THE COURT OF APPEAL **[1993] QCA 254**

SUPREME COURT OF QUEENSLAND

Appeal No. 104 of 1993

O.S. No. 625 of 1993

Brisbane

[Re: Henderson]

IN THE MATTER of the Real Property Act 1861

- and -

IN THE MATTER of Caveat No. L434013B by EDITH HENDERSON

Ex Parte PETER VICTOR HARBURG

(Appellant)

The Chief Justice
Mr Justice Davies
Mr Justice Demack

Judgment delivered 12.07.93

Joint reasons delivered by the Chief Justice and Demack J. Separate reasons delivered by Davies J.A. All agreeing as to the form of order to be made.

APPEAL DISMISSED WITH COSTS.

CATCHWORDS: TORRENS SYSTEM - CAVEAT - APPLICATION FOR REMOVAL - Resp claims equitable interest in land - Wh wider view of a caveatable interest under s. 98 can apply given expanded view of what can constitute an equitable interest in land - Wh serious questions to be tried - Wh status quo ought be maintained.

Counsel: Mr J. Curran for the appellant.

Ms D. Skennar for the respondent.

Solicitors: Cranston McEachern & Co. for the appellant.
Walker Pender for the respondent.

Hearing date: 18.06.93

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(Appellant)

JOINT REASONS FOR JUDGMENT - THE CHIEF JUSTICE AND DEMACK J.

Judgment delivered 12.07.93

This is an appeal from the decision of the chamber judge dismissing an application for the removal of a caveat.

Robert John Hallett died at Redbank Plains on 4 May, 1973.

By his last will and testament, he appointed his brother, Thomas Rodger Hallett, and his brother-in-law, Allan Watson, as his executors and trustees ("the Trustees"). He made pecuniary bequests to his brother Thomas and to two women, he bequeathed his livestock and machinery to Thomas and his furniture and effects to his sisters Hazel Basden, Jessie Gray, Evelyn Davies and Edith Henderson. He left the residue of his estate to his brother, sisters and one of the pecuniary legatees.

Part of the deceased's estate comprised three parcels of land in Redbank Plains, including a 42 acre block of land ("Portion 69"). The deceased had been the registered proprietor of Portion 69 since 1939. The Trustees became registered proprietors of Portion 69 by transmission by death on 9 October, 1974. On 23 July, 1973, the Trustees entered into a contract to sell the three parcels, "excluding an area of 2 acres on the north western corner of Portion 69 with a frontage of Old School Road," to Booker Industries Pty Limited. The contract was subject to the Trustees becoming registered. The purchaser agreed "to carry out at his own expense all necessary survey work regarding excise of those pieces of land which the vendors wish to retain ... an area of approximately 2 acres on the north western corner of Portion 69," (special condition 9). Six acres in another block, Portion 66, were also retained by the Trustees.

Booker Industries Pty Limited became the registered proprietor of Portion 69 on 7 November, 1974 and nothing was noted on the register in respect of the two acres on the north

western corner. On 5 March, 1981 Lombank Properties Pty Limited ("Lombank") became the registered proprietor of Portion 69.

In 1983 Lombank invited tenders for the purchase of a number of parcels of land, including the three blocks sold by the Trustees. The three blocks were called the Westmeadows Estate. The tenders had to be lodged by 26 August, 1983. The tender documents included the following cl. 16:-

> "The purchaser acknowledges that in the case of the lands described as 'Westmeadows Estate' there is a certain reservation of land to be excised and transferred to the original vendors, Thomas Roger Hallett and Allan Watson pursuant to the terms of a Contract of Sale dated 3rd July, 1973 such reservation being an area of approximately two (2) acres on the north western corner of Portion 69 such proposed excision appears on the copy plan herewith and all necessary survey work, subdivisional work and costs of transfer shall be at the expense of the Purchaser hereunder."

The schedules, which contained the description of the lands offered for sale, included in reference to Portion 69, in a column headed "Encumbrances, Liens and Interests" the following:

> "Approx. 2 acres to be excised as detailed in Clause 16 of conditions."

