft statement of claim.[23]

[26] Paragraph 19(g) of the draft statement of claim pleaded clause 16.14 of the Shareholders Agreement. Paragraph 19(h) pleaded that the Project was deemed to be completed for all purposes for the Shareholders Agreement if during the Selling Phase of the Project a reasonable amount of time passed and all the subdivided Project Land lots were unable to be sold, or alternatively if it became apparent that all the unsold subdivided Project Land lots were unlikely to be able to be sold within a reasonable time. Paragraph 19(h) was pleaded as an implied term of the Shareholders Agreement.[24] Paragraph 31 of the draft statement of claim pleaded that the final phase of the joint venture commenced and all subdivided project land lots had been sold except for lots 22 and 23. Paragraph 32 pleaded that the joint venture had been completed. The prayer for relief included an order that Old Coach Developments specifically perform clause 16.14 of the Shareholders Agreement and a declaration that Old Coach Developments held lot 23 on constructive trust for Devren. The majority of the 33 lots of the subdivision development sold in 2009 and 2010.[25]

[27] On 22 June 2012 by email sent at 8.14 am Mr Loel advised Mr Hobson to proceed as follows:[26]

> "1. lodge the caveat over lot 23
>
> 2. file and serve the Claim and Statement of Claim
>
> 3. seek an undertaking regarding the non disposal of Lot 22 or any proceeds of its sale."

[28] The claim and statement of claim were filed on or about the same day as the caveat was lodged, namely 27 June 2012. In an affidavit sworn by Mr Loel on 1 June 2016[27] Mr Loel described the circumstances of the lodging of the caveat over lot 23 as follows:

> "The caveat was lodged on 27 June 2012, after the commencement of the proceedings and given dealing number 714534244…
>
> The Caveat was:
>
> (a) lodged by Lillas & Loel on instructions from Devren;
>
> (b) signed by me, in my capacity as the sole director of Lillas & Loel Lawyers Pty Ltd; and
>
> (c) not lodged by me personally. I am unsure who in the employ of Lillas & Loel lodged the caveat, but it was not me."

[29] The caveat shows that the relevant clause of the Shareholders Agreement was initially misidentified as being clause 16.4 rather than clause 16.14.[28] The details of alteration or

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[23] Defendants' Trial Bundle, Vol 1, tabs 17 and 18, Exhibit 14.
[24] Defendants' Trial Bundle, Vol 1, tab 18, Draft Statement of Claim [23], Exhibit 14.
[25] T3-38, lines 21-22.
[26] Defendants' Trial Bundle, Vol 1, tab 19, Exhibit 14.
[27] Plaintiffs' Trial Bundle, Vol 3, tab 108, paras 11-12, Exhibit 1.
[28] Plaintiffs' Trial Bundle, Vol 2, tab 67, Exhibit 1.

minor correction to the caveat also shows the removal of the words "pursuant to clause 16.14 of a Shareholder Agreement dated 2 August 2008 between the caveator and registered owner as deposited with dealing 714618043" and addition of the words "see enlarged panel". From the enlarged panel the grounds of claim in respect of the caveat are:

> "Pursuant to clause 16.14 of a Shareholder Agreement dated 2 August 2008 between the caveator and registered owner as deposited with dealing 714618043 a constructive trust was created between the registered owner as trustee and caveator as beneficiary."

[30] The claim and statement of claim (action SC No 5638/2012) named Devren as plaintiff and Old Coach Developments, Mr and Mrs Miller (both in their personal capacity and as trustees of the Peter Miller Family Trust) and Zecore as defendants. The claim and statement of claim were served on 29 June 2012. The trial was heard over eight days in late 2014 and on 19 March 2015 Boddice J delivered judgment dismissing Devren's claim. Relevantly in relation to the caveatable interest, Boddice J stated:

> "Whilst the Joint Venture Agreement envisaged Lot 23 would be transferred to the plaintiff if it were not sold, there is no basis to conclude a reasonable time has passed with regard to the sale of that lot. Lot 23 was subject to a contract of sale which could not proceed as a consequence of the plaintiff's own actions in placing a caveat on that lot."[29]

According to Mr Loel the first time he thought that Devren did not have a caveatable interest was after Boddice J delivered judgment on 19 March 2015.[30] Prior to the delivery of this judgment Mr Loel believed that Devren was entitled to a transfer of lot 23 and, as the equitable transferee, it had a caveatable interest.[31] Mr Loel held the belief that Devren had a good claim and prospects of success. Apart from seeking advice from counsel in relation to the caveatable interest Mr Loel had also discussed the caveatable interest with others in his office including a consultant, John Rivett.[32] Neither Mr McGlade nor counsel briefed for the trial, Mr Ferrett, ever expressed the view to Mr Loel that the claim had no prospects of success.[33] Mr Loel had discussed the prospects of success with both Mr McGlade and Mr Ferrett and with the solicitor who had conduct of the matter in his office, Mitchell Byrne.[34] Mr Loel handed over conduct of Devren's claim to Mitchell Byrne in or about March 2013.

[31] Mr Loel had to reconsider the prospects of success and the grounds for the caveatable interest when he was informed of an alleged agreement dated 4 May 2012 on or about 4 July 2012. The agreement was executed by Mr Clair on behalf of Devren. The parties to this agreement, which also included Old Coast Developments and the Millers, had agreed to dissolve the joint venture upon payment to Devren of $15,000 in satisfaction of any entitlement Devren held in respect of lots 22 and 23.[35] Mr Clair had actually been

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[29] *Devren Pty Ltd v Old Coach Developments Pty Ltd & Ors* [2015] QSC 53, [136].
[30] T2-7, lines 31-34.
[31] T2-7, lines 25-29.
[32] T2-7, lines 37-43.
[33] T2-8, line 39 to T2-9, line 1.
[34] T2-10, lines 5-9.
[35] Defendants' Trial Bundle, Vol 1, tab 22, page 2, Exhibit 14; Miller Affidavit, [66]-[67].

removed as a director of Devren by Mr Hobson on 5 April 2012. Mr Hobson had been reappointed a director of Devren on 15 November 2011 having been previously removed on 21 March 2011. This fact was not known to Mr Miller. The caveatable interest had to be reassessed because if Mr Clair was found to have had ostensible authority to bind Devren even though he was not a director, Devren would not have a caveatable interest in respect of lot 23.

[32] Mr Loel immediately identified the impact that the alleged 4 May 2012 agreement would have on the caveatable interest and Devren's prospects of success. In an email sent 4 July 2012 at 17:19 to Mr Hobson and copied to Mr McGlade, Mr Loel stated:[36]

> "Your mate Claire was a busy boy whilst you were removed.
>
> Could be fatal to us?
>
> I am researching and will speak to Counsel."

[33] On 5 July 2012 Mr Loel received the following advice from Mr McGlade: [37]

> "As you no doubt appreciate, if Clair has effectively compromised Devren's rights that could be a real issue. You should probably get the other side to send you a copy of the compromise agreement/deed.
>
> If there was a compromise entered into, the only foreseeable way around it would be if Devren could, somehow, say it was not bound by the compromise agreement (or could set it aside). To work this out, we would have to know a lot more about Mr Hobson's removal and re-appointment as a director of Devren, what his arrangements with Clair were during the period he was not a director of Devren as to the operations of the company and what OCD/Mr Miller knew about this."

[34] On 9 July 2012 the solicitors for Old Coach Developments and the Millers wrote to Mr Loel requesting that Devren withdraw the caveat without further delay.[38]

[35] On 23 July 2012 Mr Loel replied to this correspondence stating that Devren would not be withdrawing the caveat for the following reasons:[39]

> "1. At the time, on 4 May 2012, that Mr Clair signed the Memorandum of Agreement he was not an officeholder of the Plaintiff and because of the history of the dealings between each of Mr Hobson, Mr Claire and the Defendants the relevant Defendants were by virtue thereof put on enquiry as to the existence of any irregularity, have not dealt with the Plaintiff in good faith, could not reasonably assume that the act of entering the Agreement had been properly and duly performed by the Plaintiff and were bound to enquire whether acts of internal management were regular in respect of that Agreement. This is so particularly as the Agreement gave away what the Plaintiff will assert

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36 Defendants' Trial Bundle, Vol 1, tab 23, Exhibit 14.
37 Defendants' Trial Bundle, Vol 1, tab 23, Exhibit 14.
38 Defendants' Trial Bundle, Vol 1, tab 28, Exhibit 14.
39 Defendants' Trial Bundle, Vol 1, tab 30, Exhibit 14.

