

Court warns against lodging e-caveats without reasonable cause

BY BENJAMIN ADAMS AND KYE TRAN-TSAI



Benjamin Adams is Senior Associate at Baker McKenzie. **Kye Tran-Tsai** is principal of Kye Tran, Lawyer.

PEXA is an electronic lodgment network ('ELN') used by subscribers to that network to prepare, settle and lodge land transactions online. From 1 July 2018, in NSW all stand-alone caveats lodged by legal practitioners must be lodged using an ELN, subject to certain exemptions and waivers.

The recent decision of *Guirgis v JEA Developments Pty Ltd* [2019] NSWSC 164 ('*Guirgis*') is a key reminder to all subscribers lodging a caveat in an ELN that a caveat may only be lodged in respect of a 'caveatable interest', being a 'proprietary' interest at law or in equity, in respect of the land pursuant to section 74F of the *Real Property Act 1900* ('*RPA*').

It is also authority for the proposition that there is no lesser obligation on a practitioner to advise their client when lodging a caveat through an ELN instead of on paper.

Background facts

Mr and Mrs Guirgis were involved in a matrimonial dispute. Mr Guirgis was due to settle the sale of a property on 25 February 2019. On 11 February 2019, a conveyancer acting for Mrs Guirgis's corporate alter-ego JEA Developments Pty Ltd ('*JEA*') lodged a caveat on PEXA in respect of Mr Guirgis's property.

The estate or interest claimed in the caveat was a 'charge' by virtue of an '[a]greement' between the defendant and the plaintiff arising due to an '[o]utstanding loan'. Mr Guirgis denied entering into a loan agreement or other arrangement granting a caveatable interest in the land to JEA (or Mrs Guirgis) and made an urgent application for orders under section 74MA and 74P of the *RPA* for the removal of the caveat and for compensation.

Decision

The Supreme Court held in favour of Mr Guirgis. Justice Kunc ordered that the caveat be removed on the basis that JEA had no caveatable interest in the land and JEA was ordered to pay Mr Guirgis' costs. The question of compensation was stood over to a later date.

Snapshot

- Legal practitioners play an important role in ensuring that unmeritorious caveats are not lodged.
- In a recent case, a conveyancer failed to advise and make inquiries to determine whether her client had a good and valid claim in the subject land, thereby causing her to make certifications the Court found to be untrue and misleading.
- Practitioners must understand the significance of making certifications under the Participation Rules. There is no lesser obligation on the practitioner to advise their client when lodging a caveat electronically than on paper.

Justice Kunc found that, in lodging the caveat on behalf of JEA, the conveyancer failed to make inquiries to ascertain whether her client had a claim in the land sufficient to support the lodgment of a caveat. At the time of electronically signing and lodging a caveat through PEXA, subscribers are required to certify to the 'best of their knowledge' that their client has a claim to a 'caveatable interest' in the land.

Evidence given during the hearing indicated that when Mrs Guirgis instructed the conveyancer to lodge the caveat there was no written loan agreement between Mr Guirgis and the defendant. Indeed, Mrs Guirgis acknowledged that she caused the caveat to be lodged as a 'tactic for the purposes of negotiation in the lead up to a Family Court hearing' (at [16]). As to the caveat form as electronically lodged, his Honour found it deficient in the following respects:

ically lodged, his Honour found it deficient in the following respects:

- The facts on which the claim was based, whether it was oral or in writing, and the date of the agreement were not stated. There was also no statement of the amount of the debt or its nature, as required by the *Real Property Regulation 2014* ('*Regulation*').
- For the conveyancer to be able to state 'to the best of their knowledge' that the caveator had a good and valid claim to the estate or interest requires more than a casual or incomplete inquiry. In these circumstances there was a complete failure to take proper steps to ascertain whether the caveator had a good and valid claim, and therefore, the conveyancer was unable to state that 'to the best of [her] knowledge'.
- The certification that the conveyancer had taken reasonable steps to ensure the caveat was 'correct and compliant with relevant legislation and any Prescribed Requirement' could not have been correct on the evidence before the Court.