The tender documents also included a survey map on which the north west corner of Portion 69 was hatched. There are roads drawn on the plan along the northern and western boundaries of Portion 69. Redbank Plains School is shown to be to the north of Portion 69, and on the road running along the western boundary. The hatched area shows a shorter boundary to the western frontage than to the northern frontage.

On 26 August, 1983, Harburg Holdings Pty Ltd ("the Company") submitted a tender for Westmeadows Estate of $91,200. The schedules to the tender documents show that Portion 69 was included in Westmeadows Estate. The other two parcels in the Westmeadows Estate were the other two blocks which the Trustees had sold to Booker Industries, less a portion excised from Portion 66. This also appears from the schedules and a survey map.

The tender by the Company was given under its common seal and Peter Victor Harburg was one of the authenticating signatories.

On 23 September, 1983, Lombank executed a memorandum of transfer of the Westmeadows Estate land, including Portion 69, to Mr Harburg. The document states:

> "In consideration of the sum of ninety-one Thousand Two Hundred Dollars ($91,200) paid to it by Peter Victor Harburg the receipt of which sum is hereby acknowledged (Lombank) do hereby transfer to the said Peter Victor Harburg all its estate and interest in the said pieces of land."

On 20 December, 1983, Mr Harburg became the registered proprietor of Portion 69. Again nothing was noted on the register about the two acres on the north western corner, although the tender documents had referred to this in cl. 16.

The reason for the reservation in the sale of Booker Industries and for the condition of excision stated in cl. 16 of the Lombank documents of 1983 is readily explained. In or about 1978 it appears that Mrs Henderson entered into oral agreements with the Trustees and her co-beneficiaries to purchase two acres of Portion 69 for $4,000. Variously worded receipts were given,

dated between May and July, 1978 and generally referring to two acres in Hogan's paddock. The name of the paddock apparently derives from the fact that the original Deed of Grant of Portion 69 dated 1 December, 1863 was to John Hogan.

In or about 1980, Mrs Henderson advised Mr Booker, the principal of Booker Industries Pty Limited, in writing of her interest in the two acre block, that company having become the registered owner of Portion 69 in 1974. She wrote in the following terms:

> "I have paid $4000 for the 2 acre block belonging to the estate of R.J. Hallett, which, according to his will I was to purchase and this money was to be paid to all beneficiaries. All beneficiaries have been paid their share and I am holding receipts from each of them. When the deed is forthcoming, I wish it to be made out to my daughter Maxine Cheryl Henderson, 252 Cavendish Road, Coorparoo, as a gift from me.
>
> I believe you agreed that the long side of this 2 acre block would face the side road with the short side facing School Road. This was agreed with my brother as this is the only way one could get good building blocks and this is the purpose for which it was acquired."

As a result of her conversations with Mr Booker, Mrs Henderson believed the two acres could not be excised at that time because the subdivision which would be involved fell outside the guidelines laid down by the Moreton Shire Council. When Lombank sold Portion 69, Mrs Henderson was aware of cl. 16 of the tender documents and believed her interests were protected.

Until she heard rumours that Portion 69 was to be sold, Mrs Henderson continued to believe the two acres could not be excised. She then approached Mr Harburg and asked him to honour

the agreement to excise the two acres. This was in or about April, 1992. Mr Harburg says this was the first time he was aware of any claim, and that before he became aware of Mrs Henderson's claim he had entered into a contract to sell Portion 69 for $493,500. The contract is dated 17 March, 1992, and is conditional upon approval being obtained from the Moreton Shire Council to subdivide the land into residential allotments.