> are very valuable rights for a minimum sum of money in circumstances where your client knew or ought to have known that Mr Clair was facing criminal prosecution as to which see the attached article dated 25 June 2012in the Cairns Post; and
>
> 2. Your clients cannot rely on section 129 Corporations Act 2001 because they obviously did not conduct an ASIC search in circumstances where it is submitted that they clearly ought to have, and
>
> 3. Clause 16.14 of the Shareholder Agreement clearly provides what is to occur with Lot 23 "if the Project cannot be completed because Lots 22 and 23 have not been sold to third parties" … As is the case."

[36] Mr Loel then gave consideration to whether Mr Clair and the solicitors involved in the 4 May 2012 agreement should be joined as parties to SC No 5638/2012. Ultimately this application was not proceeded with.[40]

[37] In spite of the 4 May 2012 agreement Mr Loel remained "quietly confident that the outcome would be successful".[41] Both Mr Ferrett and Mr Byrne expressed the opinion to Mr Loel, which he adopted, that Mr Clair having been convicted of a serious criminal offence (a fact that was known to Mr Miller) precluded Mr Clair from having any involvement in the affairs of Devren.[42] As at 20 January 2014 Mr Loel assessed Devren's prospects of success at 60/40, while Mr Byrne was more optimistic with the prospects ranging from 75 per cent on some issues to 90 per cent on others.[43] Mr Ferrett, who appeared as counsel for Devren at the trial before Boddice J, never advised Mr Loel that there was no caveatable interest.[44]

[38] Boddice J in his reasons for judgment delivered 19 March 2015, accepted that Mr Clair, because of convictions for fraud, was disqualified from managing corporations for a period of five years from 6 December 2007. As such, as at 4 May 2012 he was not qualified to be a director of Devren. Accordingly, Mr Hobson remained a director of Devren throughout the relevant period as Mr Clair never had the standing to remove him.[45] His Honour however, found that Mr Clair had ostensible authority to bind Devren at the relevant time.[46] His Honour further observed that even if he was wrong in that conclusion, a consideration of the terms of the Joint Venture Agreement did not support the plaintiff's submissions that it had an entitlement to have lot 23 transferred to it, unencumbered. This was because there was no basis to conclude a reasonable time had passed with regard to the sale of lot 23.[47] Boddice J identified the central issue for determination at trial as being whether a person listed as a director of Devren had authority to bind it.[48] His Honour's determination of this central issue was informed by his findings as to the credit of both Mr Hobson and Mr Miller. He found both to be unreliable and inaccurate historians, with much of their evidence being characterised by

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40 Defendants' Trial Bundle, Vol 1, tab 35, Exhibit 14.
41 T2-10, lines 9-11.
42 T2-10, lines 15-25.
43 Defendants' Trial Bundle, Vol 1, tab 42, Exhibit 14; T2-62, lines 25-45; T2-63, lines 20-22.
44 T2-6, lines 44-47.
45 [2015] QSC 53, [116].
46 [2015] QSC 53, [132].
47 [2015] QSC 53, [135]-[136].
48 [2015] QSC 53, [3].

underlying distrust for the other. They were prepared to tailor their answers to questions in order to place their conduct in a better light.[49] His Honour also identified particular aspects of concern in respect to Mr Hobson's evidence.[50] As a result his Honour was satisfied that additional caution was required to be exercised in relation to any evidence that Mr Hobson gave by way of purported explanation for the contents of contemporaneous emails and other documentary evidence. His Honour was satisfied that Mr Hobson was quite prepared to give deliberately inaccurate evidence in order to positively harm the defendants' defence of the plaintiff's claim.[51] Devren's claim was therefore dismissed by his Honour after an eight day trial on an issue of ostensible authority by reference to not only contemporaneous documents but also by a specific adverse finding as to the credit of Mr Hobson.

[39] At the time the caveat was lodged on 27 June 2012, 31 of the 33 lots of the subdivision development had been sold.[52] At the time the caveat was lodged there was no contract of sale in place in respect of either lot 22 or lot 23.[53] Lot 22 (over which there was no caveat lodged) did not sell until 1 May 2013.[54] This was 10 months after the caveat had been lodged in respect of lot 23.[55] The purchase price for lot 22 was $220,000. The first contract in respect of lot 23 was executed on 5 July 2013. The purchase price was also $220,000.

[40] On 20 March 2013 Mr Hobson was declared bankrupt. Prior to this date, on 27 February 2013 Mr Loel caused Mr Mahan, the second defendant to be appointed sole director and secretary of Devren. Mr Mahan gave evidence as to the circumstances of his appointment. He had previously been represented by Mr Loel in a matter some time before that had been resolved.[56] Mr Mahan was made bankrupt in the early 1990s. Mr Loel explained to Mr Mahan that a person who he was representing in a court case, a director of Devren, was being declared bankrupt (Mr Hobson). Mr Mahan replied that in those circumstances, having been a previous bankrupt himself, he was happy to assist. He instructed Mr Loel to continue to communicate with Mr Hobson in relation to the "nuts and bolts" of the action.[57] Mr Mahan had no idea until 2016 that a caveat had been lodged by Devren in respect of lot 23.[58] Mr Mahan did not communicate directly with Mr Hobson but rather instructed Mr Loel to communicate with "the previous director".[59] Mr Loel confirmed that Mr Mahan's instruction to him was to deal with Mr Hobson.[60] Mr Mahan never gave Mr Loel any instructions to continue the caveat. Mr Mahan's instructions were more general; namely to conduct the litigation in the best interest of Devren.[61] Mr Loel arranged for Mr Mahan to be appointed as the director of Devren as

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49 [2015] QSC 53, [99]-[100].
50 [2015] QSC 53, [102]-[102].
51 [2015] QSC 53, [103].
52 T1-11, line 34.
53 T1-12, lines 34-36.
54 T1-14, lines 40-46; Exhibit 7.
55 T1-16, lines 13-15.
56 T2-90, lines 44-46.
57 T2-91, lines 9-24.
58 T2-91, lines 25-27.
59 T2-91, lines 33-35.
60 T2-17, lines 32-33.
61 T2-17, lines 40-46.

the company was devoid of a director because of Mr Hobson's bankruptcy.[62] Mr Loel did however regularly tell Mr Mahan what was going on with Devren's case.[63]

[41] Lillas & Loel conducted Devren's case on a no win, no fee basis. Mr Loel was aware that Lillas & Loel would be liable to pay fees for counsel as well as expert fees.[64] These costs amounted to approximately $100,000.[65] Mr Loel also arranged for the payment of $50,000 security for cost, as ordered by Applegarth J on 25 September 2013.[66] Mr Loel was willing to arrange security for costs and incur $100,000 in costs for his firm on the basis that he "had a good feeling about the prospects of success in the matter".[67]

[42] In an affidavit sworn by Mr Loel on 20 August 2013 he referred to these arrangements and the fact that his firm stood to benefit from the proceedings:[68]

> "16. In any event, I say that the plaintiff's [Devren's] shareholders will not stand to benefit from these proceedings because there will be insufficient monies to pay plaintiff's creditors and therefore no money will be available for the shareholders.
>
> **Creditors Who Stand to Benefit from these Proceedings**
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> 17. My firm stands to benefit from these proceedings because of the legal fees that are owed to it. I say my firm is currently owed approximately $60,000 in legal fees from the plaintiff. Additionally, Mr Ben McGlade of Counsel is owed $10,000 and Mr John Rivett of Counsel is owed $12,000.
>
> 18. The fees owed to my firm and Mr Rivett will increase as these proceedings progress.
>
> 19. I say the plaintiffs' creditors also stand to potentially benefit from these proceedings."

[43] Old Coach Developments applied on a number of occasions to have the caveat removed. The first application was lodged on 9 August 2013 and heard by Peter Lyons J on 21 August 2013. In his reasons for refusing the application his Honour identified three submissions in support of the removal of the caveat.[69] First, Old Coach Developments submitted that as lot 23 was subject to a contract of sale, [70] clause 16.14 of the Shareholders Agreement did not operate so as to require a transfer of lot 23 to Devren. The second submission was that the caveat was based on an interest created by clause 16.14, which had been extinguished by an agreement made in correspondence dated 13 October 2011, 5 December 2011 and 7 December 2011. The third submission relied on the 4 May 2012 agreement.