- (iv) The conveyancer certified that evidence was retained to support the caveat. This was misleading because the conveyancer had not retained anything.

The Court commented that it was the expectation of the Court and community that the person making the various representations and certifications in an electronic caveat has the requisite degree of knowledge and has approached that task with appropriate diligence (at [42]). This is particularly relevant with respect to (i) above, which may have arisen as a consequence of PEXA's current electronic form not prompting the subscriber or user to enter all the information required by the Regulation when inserting text into a caveat form. For example, insertion of the date of interest claimed is 'optional'.

When considering the meaning of the words 'to the best of my knowledge', (with respect to (ii) above) his Honour adopted what was said by Austin J in *Australian Securities and Investments Commission v Vines* [2005] NSWSC 738, namely that such words, when used to formally sign-off on a document executed by a person, contain an implied representation for the matters certified. Where the signatory has not taken steps to satisfy themselves through inquiry of the matters certified, the document is misleading to that extent.

When transacting in an ELN, a number of certifications are required to be made by a subscriber when electronically signing and lodging a caveat and other registry instruments. Certifications for electronic transactions are set out in Schedule 3 of the NSW Participation Rules (currently Version 5), with Kunc J commenting in respect of a subscriber's certifications that the 'requirement to give the requisite representations and certifications operates to confer on them the role of a guardian at the gate' (at [39]). This makes the conveyancer's failure noted at (iii) above all the more critical, with the production of false certifications forming part of the register.

Justice Kunc found that the conveyancer lodged the caveat 'with either a reckless disregard for the conveyancer's obligations or the [c]onveyancer had failed to meet the standard of care to be expected of a reasonably competent conveyancer certifying a caveat'. Consequently, those failures lead to wasted costs and the Court's time. His Honour further stated that '[n]o reasonably competent conveyancer who had bothered to take proper instructions from Mrs Guirgis would have co-operated in the lodgement of the [c]aveat. Had the [c]onveyancer acted with the requisite skill and diligence, a great deal of money and the parties' and Court's time would almost certainly have been saved ... (at [34]).

The Court considered referring the conveyancer to NSW Fair Trading but did not as, after hearing from the conveyancer, Kunc J accepted that the conveyancer apologised and showed contrition.

Guidance for practitioners

The Court made clear that its decision to publish the case was to reinforce how seriously the Court views the obligations of those who advise and certify in respect of caveats. When confronted with the issue of whether to lodge a caveat, considerations can include:

- if the client has a 'caveatable interest'. This can be judged by making prudent inquiries to investigate the nature of the estate or interest claimed. The practitioner's inquiry should be aimed at determining:
 - a) whether the caveator has a proprietary interest in the land that can potentially withstand litigation; and
 - b) whether the interest is a purely contractual interest and, if so, whether the contract can be construed as giving rise to a proprietary interest in the land.
- the estate or interest claimed by the caveator should be accurately described in the caveat (see Schedule 3 of the Regulation), to the extent permitted by PEXA or the ELN used. Whilst a defect in the form of the caveat can be disregarded under section 74L of the *RPA*, poorly drafted caveats may be held to be defective - even if the claimed interest exists.
- the underlying agreement/s giving rise to the caveatable interest must be retained as evidence by the subscriber, stored safely and securely for seven years from the date of lodgment (Participation rule 6.6).
- if a caveat is advised to be 'high risk' and a client notwithstanding insists upon lodgment, a prudent practitioner may suggest to the client that it lodge the caveat personally, relying on Conveyancing Rules Waiver CR 5/2018 which allows an unrepresented caveator to lodge a caveat at NSW Land Registry Services without using an ELN.

Practitioners must be familiar with their legal and ethical obligations when advising on the prudence of lodging a caveat and when preparing a caveat in an ELN. A failure to do so may lead to serious financial consequences for the parties involved and personal liability for the practitioner, including a personal costs order, allegations of professional negligence, disciplinary proceedings and a compliance examination pursuant to section 33(b) of the *Electronic Conveyancing National Law*. **LSJ**