Since Mrs Henderson was unable to obtain appropriate assurances she, on 30 March, 1993, lodged a caveat in respect of Portion 69, claiming the following interest:-

> "As beneficiary under the will of ROBERT JOHN HALLETT deceased and an estate in fee simple as purchaser of part of the land being an area of two acres on the north western corner or alternatively an equitable interest in the said two acres."
>
> The grounds of the claim were said to be:-
>
> "As one of the beneficiaries being entitled to an interest in the land pursuant to the will of ROBERT JOHN HALLETT deceased.
>
> And pursuant to a contract of sale dated the 23rd July, 1973, whereby the land was sold to BOOKER INDUSTRIES PTY LIMITED excluding an area of 2 acres on the north western corner which part of the land was to be excised by BOOKER INDUSTRIES PTY LIMITED.
>
> And pursuant to oral contracts entered into between EDITH HENDERSON as purchaser and the other beneficiaries entitled to an interest in the land pursuant to the will of ROBERT JOHN HALLETT deceased as vendors whereby EDITH HENDERSON purchased the whole of the estate in fee simple of the said 2 acres.
>
> And further pursuant to a written contract, the date of which is not known between LOMBANK PROPERTIES PTY LIMITED and PETER VICTOR HARBURG a condition of which contract was that the said 2 acres was to be excised.
>
> Further, or in the alternative, as a result of the aforesaid PETER VICTOR HARBURG holds the said two

acres on trust for EDITH HENDERSON and as against EDITH HENDERSON is a volunteer."

Mr Harburg sought to have the caveat removed. The contract for sale is now unconditional and due to be completed on 17 July, 1993.

The chamber judge found there are serious issues to be tried and that the balance of convenience favoured the maintenance of the status quo. On the condition that Mrs Henderson commenced proceedings to establish the interest claimed on or before 10 June, 1993, he dismissed the application. A writ has been filed and a statement of claim has been delivered.

In argument before us, the appellant raised the following issues:

(1) It was said that any agreement for the purchase of Portion 69 to the extent that it incorporated the tender conditions, was an agreement under which Harburg Holdings Pty Ltd rather than Harburg personally was the purchaser. Accordingly, it was said that there was no evidence that the appellant, Harburg, agreed to be bound by cl. 16 of the tender conditions.

(2) It was said that the evidence pointed to a situation where the appellant took his title by conveyance as a result of direction by or as nominee of Harburg Holdings Pty Ltd.

(3) The assertion then was that the appellant, having become registered, had acquired title

which was indefeasible because mere knowledge of the circumstances of the respondent's prior claim or interest would not have involved the appellant in any fraud.

(4) In any case, it was submitted that the respondent had no caveatable interest because statutory provisions in place made her claim subject to the approval of the relevant local authority and it was claimed that such approval would not be given and that even if approval might be forthcoming it had not yet been granted and that no caveatable interest could exist in advance of that event.

(5) Again, it was said that the caveat was too wide since it claimed an interest in the whole of Portion 69 and not just the two acres.

(6) Lastly, it was submitted that the respondent's delay should be held to defeat her claim.

Because of these various matters it was submitted that the respondent had not shown a serious issue to be tried and that the balance of convenience was against allowing her caveat to remain.

It is convenient to take the issues referred to in paragraphs (1) to (3) together.

In the argument advanced on the appellant's behalf reference was made to Re Davies (1989) 1 Qd.R. 48 esp. at 53 and reliance was placed on the nature of a transfer by direction of

a purchaser under a contract. The authorities there referred to show that such an arrangement does not involve the transferee in a contractual relationship with the vendor. However, in the present case, the evidence available on the interlocutory hearing distinctly leaves open the possibility that the appellant did enter into a contractual relationship with the vendor, Lombank. No written contract, either with Harburg Holdings Pty Ltd or the appellant, can be found, but on what we were informed the appellant seems to have arranged the payment of the amount of the purchase price directly to the vendor out of his own funds.

The evidence also shows that the appellant himself executed on behalf of the Company a Form of Tender document which acknowledged that if the offer contained in the tender were proceeded with, the purchase would be completed in accordance with the conditions of the tender. Clause 16 of that document has been quoted above.