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62 T2-18, lines 1-4.
63 T2-56, line 4.
64 T2-50, lines 18-21.
65 T2-14, lines 15-26.
66 T2-14, line 7; Plaintiffs' Trial Bundle, Vol 3, tab 101, Exhibit 1.
67 T2-14, lines 33-34.
68 Plaintiffs' Trial Bundle, Vol 2, tab 82, Exhibit 1.
69 Plaintiffs' Trial Bundle, Vol 2, tab 100, Exhibit 1.
70 The Contract of Sale is "Exhibit PM21" to the Affidavit of Peter John Francis Miller, sworn 9 August 2013, Exhibit 8.

[44] His Honour rejected each of these three bases for the removal of the caveat. As to the first basis, his Honour noted that this required an investigation of the facts to see whether the Project had not been completed. As to the second basis, the proposal contained in the three letters was not demonstrated to have been acted upon. Any agreement that Mr Miller would receive 75 per cent of the profits from the sale of lots 22 and 23 was on the basis that he would obtain a loan against his personal property for use in completion of the Project. As to the 4 May 2012 agreement, his Honour was not satisfied that any basis had been identified for demonstrating that Mr Clair had authority to sign the agreement on behalf of Devren. The question whether there was an enforceable agreement binding on Devren could not be resolved with sufficient certainty to warrant the removal of the caveat. As to the balance of convenience his Honour was also troubled by the fact that Mr Miller was not prepared to accept Devren's open offer that the caveat be removed but the proceeds of the sale from lot 23 be held in trust.

[45] On 16 September 2013 a further application for removal of the caveat was lodged. This application was heard by Applegarth J on 25 September 2013. At this hearing Old Coach Developments provided copies of bank statements showing transfers totalling $150,200 from a loan secured by the Millers' home and Old Coach Developments' bank statements recording the receipt of these transfers as well as corresponding expenditure on the detention base works that totalled $330,600.[71] Applegarth J dismissed the application:

> "… the application for the caveat to be removed re-litigates a matter that was argued before Justice Peter Lyons on 21 August 2013. With some considerable reluctance, his Honour Justice Lyons declined to order the removal of that caveat, identifying some deficiencies in evidence. Those deficiencies have been addressed somewhat, however I consider that to simply re-entertain the argument for the removal of the caveat would involve the effective re-litigation of the previous application. That is contrary to the important principle of finality in litigation."[72]

[46] On 2 April 2015 Devren filed an application seeking an injunction preventing Old Coach Developments and the Millers from dealing with lot 23 until such time as Devren's proposed appeal had been determined. On 8 April 2015 Devren filed a notice of appeal in respect of the judgment of Boddice J of 19 March 2015. The application for an injunction was dismissed by Boddice J on 16 April 2015.[73] His Honour also ordered the removal of the caveat observing:[74]

> "The defendants submit they are entitled to the benefit of the decision handed down on 19 March 2015. Further, they will be substantially prejudiced by the imposition of any ongoing restraint. They have been prevented from dealing with the relevant block of land for nearly three years to date. This has adversely impacted upon them financially, including in respect of funding for future projects. Further, a decision of this court is not provisional, pending determination of an appeal. The defendants having succeeded at trial, they are entitled to the benefit of that decision."

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71 Miller Affidavit, [154], Exhibit 5.
72 Plaintiffs' Trial Bundle, Vol 3, tab 101, Exhibit 1.
73 Miller Affidavit, [178]-[181], Exhibit 5; Plaintiffs' Trial Bundle, Vol 3, tab 106, Exhibit 1.
74 Plaintiffs' Trial Bundle, Vol 3, tab 106, Exhibit 1.

[47] Mr Loel recalls that Mr Ferrett and Mr Byrne were "quite bullish" about the prospects of success of an appeal.[75] Mr Loel however wished to obtain advice of Senior Counsel. On 15 April 2015, in a letter co-signed by Mr Byrne and Mr Loel, James Bell QC was briefed to advise on prospects of appeal.[76] Mr Byrne wrote to Mr Miller on 23 April 2015 informing him as to the necessary steps for the removal of the caveat. Whilst Boddice J had ordered the removal of the caveat, the order did not specify that it was to be removed by Devren.[77] Mr Byrne's offer to Mr Miller was that the sealed order could either be served directly on the Land Titles Registry or on Devren who would comply with it as soon as reasonably practicable. In a further email dated 29 April 2015[78] Mr Byrne referred Mr Miller to the Land Titles Manual at [14-2100], which provided:

> "The caveatee may apply to the Supreme Court for an order that the caveat be removed (s 127 of the *Land Title Act* 1994 or s 389H of the *Land Act* 1994). If successful, the caveatee lodges the Court order with a Form 14 – request to remove caveat. See example 8."

[48] Mr Miller had, in the interim, brought an application for the removal of the caveat. Mr Byrne's email of 29 April 2015 contained an open offer for this application to be dismissed with no order as to cost. Mr Miller did not agree to this course. On 1 May 2015 Dalton J heard an application filed by Old Coach Developments and the Millers on 23 April 2015, seeking an order that Devren remove the caveat in terms of Boddice J's order of 16 April 2015. Justice Dalton refused the application. Mr Miller engaged solicitors and had the caveat removed on 12 July 2015 pursuant to the order of Boddice J made 16 April 2015.

[49] The sale of lot 23 for $240,000 was settled on 23 July 2015.

[50] Devren did not proceed with the appeal. This was based on two factors, namely Mr Bell's advice and the fact that an order for security for costs for the appeal in the sum of $20,000 was ordered by Philippides JA on 21 May 2015.[79]

Section 130 *Land Title Act*

[51] Section 130 was recently considered by Henry J in *Re Brooks' Caveat.*[80] His Honour referred to the test propounded by Wooten J in *Bedford Properties Pty Ltd v Surgo Pty Ltd*,[81] namely that 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. Henry J observed: [82]

> "Thus a caveator must only prove the caveat was lodged or continued with reasonable cause.

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75 T2-15, lines 7-10.
76 Defendants' Trial Bundle, Vol 1, tab 53, Exhibit 14.
77 Defendants' Trial Bundle, Vol 1, tab 54, Exhibit 14.
78 Defendants' Trial Bundle, Vol 1, tab 55, Exhibit 14.
79 Plaintiffs' Trial Bundle, Vol 3, tab 102, Exhibit 1.
80 [2014] QSC 76.
81 [1981] 1 NSWLR 106 at 108.
82 [2014] QSC 76 at [17]-[19].

> It will likely be an incident of such proof that it is also proved the caveat was lodged or continued without any improper purpose, 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 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.
>
> … 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." (Citations omitted).

[52] In *Farvet Pty Ltd v Frost*[83] Demack J considered s 130 which at that time provided in s 130(3) as follows:

> "In a proceeding for compensation under subsection (1), proof that a caveat was not lodged or was not continued without reasonable cause rests on the person who lodged or continued the caveat."

[53] The heading to s 130 was at that time and remains "Compensation for improper caveat". By reference to that heading Demack J stated:

> "By virtue of s 35C(1) of the [*Acts Interpretation Act*], the heading is part of the section, and by virtue of s 14(2)(a) of the [*Acts Interpretation Act*] it is also part of the Act. It is difficult to avoid the conclusion that the words in the heading may enlarge the words in section because, being part of the section, they, too, are part of a substantive enactment. This would mean that the claimant under s 130(1) [*Land Title Act*] would need to prove that the caveat was lodged and continued improperly and without reasonable cause. Such a construction is consistent with the purpose of the Act which permits

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83 [1997] 2 Qd R 39.

> the lodging of caveats as a means of maintaining the reliability of the Register."[84]

Farvet has stood as authority for the proposition that to succeed under s 130 it was necessary for the caveatee to establish that the caveator did not have an honest belief based on reasonable grounds that it had a caveatable interest and that the caveator lodged and maintained the caveat for an improper purpose.[85] Following the decision in *Farvet* s 130 was amended in the terms of the present s 130(3) thereby reversing the onus and placing it on the caveator to establish reasonable grounds. The defendants submit that *Farvet* should still be considered good law, such that whilst the caveator must now establish reasonable grounds, the person seeking compensation continues to have to establish improper purpose.[86] This submission should be rejected for the reasons identified by Henry J in *Re Brooks' Caveat* which I adopt: [87]

> "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 course 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 sub-section requires. Thus a caveator must only prove the caveat was lodged or continued with reasonable cause." (Citations omitted).

