Conveyancing & Caveats
- By Gianna Di Stefano, PII Risk Manager and Grant Feary, Senior Solicitor, Law Claims

Lawyers engaged in conveyancing matters need to consider using caveats to protect their clients’ interests whenever there is a risk of another party seeking to enforce competing rights.

Conveyancing is an area of legal practice which carries a costly risk of a professional negligence claim. A matter handled by Law Claims demonstrates the need for conveyancing lawyers to consider using caveats whenever there is a risk of some other party seeking to enforce competing rights.

In this matter A was the owner of three adjoining parcels of land. Part of this land was leased to B, a company controlled by C. The lease was registered and was subject to a right of renewal. Crucially, the lease also contained a first right of refusal with respect to the sale and purchase of the land, i.e. before the land could be sold by A it had to be offered for sale to B.

A had some communications with C regarding a possible sale to B but was unable to reach acceptable terms. These discussions were not strictly in accordance with the right of first refusal. It was likely that A thought they were and A placed the property on the market. D, the owner of some adjoining land entered into a contract with A for the purchase of the whole of the land.

The practitioner was instructed by D to act in and about the settlement and was provided with a copy of the contract. In pursuance of this, the practitioner prepared a transfer document and commenced other steps to prepare for a settlement which was scheduled approximately a month later.

The practitioner then became aware that B had lodged caveats over the land claiming rights relating to the right of first refusal which it claimed had not been recognised. The practitioner was told of these caveats by his client who also told him that the client had spoken with A and, the practitioner was instructed to formally give notice to A to extend the time for settlement so as to enable A to “sort out” the caveats lodged by B.
The practitioner’s client appeared to be relaxed about the matter and was of the view that the caveats were unsupportable and that A would be able to have them removed so that settlement could proceed. The practitioner did not therefore consider advising D to put a caveat over the land claiming an interest as purchaser under the contracts.

Subsequently, without notice to the practitioner’s client or to the practitioner, A transferred two of the three parcels of land to B pursuant to the right of first refusal contained in B’s lease. Three days after this transfer, the land was transferred to another company associated with C.

The practitioner then received instructions to lodge a caveat on behalf of his client over the remaining land and to issue a notice to remedy breach of contract against A.

Attempts to negotiate a resolution between the practitioner’s client (D) and A failed. A then warned the caveat lodged by D and, proceedings were issued to extend the caveat. The practitioner was also joined to the proceedings.

An allegation of negligence was made against the practitioner to the effect that the practitioner failed to properly advise as to steps which might be taken to protect the interests of his client, namely to lodge a caveat. This would have prevented A from transferring some of the land which was the subject of the contract to B.

Even if the practitioner had not recommended lodging a caveat when first instructed, the practitioner should have at least discussed the possibility of lodging a caveat to protect the interest of his client as a purchaser when he became aware that a caveat had been lodged by B. Certainly, if a caveat had been lodged on behalf of the practitioner’s client, the transfer to B could not have taken place without some action to remove the caveat.

Ordinarily there is no general practice of lodging a caveat to protect a purchaser’s interest under an executory contract. However, the presence of the right of first refusal, coupled with the lodgement of a caveat asserting that right, after the date of the client’s contract, was enough to raise a risk of a competing interest in the land and, take the transaction outside the ordinary run of land purchases. In such a case, it is recommended that a practitioner give advice on the risk or possible risk of the availability of the caveat mechanism and perhaps to caveat.

This matter was extremely complex and strenuously litigated. Nonetheless, after some three years, a settlement was achieved between D and the practitioner. The claim was, however, costly and stressful for all parties.