Although the appellant executed the acknowledgment in the capacity of director, a case is raised for investigation of the extent to which, for relevant purposes, he should be regarded as sufficiently personally aware of the claim for the two acres and the basis on which the larger parcel, including the two acres, was being offered for sale. There would then have to be considered the extent to which, under the Real Property Act provisions, the exception to the general indefeasibility rule in the case of fraud would have application, that is if the appellant were to insist on retaining title notwithstanding

awareness of a prior right and claim. It would also have to be considered whether the appellant took a transfer of Portion 69 in circumstances which directly raised a binding equity against him in favour of the respondent or at least the Trustees from whom he took his transfer, either because he took as a party directly negotiating the transfer to himself or even, as it may be, as one who took by direction of the Company. An equitable interest which is created by a person who later becomes registered with an unencumbered title can continue to bind notwithstanding the fact of registration: see Bahr v. Nicolay (No. 2) (1987) 164 C.L.R. 604 at 612-3, Logue v. Shoalhaven Shire Council (1979) N.S.W.L.R. 537 at 563 and Ryan and Ors v. Brain and Anor. and Current Finance Pty Ltd Full Court No. 640 of 1991 judgment 30.3.92 unreported.

The issues referred to in paragraph (4) above raise the question whether it could be said that the respondent clearly had no current interest because she had no more than a conditional interest in the land as a result of the operation of relevant provisions of the Local Government Act bringing the consequence that her interest could not arise until local government approval of subdivision was granted. It should be mentioned that the provision on which the appellant relied to raise the condition militating against the respondent's current interest was s. 34 of the Local Government Act 1936 which provided, in effect, that agreements for the sale of portion of an existing parcel, that is for subdivision of an area not yet subdivided, were to be deemed to be subject to the approval of

the local authority being obtained. However, s. 34 was repealed by the Local Government (Planning and Environment) Act 1990 (see s. 8.8 and the First Schedule).

The appellant referred to certain authorities on the assumption that s. 34 of the 1936 Act applied to support the proposition that the respondent in the circumstances of this case could have no caveatable interest and nothing which could be styled an equitable interest: these cases included Re Bosca Land Pty Ltd's Caveat (1976) Qd.R. 119 and Re Dimbury Pty Ltd's Caveat (1986) 2 Qd.R. 348 and the earlier cases of Brown v. Heffer (1967) 116 C.L.R. 344 and McWilliam v. McWilliams Wines Pty Ltd (1964) 114 C.L.R. 656.

More recently, there has been some doubt about the authority of cases such as Bosca Land and Dimbury and a different, less restrictive view has been taken of the earlier authorities on which they were founded. There is now weighty opinion in the High Court suggesting that an equitable interest in land can exist when a claimant is entitled to something less than a full decree of specific performance ordering conveyance, that is it can exist provided that a claimant is entitled to equitable relief by way of injunction or other remedy to maintain and protect his interest. Relevant recent High Court decisions, including Chan v. Cresdon Pty Ltd (1989) 168 C.L.R. 242 and Stern v. McArthur (1988) 165 C.L.R. 498 as well as other cases, are helpfully surveyed by Brownie J. in Jessica Holdings Pty Ltd v. Anglican Property Trust Diocese of Sydney (1992) 27 N.S.W.L.R. 140 at 144-152.

With an expanded view of what can constitute an equitable interest in land, a correspondingly wider view of a caveatable interest under s. 98 of the Real Property Act can apply. There is, on this point, a substantial question for investigation and on this aspect the learned primary judge was justified in taking the view that it should not be summarily determined against the respondent at the stage of application to remove a caveat. Further, when it emerged in the course of the argument on appeal that s. 34 of the 1936 Local Government Act had been repealed, the appellant did not advance any alternative argument whether based on further statutory provisions or otherwise that might compensate for his loss of the benefit of that section. During the hearing it was made to appear that applications to subdivide Portion 69 and surrounding parcels will now be entertained by the local authority and a contract for resale of the land which has been entered into by the appellant is said to have a greatly increased value because of this potentiality.