[54] Section 130(1) refers to "a person who lodges or continues a caveat". It does not require the caveat to be lodged or continued by the caveator. In *Gordon v Treadwell Stacey Smith*[88] the New Zealand Court of Appeal (Thomas, Blanchard and Doogue JJ) considered whether "any person lodging a caveat" in s 146 of the *Land Transfer Act* 1952 (NZ) would include a solicitor lodging a caveat on behalf of a client. Blanchard J noted that s 146 was the only place in which "person" was not accompanied by a direct reference to the caveator or use of words which can refer only to the caveator.[89] The phrase "any person lodging any caveat" in s 146 was found by Blanchard J not to be restricted to the caveator. His Honour observed:[90]

> "A solicitor cannot, however, hide behind the existence of an instruction from the client to lodge a caveat if to do so was otherwise to act without reasonable cause in the circumstances confronting the solicitor. In our view s 146 makes solicitors or other agents responsible for their actions in lodging a caveat where they act dishonestly or without reasonable cause notwithstanding that on the basis of their advice to their client they have received instructions to

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84 [1997] 2 Qd R 39 at 49.
85 Closing Arguments for the Defendants, [17].
86 Closing Arguments for the Defendants, [18].
87 [2014] QSC 76 at [17].
88 [1996] 3 NZLR 281.
89 This is similar to the *Land Title Act* 1994 (Qld); see for example s 121(1) which requires a caveat to be signed by or for the caveator.
90 [1996] 3 NZLR 281, 288.

> caveat the title. If this were not so the client might be protected by taking advice from the solicitor, however wrong the advice proved to be, and the solicitor would be protected by acting in accordance with the instruction which was given because of the incorrect advice. It would be unsatisfactory if in this circular way a person affected by the lodging of a caveat could be deprived of any claim under s 146."

Blanchard J continued:[91]

> "In examining the position of a solicitor called upon to advise whether a caveat should be lodged – and this will often occur in circumstances of some urgency – the Court will first look at the honesty of the solicitor's belief. When examining reasonableness it will be aware that it is not uncommon for solicitors to be sued for professional negligence where they fail to advise a client to lodge a caveat first and argue for its validity afterwards. …
>
> The matter will be judged by the standards of a reasonable conveyancing practitioner possessed of the factual material available to the solicitor whose action in lodging a caveat is under scrutiny in advising and acting in the same circumstances. Would such a practitioner have thought in those circumstances that there was a proper basis upon which a claim could be asserted by the client? We do not consider that the approach we have taken to s 146 will create a problem where a solicitor is instructed to lodge a caveat but has a concern about whether this can properly be done. The client can be advised of the doubt and, if still instructed to lodge a caveat, the solicitor can record the advice in writing and seek an indemnity. If that is not thought appropriate and the client wants to proceed, the solicitor can always prepare the document for personal signature and personal lodgement by the client. A solicitor who does so could not be described as a person lodging the caveat."

[55] This decision was considered by Young AJA in *Windlock Pty Ltd v Davidovic*.[92] His Honour did not feel inclined to follow *Gordon* as a guide to the construction of the New South Wales Torrens Act.[93]

[56] In the present case it is not necessary for me to resolve any conflict between *Gordon* and *Windlock*. It was conceded on behalf of Mr Loel in the course of oral submissions that, for the purposes of s 130(1), he was a person who both lodged and continued the caveat.[94] The central issue is whether Mr Loel did so with reasonable cause.

Issue 1

Did Mr Loel lodge or continue the caveat with reasonable cause?

[57] I accept Mr Loel held the honest belief, based on reasonable grounds, that, by clause 16.14 of the Shareholders Agreement, Old Coach Developments held lot 23 as a constructive

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91 [1996] 3 NZLR 281, 289.
92 [2014] NSWSC 269.
93 [2014] NSWSC 269 at [39].
94 T3-29, lines 4-14.

trustee for Devren. Even though Mr Loel was assisted by the opinion of Mr McGlade in relation to there being a caveatable interest, Mr Loel formed his own view in this respect.[95] Mr Loel's belief that a caveatable interest arose was not on the basis of any implied term. His evidence was that:

> "Clause 16.14 on its face actually does the work by itself without having anything imputed in it and any requirement for reasonableness, but counsel brought to my attention that – and he says, I know presumably. I wasn't so sure that it was to be presumed, but – but I did consider the issue and it appeared to me that in circumstances where Devren had been locked out of the joint venture for two years at that point and that 32 or 31 of 33 lots had been sold starting some year beforehand that a reasonable period of time had arguably passed and that coupled with Mr Hobson's instructions to that effect – to the effect of each of those matters led me to form the view that that was so."[96]

[58] The caveat was lodged by Mr Loel six weeks after he first received instructions from Mr Hobson. Mr Loel made a conscious decision not to proceed with the freezing order or to caveat the Millers' property or lot 22 in accordance with Mr Hobson's previous legal advice. Mr Loel, Mr Hobson and Mr McGlade were all involved in the drafting of Mr Hobson's affidavit. Mr Loel was closely involved with Mr McGlade in the drafting and settling of the statement of claim which identified and specifically pleaded the basis of the caveatable interest. Mr Loel discussed the nature of the caveatable interest not only with Mr McGlade but also with other solicitors in his office and another barrister, Mr Rivett.

[59] When the 4 May 2012 agreement was brought to his attention he took appropriate steps. He sought documents, instructions and advice as to the agreement's effect on the continuation of the caveatable interest. The fact that Devren was not ultimately successful at trial does not detract from the genuineness of Mr Loel's honest belief that Devren had a caveatable interest and a reasonable cause to lodge and continue the caveat over lot 23.

[60] Mr Loel formed his own views as to prospects of success. He also had the benefit of the views of Mr Byrne and Mr Ferrett as to Devren's prospects of success.

[61] Mr Loel did not attend the hearing of the applications brought by Old Coach Developments for the removal of the caveat. He was however informed of their outcome.[97] He therefore knew that two applications for the removal of the caveat had been refused by this Court.

[62] Mr Loel's honest belief that there was a caveatable interest is also supported by the fact that his firm paid about $100,000 in outlays in respect of the Devren proceedings. These included both counsel and expert fees and other associated court fees. Mr Loel did not view there to be a high risk of not recovering those fees because he had "a good feeling about the prospects of success" in the matter. His own assessment of prospects was 60/40 in favour of Devren.

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[95] T2-39, lines 40-44.
[96] T2-11, lines 30-35.
[97] T2-44, lines 39-46.

[63] The plaintiffs submit that Mr Loel has not discharged his onus of establishing that the caveat was lodged or continued with reasonable cause.

[64] First the plaintiffs submit that Mr Loel either knew or should have known of an improper conspiracy between Mr Hobson and Mr Clair to secretly induce the plaintiffs into providing funding for the detention basin construction, when they intended to commence legal proceedings to obtain "improper possession" of lot 23. The nature of this alleged conspiracy and the documents said to evidence it are outlined in paragraphs 68 to 82 of Mr Millers' affidavit.[98] In paragraph 78 of the Miller Affidavit Mr Miller describes the conspiracy as follows:

> "… He [Mr Hobson] and Mr Clair had agreed to conceal and keep secret from Mr Miller their intentions to mount a legal challenge until work had commenced on the detention basin in order to ensure that the detention basin works which the Millers had agreed to fund were completed, because they believed that if the Millers were aware of these intentions, they were likely not to have provided the required development funding."

[65] The "detention basin works" referred to in the above quoted paragraph is particularised in paragraph 18(d) of the Further Re-Amended Statement of Claim by reference to the origins of clause 16.14:[99]

> "d. In the event that the project could not be completed because Lots 22 and 23 had not been sold to third parties, Lot 22 was to be transferred free of charge by OCD to Mr Miller and Lot 23 was to be transferred free of charge by OCD to Devren. Both Mr Miller and Devren were to pay the respective costs of these transfers.
>
> **Particulars of Paragraph 18 d above**
>
> (i) This clause arose as a result of initial subdivision approval by the Moreton Bay Regional Council (MBRC) on 21 March 2008, that had unexpectedly required that proposed Lots 22 and 23 (the detention basin lots) be used for the purposes of drainage detention. This change in approval from that originally negotiated was caused by the delay by approximately 20 years, of a joint project by MRBC and the Queensland Department of Main Roads (DMR) to construct an arterial road on contiguous DMR land that would have provided the drainage detention required by the subdivision. MBRC had allowed the lots to be issued with separate titles on completion of the subdivision, but had imposed conditions requiring an easement forbidding sale of these lots until alternate drainage facilities had been found to service the entire subdivision. There were two alternative solutions. The first was to wait for 20 years for drainage to be supplied with the ultimate construction of the arterial road. The second was to negotiate with DMR for a permit to construct a detention basin on the contiguous property owned by it, to construct this detention facility and to remediate the detention lots, converting these into residential lots.

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[98] Plaintiffs' Trial Bundle, Vol 1, tabs 40 to 47, Exhibit 1.