As to the issues raised in paragraph (5) we do not think that the caveat should be defeated on the basis that in claiming an interest in the whole of Portion 69 it is too wide. If the parties had agreed or evidence had been presented which at this stage established that the caveat should be amended to refer to a smaller parcel of two acres precisely identified, that would be one thing, but the two acre area has not yet been subdivided nor does it have its boundaries exactly established by any decision of the Court on firm evidence agreed between the parties. The Court therefore should not hold that the caveat is

too wide and attempt to order its restriction or amendment in some fashion. Until precision is established it seems correct to accept at the caveat stage that the respondent has an equitable interest sufficiently applicable to all of Portion 69.

Finally, the judge below was not obliged to hold that the caveat should be defeated by the respondent's delay in taking steps to enforce her claim over an extended period of years. The respondent has never withdrawn her claim, although it would appear that for a period she accepted that it was not practicable to enforce her right to excision, this being because of what she understood to be the local authority's attitude. On the contrary, steps were taken to make the present registered proprietor aware of her claim for excision before he or the company with which he was associated purchased the land and the respondent was, in the circumstances, entitled to feel assured that her claim would be honoured when it was possible to arrange it. When she became aware that the appellant was proposing to act in a way contrary to her claim, she took due steps to insist upon her right and, it not being acknowledged, to enforce her claim.

The conclusion then should be that the judge below was entitled to decide that not only were there serious questions to be tried, but also that the balance of convenience favoured maintaining the caveat.

During the argument on appeal, at the suggestion of the Court, the respondent, by her solicitors, offered an undertaking to pay damages which may be sustained by reason of the caveat

and an appropriate form of undertaking has now been filed. Notwithstanding the submission of the appellant as to the inadequacy of this undertaking, the Court should act upon it in the course of coming to its conclusion that the appeal should be dismissed.

The appeal is dismissed with costs.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 104 of 1993

Brisbane

The Chief Justice
Mr Justice Davies
Mr Justice Demack

[Re Henderson]

IN THE MATTER of the Real Property Act 1861

- and -

IN THE MATTER of Caveat No. L434013B by EDITH HENDERSON

Ex Parte PETER VICTOR HARBURG

REASONS FOR JUDGMENT - DAVIES J.A.

Judgment delivered 12.07.93

The appellant is the registered proprietor of land which includes Portion 69 in the County of Stanley Parish of Bundamba, being land at Redbank Plains. The respondent, whose caveat the appellant seeks to have removed, claims an equitable interest in Portion 69.

The respondent's claim arises as follows. Until his death on 4 May 1973 Robert John Hallett was the registered proprietor of,

inter alia, Portion 69. The respondent is a sister of the deceased and was a beneficiary under his will. Some time after his death she says that she entered into an oral agreement with the executors and trustees of his will and her co-beneficiaries to purchase, for $4,000 which she has since paid, a two acre parcel of land in the northwest corner of Portion 69, rectangular in shape, the longer side being along the western boundary of Portion 69. No question of identification of that two acre parcel arises before us.

By written contract of 23 July 1973 the executors and trustees sold Portion 69 to Booker Industries Pty Limited. By that contract Booker Industries agreed to excise for retention by the vendors two parcels within Portion 69, one of which was the two acre parcel referred to above.

By letter in about 1980 the respondent advised Mr Booker, the principal of Booker Industries, of her interest in the two acre parcel and also during the period from the time when she acquired it until about 1983 she had discussions both with Mr Booker and with a representative of Lombard Australia Limited, the mortgagee of Portion 69, concerning her interest. As a result of these conversations, she formed the belief that the two acre parcel could not be excised as it fell outside the guidelines laid down by Moreton Shire Council within whose shire the land was situated.

Booker Industries changed its name to Lombank Properties Pty Ltd in 1983. In the same year that company offered land, which included Portion 69, for sale by tender. Clause 16 of the conditions of tender contained an acknowledgment by the purchaser that the two acre parcel was to be excised and transferred to the original vendors, the above executors and trustees, and that the cost of doing so was to be at the expense of the purchaser.

Harburg Holdings Pty Ltd, a company associated with the appellant, submitted a form of tender to purchase the land and the common seal of that company was affixed over the signature of the appellant. In fact, the land was acquired by the appellant, not Harburg Holdings. The appellant says that he cannot recall the exact circumstances in which this occurred, but denies any obligation to the respondent and any knowledge of cl. 16 of the conditions of tender. He became registered proprietor of the land in December 1983.

The respondent, apparently assuming that the land had passed subject to cl. 16 of the conditions of tender and that Council by-laws still prevented subdivision to allow excision of the two acre parcel, did nothing further until she heard rumours that the appellant intended to sell the land. She says that she asked him whether he would honour the agreement to excise

the two acres and he indicated that first he would have to confirm his signature on the document, presumably the tender document. When no positive acknowledgment was forthcoming from the appellant, the respondent lodged the subject caveat. The conversation which I have related is disputed by the appellant but of course no such dispute can be resolved in these proceedings.

Portion 69 is now apparently valuable subdivisional land which the appellant, by contract dated 17 March 1992, has agreed to sell for $493,500. That contract is due for settlement on the 17th of this month.

The appeal was conducted by both parties, correctly in my view, on the assumption that the two questions which had to be determined were first whether there was a serious question to be determined as to the respondent's interest; and secondly, if there was, whether the balance of convenience favoured retention or removal of the caveat. See Heritage Properties (No. 3) Pty Ltd & anor. v. Coles Supermarkets Australia Pty Ltd (Court of Appeal, unreported, 24 March 1993); Burman & anor. v. AGC (Advances) Ltd (Court of Appeal, unreported, 9 July 1993).

The appellant's main argument before us was that he was the registered proprietor of the land, that he had become registered proprietor without fraud, and that consequently his

title was indefeasible: Real Property Act 1861 ss. 44, 109; Real Property Act 1877 s. 51. This argument may, in the end, turn out to be correct; but it will need a good deal more exploration of the facts before the question can be resolved.

It is not at all clear how the appellant came to acquire Portion 69. It is clear enough that he acquired it by transfer from Lombank Properties by memorandum of transfer dated 23 September 1985 and that he paid Lombank Properties $91,200 in consideration of the transfer. But that leaves open the possibility that the appellant purchased it directly from Lombank Properties or, as he contended before us, that he purchased it from Harburg Holdings but received a transfer by direction from Lombank Properties. Although the statement in the memorandum of transfer that it was made in consideration of the sum of $91,200 paid to Lombank Properties by the appellant lends support to the former of these possibilities, the latter nevertheless remains open. The former of these possibilities is further supported by a letter from Lombank Properties' solicitor which says that their client's interest in the property was purchased by Mr P.V. Harburg.

Even if the appellant cannot recall the circumstances in which he came to acquire the land, it may well be that others can; for example officers or former officers of Lombank Properties or of Harburg Holdings. On the available evidence, it appears

more likely than not that he purchased the property direct from Lombank Properties. If that is correct, and if he did so on the terms of the conditions of tender as also seems likely, he would be contractually bound to Lombank Properties to recognise the respondent's interest. In that event, the respondent would be entitled, as she seeks in the action which she has commenced, to a declaration that the appellant holds the two acre parcel in trust for her and an order for excision and transfer of it to her: Bahr v. Nicolay (No. 2) (1987) 164 C.L.R. 604. In my view, that is a serious question to be tried.

But even if, as the appellant contended before us, he acquired the land by direction from Harburg Holdings, it is possible that his purpose in doing so was to avoid the binding effect upon Harburg Holdings of cl. 16 of the conditions of tender. If that were so, it would be fraud in the sense in which that term is used in the indefeasibility provisions of Torrens title legislation: Bahr at 614.