[99] Paragraph 18 of the Further Re-Amended Statement of Claim is admitted in paragraph 1 of the Amended Defence.

(ii) All the ventures chose the second solution and negotiations with DMR and MBRC had progressed to a stage whereby in November 2011, formal approval was imminent and a final operational works approval was issued by MBRC on 23 December 2011. Construction of the detention basin and remediation of the detention basin lots commenced in February 2012 and was completed in August 2012.

(iii) Devren had been kept fully informed of progress with negotiations to complete the development of the detention basin works, but had informed Mr Miller that it did not have funds to make any contribution to the cost of these works. Mr Miller had informed Devren that it would consider providing such funding, including raising funds from a mortgage over the Miller's house. In return for this funding the Miller's required an agreement that Devren's share of profit from the sale of lots 22 and 23 was to be reduced from 50% to 25%. This agreement was confirmed in a letter to Devren's solicitor from OCD's solicitor on 5 December 2011 and confirmed by Devren's solicitor in response on 7 December 2011, when he wrote as follows:

'We are instructed by the Principal of Devren Pty Ltd that Devren is in full agreement with the items identified in your correspondence of 5th December 2011'"

[66] The contemplated legal challenge is revealed in an email from Mr Clair to Mr Hobson dated 11 November 2011:[100]

"In our view our plan of attack is divided into stages. I will summarise each –

1) I am with Peter Miller arranging for the final detention basin blocks to be submitted to Council – there are some minor issues that must be resolved however I am working on the basis that we obtain "Operational Works" by mid December. Nothing can be or should be done by this time, as any move by us would allow Miller ample time to sabotage the project. Peter Hobson agrees.

2) Once operational works is achieved we commence a three pronged attack as follows –

   Ii Caveats over blocks owned by OCD and 939 Beams Road.

   Iii Mareva injunction against Peter Miller Family Trust and OCD

   Iv Interloclerty [sic] injunction to ANZ and NAB suspending all OCD accounts.

3) Thereafter, we file supreme court proceedings against the following –

   Peter Miller
   Susan Miller
   OCD
   Tenth Zecore
   David Spiro

[100] Plaintiffs' Trial Bundle, Vol 1, tab 43, Exhibit 1.

McGees Valuations
Peter Miller Family Trust

Claims on the basis of mismanagement, misappropriation and misrepresentation.

4) There is no negotiation and no settlement, we proceed with a shock and awe strategy of multiple proceedings at once. He will need to fund the entire litigation himself. He will have no access to OCD accounts – as he is broke this will assist us."

[67] On 9 May 2012, (which was one day after Mr Hobson had first contacted Mr Loel), Mr Hobson sent an email to Mr Loel which relevantly stated: [101]

> "Once Op Works issued by council we intend to place Caveats on every block as soon as Possible and simultaneously file proceeding in the Supreme Court. As far as an placing caveats we believe it will either be a Constructive Trust, or an Equitable mortgage. Please advise? Matt [Clair] would also like to personally serve Peter Miller. Please advise in writing that this is possible?"

[68] Mr Hobson in the same email places this information into context:[102]

> "Below is some recommendations or ideas in addressing this matter. I had retained a counsel to assist in this matter but after costing a lot and achieving nothing I felt this was an unsuitable course of action due to the cost benefit ratio. Below are his questions and my recommendations or answers."

[69] Whilst Mr Hobson's email of 9 May 2012 was addressed to Mr Loel, there is no evidence that the earlier email communications between Mr Hobson and Mr Clair and in particular Mr Clair's email of 11 November 2011 were ever read or considered by Mr Loel. Mr Loel never met nor took instructions from Mr Clair. His instructions came from Mr Hobson. One of the first things that Mr Loel did was to obtain an ASIC search which showed Mr Hobson as the sole director of Devren. Mr Loel was asked whether at any time he believed that the proceedings in SC No 5638/12 were the product of a conspiracy between Mr Hobson and Mr Clair:[103]

> "Absolutely not. My understanding during my involvement in the matter, which was more intense between May of 2012 and May of 2013, was that if you put Clair and Hobson in the same room that there'd be need for an ambulance."

[70] Mr Loel's understanding was based on what he had been told by Mr Hobson.[104] Mr Loel's recollection was that there had been a complete breakdown between Mr Hobson and Mr Clair.[105]

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[101] Defendants' Trial Bundle, Vol 1, tab 1, pages 2 and 3, Exhibit 14.
[102] Defendants' Trial Bundle, Vol 1, tab 1, pages 2 and 3, Exhibit 14.
[103] T2-9, lines 19-24.
[104] T2-9, line 25.
[105] T2-22, lines 9-10.

[71] Quite apart from Mr Loel's denial of any knowledge of the alleged conspiracy between Mr Hobson and Mr Clair, it is evident that Mr Loel brought his own independent legal mind to the lodging of the caveat. In spite of Mr Hobson's sense of urgency, which is evident in his email of 11 May 2012,[106] Mr Loel took more than six weeks before he lodged the caveat over lot 23. Mr Loel did not seek to caveat lot 22 or any other property held by the plaintiffs nor did he proceed with a freezing order in relation to the bank accounts of Old Coach Developments. Mr Loel, solely on the instructions of Mr Hobson, did not implement a number of steps previously contemplated by Mr Hobson and Mr Clair in the context of the alleged conspiracy.

[72] Secondly, the plaintiffs submit:[107]

> "… Mr Loel was aware that Mr Hobson's major concern expressed to Mr Loel was that the two lots in question had been converted into a saleable state and were, in his opinion likely to be sold in the near future thereby giving cause for urgency in bringing the matter to court at the earliest possible time. It was obvious that both Mr Hobson and Mr Clair knew and approved of Mr Miller's efforts to achieve this position. Accordingly there was no validity in the argument that a reasonable time had passed for the lots to be sold."

This submission should be rejected. Lot 22 was not transferred until 1 May 2013, with the settlement occurring on or about 11 April 2013.[108] The contract of sale in relation to lot 23 was not executed until 5 July 2013. Whilst it may have been Mr Hobson's opinion that lots 22 and 23 would be sold in the near future thereby giving cause for urgency, lot 22 was not transferred until 1 May 2013 and no contract was in place for lot 23 until over one year later. Further, even if Mr Hobson felt some sense of urgency, Mr Loel took a further six weeks prior to lodging the caveat. Mr Loel's response to Mr Hobson's sense of urgency is instructive:[109]

> "Peter I attach the searches that I have done.
>
> Lots 22 and 23 remain in OCD. When I have read the file I will tell you whether I believe that you can maintain a Caveat.
>
> I searched only Lots 3 and 5 of the other lots and they have been transferred to presumably buyers. I didn't search 7, 9 or 10 based on the presumption that they will also have been sold. I will do so when I figure out your remedy."

[73] At the time Mr Loel lodged the caveat he was "absolutely unaware" of the funding arrangements in relation to the detention basin.[110] His evidence was as follows:[111]

> "I became aware at some stage that you had funded the detention basin in an amount that you said you'd spent somewhere. It was later in the proceedings.

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[106] Plaintiffs' Trial Bundle, Vol 1, tab 49, Exhibit 1.
[107] Plaintiffs' Final Trial Submissions, [27]; Plaintiffs' Trial Bundle, Vol 1, tabs 49 and 50, Exhibit 1.
[108] T1-16, lines 25-34.
[109] Plaintiffs' Trial Bundle, Vol 1, tab 49, Exhibit 1.
[110] T2-29, lines 24-26.
[111] T2-29, lines 37-46.

> It wasn't early. And even as late as the trial, there was no real evidence of – of how much, other than your saying you'd spent x dollars. And to be frank about it, I really had no positive cognition about the relationship between the payment of those moneys and the saleability or otherwise – the capacity to deal with the two lots that are subject of – or the one lot was the subject of these proceedings. If that makes things clearer."

Mr Loel held the belief that lots 22 and 23 could have been transferred at or about the same time as the other lots.[112] As stated by Mr Loel in evidence:[113]

> "I must say, the whole of the detention basin issue was always a bit of a – an issue that, even today, I'm not sure how it affected the development, because lots 22 and 23 were registered and were unencumbered on the same day as all the other lots, and my recollection – and it's only from a conversation that Byrne and I had after the trial – was that no real evidence was put before Justice Boddice about whatever the cost of the development of the detention basin were."