Two other arguments were advanced by the appellant, either of which, it was submitted, would defeat the respondent's claim to a caveatable interest.

The first of these concerned the absence of subdivisional approval from the local authority which would enable the two acre parcel to be excised. Two submissions were made with

respect to this. The first was that the available evidence indicated that local authority approval was not possible. There is really no evidence either way about this, though there was some evidence that, as long ago as 1983, the respondent formed the belief, in respect of something which she had been told, that the Moreton Shire Council would not approve the subdivision necessary to excise the two acre parcel. On the other hand, the contract which the respondent made on 17 March 1992 and which is shortly due for settlement was made conditional upon approval being obtained from the Moreton Shire Council to subdivide the land into residential allotments within six months of its date. In the absence of any evidence from the appellant upon this, it may be inferred that that approval has been granted. At the very least, there is a serious question to be tried. There is therefore no substance in this contention.

Alternatively, the appellant submitted that the subdivision necessary to excise the two acre parcel was subject to local authority approval and that, until that approval was obtained, the respondent did not have a caveatable interest. He relied on Re Dimbury Pty Ltd's Caveat [1986] 2 Qd.R. 348 and the cases there referred to.

At the time the respondent's alleged contract to purchase the two acre parcel must have been made, if indeed it was, s.

34(1) of the Local Government Act 1936 provided that land should not be subdivided except in accordance with that Act and in sub-s.(19) provided that nothing in that section should be deemed to render any agreement to sell illegal or void by reason merely that it was entered into before an application for subdivision had been approved by the local authority but that the agreement should be deemed to be made subject to such approval being obtained. There is no doubt, in my view, that the excision of the two acre parcel constituted a subdivision and consequently that, by reason of the above provisions, the respondent's contract to purchase was subject to subdivisional approval being obtained.

Section 34 was repealed by the Local Government (Planning and Environment) Act 1990 and replaced by Part 5 of that Act. Whilst Part 5 does not contain a provision either in the form of sub-s. (1) or of sub-s.(19) of s. 34, it has the same effect, in my view, namely that any contract for sale of a parcel of land which has not been subdivided must, because local authority approval is required, be subject to a condition that that is obtained. Dimbury, Re Bosca Land Pty Ltd's Caveat [1976] 2 Qd.R. 119 and Re Premier Freehold Pty Ltd's Caveat [1981] Qd.R. 547, hold that in such a case a purchaser does not have a sufficient interest to sustain a caveat. If those cases are correctly decided, the appellant must succeed. In my respectful opinion, they are not. The

question is whether a purchaser under a conditional contract for sale of land, the condition not being one fulfilment of which is promised by the vendor, is a person "claiming an estate or interest" in the land the subject of the contract within the meaning of s. 98 of the Real Property Act 1861.

It is true that where the occurrence of an event, upon which the obligations to complete a contract are contingent, is not promised by a vendor, a court will not, at the suit of the purchaser, decree completion by the vendor of the contract absolutely: Perri v. Coolangatta Investments Pty Ltd (1982) 149 C.L.R. 537 at 566. Still less could it be said that such a purchaser is an equitable owner of the land whether or not she has paid the purchase price. However, before fulfilment of that condition, such a purchaser has an interest capable of protection in equity against forfeiture. The difference between that interest and that of a purchaser who has paid the purchase price under an unconditional contract is one only of degree: Legione v. Hateley (1983) 152 C.L.R. 406 at 446, 456; KLDE Pty Ltd v. Commissioner of Stamp Duties (Q) (1984) 155 C.L.R. 288 at 300; Stern v. Macarthur (1988) 165 C.L.R. 489 at 522-3; Chan v. Cresdon Pty Ltd (1989) 168 C.L.R. 242 at 252-3. The words of s. 98 are wide enough to encompass the interest of a purchaser under such a conditional contract and, in my view, should be so construed: Kuper v. Keywest Constructions Pty Ltd (1990) 3 W.A.R. 419; Jessica Holdings Pty Ltd v.