I accept that, at the time Mr Loel lodged the caveat, he honestly believed and continued to believe that clause 16.14 of the Shareholders Agreement was engaged because a lengthy period of time had passed since the sale of the other 31 lots.[114]

[74] Thirdly, the plaintiffs submit that Mr Loel, by relying on clause 16.14 of the Shareholders Agreement as supporting a caveatable interest, "cherry-picked" from the Shareholders Agreement and the Joint Venture Agreement.[115] The plaintiffs point in particular to the conditions for termination of the Joint Venture and the Shareholders Agreement which were essentially the same. The Joint Venture could be terminated where a single venturer became entitled to 100% of the profits. This was the effect of the 4 May 2012 agreement. The binding nature of that agreement made by Mr Clair on behalf of Devren was only determined by Boddice J after an eight day trial. As I have already observed, Mr Loel considered and took advice in respect of the effect of that agreement on the caveatable interest. Mr Loel also rejected any suggestion that he cherry-picked a particular clause:[116]

> "If you read clause – I actually went further than, potentially, others might. If you read clause 16.14 on its face, if the project cannot be completed because lots 22 and 23 on the plan have not been sold to third parties, then lot 22 shall be transferred, and lot 23 shall be transferred. It's imperative. It's not within a reasonable period of time, or at some other stage, or – I read this as – as entitling – as an entitling clause, effectively, on its face and by itself.
>
> But, nevertheless, it's contradicted here, because that entitlement would only have been brought about by the unanimous agreement of the shareholders?- - - Well, that's something I didn't consider at the time. And maybe I should have; I don't know. I'm not going to answer that question in

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[112] T2-22, line 35 to T2-23, line 5.
[113] T2-19, lines 9-14.
[114] T2-11, lines 30-35.
[115] T3-45, lines 31-45; Plaintiffs' Final Trial Submissions, [17].
[116] T2-27, lines 17-47.

> the affirmative. But what I did consider was whether a reasonable period of time had passed, and I took the view that one had."

[75] Mr Loel accepted that he would have had the agreements before him. He may have looked at them at the time and taken the view that the other clauses were not relevant to the issue.[117]

[76] Fourthly, the plaintiffs further submit that neither Mr Loel nor Mr Byrne were able to produce "a single piece of evidence that supported the allegations made by Mr Hobson".[118] The difficulty with this submission is that Mr Hobson's allegations as to how the joint venture was conducted by Mr Miller was the subject of an eight day trial before Boddice J. Mr Loel's honest belief as to there being a caveatable interest is not simply to be assessed in light of the outcome of the trial. Mr Loel, as the relevant solicitor, signed a Supreme Court claim and statement of claim. These documents were drafted on instructions from Mr Hobson and in Mr Loel's view, supported by sufficient evidence to justify him signing them.[119] Mr Loel had requested Mr Hobson to produce all relevant documents.[120]

[77] Fifthly, by reference to the reasons of Peter Lyons J of 21 August 2013, the plaintiffs submit that the principle determined by his Honour was that if the Millers had paid for the development to make lot 23 saleable, and Devren had not contributed to these costs, then there was no entitlement for Devren to benefit from the "free" transfer of lot 23. I do not accept this submission. As I identified above, Peter Lyons J rejected the application for the removal of the caveat on three bases. The third basis was the 4 May 2012 agreement. The validity of this agreement was a central issue which was determined by Boddice J at trial. In any event, the issue of who paid for the remediation work to lots 22 and 23 was irrelevant to the caveatable interest as identified by Mr Loel.[121] There is no evidence to support the plaintiffs' submission that Mr Loel was either aware or should have been aware that both Justice Lyons and Justice Applegarth considered that the reasons for lodging the caveat were invalidated by the Millers' funding of the construction of the alternate drainage facilities but continued the caveat despite this knowledge. This submission is premised on a misunderstanding of the reasons given by Peter Lyons J for refusing the application to remove the caveat.

[78] As Mr Loel concedes that he is a person who lodged or continued the caveat within the meaning of s 130(1), there is no need to consider the plaintiffs' submissions as to Mr Loel's and Mr Byrne's conflicting accounts of the extent of supervision that Mr Loel exercised over Mr Byrne.[122] Nor in light of the concession is it necessary to consider an issue identified by the parties, namely whether Mr Loel acted in the role of a de facto director of Devren.[123]

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[117] T2-30, line 45 to T2-31, line 3.
[118] T3-46, lines 30-35; Plaintiffs' Final Trial Submissions, [28].
[119] T2-24, lines 17-19.
[120] T2-24, lines 40-46.
[121] T2-11, lines 30-35.
[122] Plaintiffs' Final Trial Submissions, [30].
[123] List of Agreed Issues, Item 60; Plaintiffs' Final Trial Submissions, [37]-[44].

[79] In light of Mr Loel's evidence, that he ceased to have an honest belief that Devren had a caveatable interest after Boddice J delivered judgment on 19 March 2015, it is necessary to consider whether Mr Loel continued the caveat from that date to the date of the removal of the caveat by Mr Miller on 12 July 2015 with reasonable cause.

[80] Mr Loel's belief was that once the judgment was delivered and no stay pending appeal was granted, there was no right for Devren to continue the caveat.[124] On 19 March 2015 when Boddice J delivered reasons for dismissing Devren's claim, his Honour gave leave to the parties to deliver written submissions in respect of furthers orders and costs. These submissions were filed. On 30 March 2015 Old Coach Developments filed an application seeking orders for the removal of the caveat. On 2 April 2015 Devren filed an application seeking orders restraining Old Coach Developments from disposing or otherwise dealing with lot 23 pending determination of an appeal filed by Devren against the decision of Boddice J delivered on 19 March 2015.[125] On 16 April 2015 Boddice J refused the injunction and ordered the removal of the caveat. In the chronology of events above I have already identified that his Honour's order did not specify which party was to remove the caveat. It is the case however, that from the making of that order, Old Coach Developments and the Millers were able to take out the sealed order and have the caveat removed. Mr Byrne sought to assist Mr Miller to achieve this result. Rather than accepting Mr Byrne's assistance, Mr Miller filed an application for the removal of the caveat. This application was refused by Dalton J. Although I do not have the benefit of the transcript of proceedings before her Honour, as a matter of logic the application must have been refused on the basis that Old Coach Developments already had an operative order for the removal of the caveat.

[81] Croft J in *RDN Developments Pty Ltd v Shtrambrandt*[126] stated:

> "It was common ground that there is a duty on a caveatee to mitigate loss in the context of a claim under provisions such as s 118 of the Act. In this respect, the plaintiff referred to the decision of Young J (as he then was) in *National Australia Bank Ltd v Bridge Wholesale Acceptance Corporation (Aust) Ltd*. Young J, in that case, made it clear that the duty to mitigate does not require the caveatee to do anything other than in the ordinary course of business, but it does also require the caveatee to avail itself of procedures available to remove a caveat."[127] (Citation omitted).

[82] Upon receipt of the judgment of Boddice J on 19 March 2015, Mr Loel took appropriate steps in filing a notice of appeal and seeking an injunction pending appeal. These steps were taken in light of Mr Byrne's and Mr Ferrett's views as to the prospects of an appeal. The injunction was refused on 16 April 2015, which was the same day that the caveat was ordered to be removed. After this order was made Old Coach Developments and the Millers (in the terms described by Croft J), were required to avail themselves of procedures available to remove a caveat. Those procedures were spelt out to Mr Miller by Mr Byrne in correspondence. The caveat could have been removed by Old Coach Developments and the Millers any time from 16 April 2015. An order having been made

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[124] T2-8, lines 10-11.
[125] Plaintiffs' Trial Bundle, Vol 3, tab, 106, page 2, lines 1-15, Exhibit 1.
[126] [2011] VSC 130.
[127] [2011] VSC 130, [80].

for the removal of the caveat by Boddice J on 16 April 2015, Mr Loel should not be considered as a person who continued a caveat after that date.

[83] I therefore conclude in respect of issue 1 that Mr Loel has discharged his onus of establishing that he lodged and continued the caveat in respect of lot 23 with reasonable cause.

Issue 2

Did Mr Mahan continue the caveat with reasonable cause?

[84] The plaintiffs submit that Mr Mahan, by his agreement to act as a "dummy" director for Mr Loel, knowingly facilitated Mr Loel's ability to exercise complete control over Devren's affairs and consequently was also responsible under s 130(1).[128] Consequently, Mr Mahan is required, at least from the date of his appointment as the sole director and secretary of Devren, to prove that the caveat was continued with reasonable cause. The plaintiffs submit that Mr Mahan has not done so.

[85] Mr Mahan submits that he had no knowledge of the existence of the caveat and therefore no basis existed on which he could ever form a view as to whether the caveat was being continued with reasonable cause. The question by extension, it is submitted, is whether a director is liable for the acts of the company taken without his knowledge and/or whether such a director is "a person" within the meaning of s 130. Mr Mahan submits that whilst he may be treated as the mind and will of Devren, he is not personally liable for its acts. Nor did he direct or procure the continuation of the caveat.[129]

[86] It is not necessary to determine these submissions. If one accepts that Mr Mahan relied entirely on Mr Loel in relation to the conduct of the litigation (which would include the continuation of the caveat), then Mr Mahan's situation falls or rises according to Mr Loel's honest belief.

[87] As I have found that Mr Loel has established that he continued the caveat with reasonable cause, even if Mr Mahan was considered "a person" who continues a caveat for the purposes of s 130(1), it must also follow that he continued the caveat with reasonable cause.

Issue 3

If the caveat was lodged or continued by either Mr Loel or Mr Mahan without reasonable cause, have the plaintiffs established that they suffered loss or damage as a result?

[88] In light of my determination in relation to issues 1 and 2, it is not necessary for me to determine issue 3. That is, because I have found that the caveat was lodged and continued with reasonable cause, the plaintiffs have no right to compensation under s 130 of the

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[128] Plaintiffs' Final Trial Submissions, [43].
[129] Closing Arguments for the Defendants, [26]-[29].

Act. I will however proceed to consider the third issue on a precautionary basis. The plaintiffs claim that the defendants' actions in lodging and continuing an improper caveat have rendered them unable to trade in property development for a period of three years. The loss has been calculated by averaging the annual taxable income of both plaintiffs, applicable to trading in the property industry, for the four years prior to lodgement of the caveat and multiplying the resultant sum by three, representing the period from lodgement of the caveat on 27 June 2012 until removal of the caveat on 12 July 2015.[130]

[89] The plaintiffs' claim for loss or damage has its genesis in a passage from the judgment of Boddice J delivered 16 April 2015 quoted in [46] above. The plaintiffs' reliance on this passage was made clear in Mr Miller's oral submissions:

> "… Justice Boddice, as I said previously, had said that, in fact, the plaintiffs had lost profits for a period of three years as a result of the caveat."[131]
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> …
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> "the claim is based on three years income, which is based on Justice Boddice's calculation. In actual fact, he is pretty close to it. It's just over three years that, in fact, the caveat prevented the trading. So what I said for three years I didn't earn any income."[132]
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> …
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> "Justice Boddice found that I had been preventing from trading, not from earning any income."[133]

Mr Miller, in my view, places too great an emphasis on this passage from the judgment of Boddice J. As I read the passage, his Honour was doing nothing more than recording the submissions made by Old Coach Developments and the Millers in support of their application to have the caveat removed. His Honour was not making any finding that the caveat adversely impacted upon them financially, including in respect of funding for future projects.

[90] Mr Miller tendered a folder of documents entitled "Plaintiffs' Trial Bundle Loss of Income". The first tab is entitled "Loel and Mahan Claim Summary Tax Returns Loss of Profit". This document was produced by Mr Miller pursuant to an order of Jackson J. The folder also contains unsigned copies of the tax returns for Old Coach Developments from 2009 to 2012. In each year Old Coach Developments did not have any taxable income. The folder also contains the 2009 to 2012 tax returns for Miller Hobson Management, Zecore, Peter Miller Family Trust, and Mr and Mrs Miller.

[91] The plaintiffs explain the basis of their loss in paragraph 52 of their written submissions:

> "The losses suffered by the plaintiffs are a direct result of the caveat that was lodged over the Joint Venture by the defendants. At the time the caveat was lodged, the Joint Venturers were The Peter Miller Family Trust with a 75%

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130 Miller Affidavit, [212], Exhibit 5.
131 T3-34, lines 30-33.
132 T3-38, lines 37-40.
133 T3-41, lines 6-7.

> entitlement while Tenth Zecore Pty Ltd (Zecore) has the remaining 25%. Both entities are wholly owned by the Millers who are the sole Trustees of the Trust and sole directors of Zecore. The Millers have been trading under this structure for a period of approximately 12 years. Funds provided to the Joint Venture to develop the detention basin of some $330,000 were provided personally by the Millers and the caveat prevented them from being repaid a substantial portion of these funds thereby preventing them from carrying out their normal income earning activities. It is evident therefore that plaintiffs are the party that has suffered the loss and that any corporate veil seen to disguise this fact should be pierced."

[92] The only documentary evidence for the amount of $330,000 is found in a folder entitled "Plaintiffs Second Supplementary Trial Bundle List of Documents.[134] Tab 7 of this folder is a typed schedule headed "Maryvale Joint Venture". This schedule identifies development costs in relation to "lots 22 and 23 detention basin" in the sum of $330,597. No supporting documentation for these costs are in evidence.

[93] Mr Miller was cross-examined in relation to the plaintiffs' claim for loss or damage. He accepted that as at the date of the lodgement of the caveat, 27 June 2012, neither lot 22 or 23 were subject to contracts of sale.[135] Lot 22 was not transferred until 1 May 2013, some 10 months after the lodgement of the caveat.[136] Mr Miller suggested that lots 22 and 23 could not be sold until the Moreton Shire Council approved the removal of an easement.[137] No document to support this suggestion was produced by Mr Miller.

[94] The first contract executed in respect of lot 23 was on 5 July 2013 for a purchase price of $220,000. The contract names Ironbark Investments Pty Ltd as the buyer. The finance date was 28 days from 5 July 2013. The contract was subject to the registration of a surrender of easement number 712650589 and the withdrawal of the caveat by 15 August 2013. If the surrender of the easement and/or withdrawal of the caveat was not achieved by 15 August 2013 each party had the right to terminate the contract by notice in writing to the other. Settlement of the contract was to be the later of 14 business days from notice to the buyer that the surrender of the easement had been registered or 20 August 2013.[138] The earliest that the contract for lot 23 could have therefore settled was early to mid-August 2013.

[95] Mr Miller's evidence was that the easement in respect of lot 23 had been surrendered by the date of the contract, namely 5 July 2013.[139] As to the other condition for the removal of the caveat, the application for removal was heard on 21 August 2013 before Peter Lyons J. As recorded in his Honour's reasons, Devren made an open offer to remove the caveat so as to permit the contract to be settled in respect of lot 23 on the basis that the sale proceeds would be held in a trust account. Mr Miller was not agreeable to this proposal.

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134 Exhibit 2.
135 T1-12, line 10 and lines 30-36.
136 T1-16, lines 13-20.
137 T1-14, lines 30-34.
138 Miller Affidavit, [22], Exhibit 5.
139 T1-17, lines 40-45.

[96] If any loss was suffered by the plaintiffs as a result of the caveat, such loss may only be claimed from the earliest date that the contract of sale for lot 23 would have settled, namely in or about early to mid-August 2013. There is no basis for the plaintiffs to claim damages from the date of the lodgement of the caveat. This fact immediately reduces the plaintiffs' claim from $1.2 million to $800,000. This was conceded by Mr Miller.[140]

[97] The plaintiffs' case is in effect, a loss of opportunity to use the "seed money" of $330,000 to commence another land development project.[141]

[98] The nature of a loss of opportunity claim was recently considered by Jackson J in *Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Limited (No. 2)*[142]. His Honour commenced his analysis by reference to the principles stated by the High Court in *Sellars v Adelaide Petroleum NL & Ors*.[143] In *Sellars* Mason CJ, Dawson, Toohey and Gaudron JJ held: :

> "…damages for deprivation of a commercial opportunity, whether the deprivation occurred by reason of breach of contract, tort or contravention of s 52(1), should be ascertained by reference to the court's assessment of the prospects of success of that opportunity had it been pursued…"

[99] The proviso to this principle, identified by Jackson J in *Principal Properties*[144] is that the plaintiff:

> "… must prove on the balance of probabilities that he or she has sustained *some* loss or damage. However, in a case such as the present, the applicant shows *some* loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had *some* value (not be a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities".[145] (Citations omitted).

[100] Jackson J identified that in some cases, the loss of a commercial opportunity is the loss of something that can only result in a benefit.[146] His Honour considered the case where the commercial opportunity missed is of a risky nature. The question posed was "how does the *Sellars* methodology cope with the risk that a plaintiff would have lost money, not made a profit?"[147] *Principal Properties* concerned the loss of a commercial opportunity or chance in respect of a development project. Jackson J observed:

> "The question whether the commercial opportunity lost by the plaintiff was valuable and the assessment of the value of the opportunity are to be answered having regard to the circumstances that any development would have been

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140 T1-29, lines 20-23.
141 T1-30, lines 35-37.
142 [2016] QSC 252.
143 (1994) 179 CLR 332, 355.
144 [2016] QSC 252, [118]-[119].
145 (1994) 179 CLR 332, 335 per Mason CJ, Dawson, Toohey and Gaudron JJ.
146 [2016] QSC 252, [121].
147 [2016] QSC 252, [122].