Anglican Property Trust (1992) 27 N.S.W.L.R. 140; Lohregger v. Francis Broady Investment Corporation Pty Ltd (Unreported, Supreme Court of Western Australia, Scott J., 19 November 1992); Locke v. Yogoat Pty Ltd (Unreported, Supreme Court of New South Wales, Hodgson J., 24 November 1992); see also CM Group Pty Ltd's Caveat [1986] 1 Qd.R. 381.

The final reason why the appellant submitted that the caveat was unsustainable was that it was in respect of the whole of Portion 69, whereas, the appellant said, the respondent's equitable interest, if any, was only in respect of the two acre parcel. In this respect, the appellant relied on the decision of Douglas J. in Re Powell's Caveat [1966] Q.W.N. 11. To similar effect are the decisions in In re Paul (1902) 19 W.N.(N.S.W.) 114 and Roclin Investments Pty Ltd. v. Makris (1974) 7 S.A.S.R. 485, and obiter comments in Re Oil Tool Sales Pty Ltd [1966] Q.W.N. 11 and Elliott v. Blanshard (1970) 17 F.L.R. 7 at 9. These authorities suggest that a caveat is bad if it prohibits dealings with the whole of a parcel of land when the caveator is claiming an interest in part only of that land, even though the particular portion of the land being claimed cannot be precisely identified because it has not yet been excised from the larger parcel by subdivision or some other method.

With respect, I cannot agree with the reasoning in these

cases. In cases such as the present, equitable relief would be available, either in the form of an injunction or a limited decree for specific performance, to ensure that the registered proprietor deals with the larger parcel of land only in a manner consistent with subdivisional approval being obtained for the excision of the claimed portion. Any such order for relief would be expressed to extend to the registered proprietor's dealings with the whole of that larger parcel. In this respect, I agree with the views expressed by Hodgson J. in Locke (at 9). See also Kuper at 427-432. In my opinion, therefore, equity recognises the respondent's interest as extending over the whole of Portion 69 until subdivisional approval is obtained. Consequently I think that the respondent has a caveatable interest in the whole of Portion 69.

The appellant then submitted that for a number of reasons the balance of convenience favoured removal of the caveat. The first of these was delay in lodging the caveat.

It is true that, notwithstanding that the respondent claims to have acquired her interest some time between 1973 and 1978, she did not lodge a caveat to protect it until 30 March this year. However, she knew that Booker Industries had agreed to excise for retention by the vendors the two acre parcel and that that company was aware of her interest in it. And she knew that when that company, after its change of name, sold

Portion 69, one of the terms upon which it offered the property for sale was that the purchaser acknowledged an obligation to excise the two acre parcel and transfer it to the executors and trustees. She naturally assumed that the appellant was bound by that contractual obligation. It is understandable and, I think, excusable that in such case she did not seek to protect her interest by caveat until she heard that Portion 69 was to be sold by the appellant and failed to receive an acknowledgment from him that her interest would be protected.

Secondly, the appellant said that the respondent's claim for only two acres was preventing a sale to an innocent third party of a very much larger parcel, approximately 40 acres, comprising the whole of Portion 69, thereby exposing the appellant to the risk of a substantial claim for damages. An obvious answer to this contention is that it assumes absence of fraud on the part of the appellant, as to which I have said there is a serious question to be tried.

Finally, on this aspect of the case the appellant submitted that the Court should infer, from the fact that Portion 69 was unencumbered, that he could pay any compensation which the Court might order and that this was an additional factor in his favour. However, the material suggests that the respondent did not want the two acre parcel for financial gain, but for her own daughter.

In my view, the balance of convenience favours allowing the caveat to remain. The respondent, by her solicitor, albeit at the suggestion of this Court, has offered an undertaking as to damages which, notwithstanding the appellant's submission, unsupported by evidence, as to its adequacy, I think this Court should accept. I would therefore, on the respondent's undertaking as to damages, dismiss the appeal with costs.