> subject to a number of risks that might have prevented the plaintiff from making the alleged profits."[148]

[101] By reference to the proposed development His Honour considered the relevant risks including whether the plaintiff would obtain development finance to complete the project. In the present case and for the reasons outlined below, there is simply no evidence before the Court which would permit a similar analysis to be undertaken.

[102] Mr Miller referred to records of the Bank of Queensland, which contains an entry dated 17 December 2013: [149]

> "Apparently the branches negotiated a $100,000 loan for them (the Millers) which they can use to pay arrears and service loans for many months. The customer admit being unable to service loan and intend to sell property however wish to do so with appropriate time being given to sell to get the best price. Security: 939 Beams Road Bridgeman Downs Queensland 4035, valued at $2,350,000 in October 2011. Please see customer file regarding FOS dispute.
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> Doug
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> This has meant that opportunities for further projects to be developed by the Millers have been extremely limited. The Millers own, through their wholly owned Company, Old Coach Developments Pty Ltd (OCD). The customers also have an existing legal dispute for the business relating to unpaid legal costs, which lead to a caveat which has been placed over another property the customers own. This property is not encumbered by BOQ. This caveat has prevented the customers from selling property. FOS dispute raised 11/12/2013 – customer wish for BOQ to provide time to resolve issues regarding caveat so that property can be sold."

[103] I accept the defendants' submission that this evidence is hearsay and does not constitute proper evidence of a loss of opportunity.[150] The same document from the Bank of Queensland contains an entry for 3 October 2013:

> "… Trying to find out what is happening with caveat matter over unrelated land request to have the Caveat removed is in the courts at present. With this removed, client can sell land and net approx $200K which will clearly enable his current position to be rectified. Have just left a message for Peter and will get back to you once I have spoken to him. Should be this arvo. Back to you shortly …"

[104] Whilst this is also hearsay it evidences, in the defendants' submission, that the proceeds from the sale of lot 23 were not to be used as seed money for further developments but to pay existing arrears.[151] In the end, these notes from the Bank of Queensland prove nothing.

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[148] [2016] QSC 252, [163].
[149] Plaintiffs' Trial Bundle, Vol 3, tab 117, Exhibit 1.
[150] T3-53, lines 17-20.
[151] T3-53, lines 25-30.

[105] Mr Miller did not refer to suffering any loss or damage in his affidavit sworn 9 August 2013 in support of the application to remove the caveat before Peter Lyons J.[152] Mr Miller stated that it did not occur to him to refer to any loss or damage suffered in his affidavit of 9 August 2013.[153] The first time he actually became aware that he had suffered loss or damage was when he read the passage from the judgment of Boddice J of 16 April 2015:

> "In actual fact, it was Justice Boddice who brought my attention in his judgment that, in fact, I had suffered losses for three years. I think you'll find it in his words."[154]

The fact that Mr Miller did not appreciate that he had suffered loss or damage prior to reading this passage is significant in assessing the plaintiffs' claim for loss or damage.

[106] Mr Miller also explained why he had not claimed loss or damage in respect to the caveat in the course of the Devren proceedings before Boddice J:[155]

> "I knew I was suffering losses but, in fact, because they had not been claimed, due to the incompetence of two sets of solicitors, I was not in a position to change the pleadings to make those claims. I quantified the claim once they were specified by Justice Boddice as to what he believed the deprivation of trading had been or which he said when he gave his decision and, at that stage, I turned my mind to making a claim for damages and, in fact, it took a lot of investigation for me and a lot of work to determine finally what that damaged claim should be."

[107] It must be remembered that lot 23 sold for $20,000 more in 2015 than the purchase price of $220,000 for the contract of 5 July 2013. This additional $20,000 needs to be taken into account in any calculation of loss or damage. The seed money of $330,000 was raised by the Millers utilising a mortgage of $150,000 over the family home and foregoing distributions from the joint venture. Mr Miller only became entitled to the whole proceeds from the sale of lot 22 and 23 by the payment to Mr Clair on behalf of Devren of $15,000. The amount of seed money should therefore be reduced from $330,000 to $315,000. The seed money should be further reduced because of the proceeds of sale from lot 22, which was transferred on 1 May 2013. According to Mr Miller 6% should be allowed for cost of sales. The proceeds from the sale of lot 22 should therefore be reduced by $13,200 to $206,800. There is no evidence before the Court as to how this $206,800 was treated. It may be expected that at least $150,000 of this amount was used to repay the mortgage on the Millers' house. In any event, the net proceeds from lot 22 of $206,800 was available to reduce the amount of seed money from $315,000 to $108,200. This is the amount of seed money that was not available to the plaintiffs for a period of two years for the purposes of further land development from early to mid-August 2013 to the date of the removal of the caveat.

[108] A second difficulty with the plaintiffs' claim for loss or damage is that there is no evidence of any future land development project contemplated by the plaintiffs. The only basis identified by the plaintiffs for the Court to accept that a future project would have

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[152] Exhibit 8; T1-31, lines 1-4.
[153] T1-33, lines 2-7.
[154] T1-33, lines 17-20.
[155] T1-34, lines 30-38.

been undertaken is that Mr Miller had been doing land development "for the last 30 years".[156]

[109] A third difficulty is that there is no evidence before the Court as to whether any future contemplated land development project would have been profitable. By reference to four years of past losses and profits, Mr Miller accepted in oral submissions that this is "the kind of disparity you get in this industry".[157] There is simply no evidence that would enable the Court to assess whether any future contemplated land development project would have been profitable or otherwise. This in itself is fatal to the plaintiffs' claim for compensation.

[110] A fourth difficulty is that there is no evidence that with any seed capital from the sale of lot 23 the plaintiffs would have been able to obtain finance for any future project. There is, for example, no evidence of any application to a financial institution for this purpose.[158]

[111] The plaintiffs have sought to average their trading income over a period of four years. In the course of that four years there were at least two land development projects, including the Mango Hill project in which 31 of 33 lots were improved and sold for a profit, with approximately $1 million received from sources outside the control of the plaintiffs. Another property development project on foot during the period of the average trading income claimed by the plaintiffs was the Griffin project.[159] There is insufficient material before the Court by which it could be satisfied of the financial factors that contributed to the average income said to have been received by the plaintiffs. Further, in respect of the average income for the four years before the lodging of the caveat, there is no evidence of the amount of seed capital that made possible the Mango Hill and the Griffin developments.[160]

[112] The plaintiffs' evidence as to whether they suffered loss or damage as a result of the lodging and continuation of the caveat is wholly deficient. I have sought to assess loss or damage on the basis that the plaintiffs are persons who, for the purposes of s 130(1), have suffered loss or damage as a result of the lodging and continuation of the caveat. I note the defendants' submission that any loss suffered as a result of the sale of lot 23 being prevented was loss suffered by the registered proprietor, Old Coach Developments and not the plaintiffs. The defendants submit that Old Coach Developments was part of a structure that was deliberately set up to achieve a specific purpose. The structure was designed with taxation purposes in mind[161] and Old Coach Developments was the vehicle through which liabilities concerning the property development at Mango Hill were quarantined.[162] The defendants therefore submit that the plaintiffs cannot accept the tax benefits and the "quarantined-liability" benefits associated with this structure, while simultaneously abandoning the structure in an attempt to claim to have been parties that suffered loss as a result of Old Coach Developments being prevented from selling lot

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156 T3-37, line 31.
157 T3-43, lines 10-15.
158 T3-37, line 43.
159 T1-36, lines 44-48.
160 Closing Arguments for the Defendants, [11](c)(i) and [11](c)(iii)(B).
161 T1-50, lines 9-40.
162 T1-2, lines 41-42.

23.[163] When Old Coach Developments sold lot 23 in 2015 it did so for $20,000 more than the purchase price in the 5 July 2013 contract. It is not necessary for me to seek to unravel the corporate and trust structures by which the Millers personally received income for the four years prior to the lodgement of the caveat. Even if one was to assume that they were entitled to compensation under s 130(1), they have failed to establish that they suffered any loss or damage as a result of the lodging or continuation of the caveat.

Disposition

[113] The plaintiffs' claim is dismissed.

[163] Defendants' Submissions, [8].