UPDATES FROM THE REAL PROPERTY LIST

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Justice Elisabeth Peden

Introduction

1 The Real Property List (RPL) is the appropriate case management forum for matters relating to "property law" in NSW where some form of equitable relief is being sought by the parties. On average, 28 proceedings are filed per month in the RPL,[1] and the list has a clearance rate of 128%.

2 The matters that travel through the list are obviously fact specific and sometimes quite complex. However, there are a few common themes in the List. The purpose of today's presentation is to canvas two recent issues and provide an opportunity to discuss how they should be approached by practitioners who are confronted by them.

3 Specifically, today's presentation will discuss the following issues:

(1) The effect of misdescription of the estate or interest claimed by a caveator on the validity of a caveat;

(2) The validity of notices to complete; and

(3) Two discrete costs issues which have arisen recently in the Real Property List.

Misdescription of the estate or interest claimed by a caveator

4 One of the most common issues that arises in the RPL is how to deal with a caveat – specifically whether a caveat ought to remain on title or be removed.

[1] 2024 2nd Qtr EQ-Real Property List Analysis.

5 Relevant to today's discussion is the application a caveator can make under s 74K *Real Property Act* 1900 (NSW) (RPA) to extend the operation of a caveat. Such an application is brought in circumstances where a lapsing notice has been issued under ss 74I or 74J. Where the Court is satisfied that the caveator's claim "has or may have substance", the application to extend the caveat will be granted: s 74K(2) RPA.

6 It is now well settled that an application to extend the operation of a caveat is treated analogously to an interlocutory injunction: *Ralph Symonds Australia Pty Ltd v Pacific Property Investments Pty Ltd* (1988) 20 BPR 18,729 (Bryson J); *CJ Redman Construction Pty Ltd v Tarnap Pty Ltd* (2005) 12 BPR 23,395 (Brereton J). The applicant has to satisfy the Court that the interest claimed by the caveat raises a seriously arguable case that warrants the maintenance of the caveat, having regard to the balance of convenience. The test for whether a caveator's claim "has or may have" substance is therefore not merely that some interest in the land is claimed, but rather that the caveator has a seriously arguable case as to the claim to the particular interest specified in the dealing: *Comserv (NO 210) Pty Ltd v Robert Ristevski* [2022] NSWSC 821 at [63] (Williams J).

7 The first topic of today's presentation is how the Court approaches the test under s 74K(2) RPA in circumstances where a dealing appears defective because it either misdescribes or insufficiently describes the interest claimed by the caveator.

8 Prior to considering this question, it serves to first provide a summary of the relevant provisions of the RPA. Pursuant to s 74F(5)(b)(v) RPA, a caveat must:

> Specify…the prescribed particulars of the legal or equitable estate or interest…to which the caveator claims to be entitled.

9 The prescribed particulars are found in Schedule 2 of the Real Property Regulation 2019 (NSW). Schedule 2 sets out 10 prescribed particulars that

ought to be considered when lodging a caveat under s 74F RPA.[2] However, only the first two prescribed particulars apply to every caveat, and these are as follows:

> **1** Particulars of the nature of the estate or interest in land claimed by the caveator.
>
> **2** The facts on which the claim is founded, including (if appropriate) a statement as to the manner in which the estate or interest claimed is derived from the registered proprietor of the estate or interest or the primary or possessory applicant against which the caveat is to operate.

10 The remaining 8 will only apply if specific interests in the land are claimed by the caveator – for example where a caveator claims as mortgagee, a statement of the amount (if readily ascertainable) of the debt or other sum of money charged on the land should be specified: see Regulations Sch 2, s 4.

11 The Court can overlook strict compliance with the formal requirements set out under the RPA, regulations or conveyancing rules: s 74L RPA. However, the interaction between s 74L and defective or non-compliance with s 74F(5)(b)(v) has arisen in a series of recent cases in the Real Property List.

12 The Court's consideration of whether a caveator's claim "has or may have substance" for the purpose of an extension application under s 74K is largely determined by a caveator's compliance with the formal requirements of s 74F(5)(b)(v), and more specifically by accurately particularising the estate or interest claimed by the caveator, and the facts in support of that claim. This is because the first step to determining whether a claim "has or may have substance" is the caveat itself: *Sutherland v Vale* [2008] NSWSC 759 at [12] (Brereton J, as his Honour then was).

13 The importance of accurately describing the nature of the interest claimed by the caveat was explained by Brereton J in *Sutherland v Vale* as follows (at [12]):

> A central concept in the Act and the Regulation is that of "the nature of the estate or interest claimed" by the caveator: it is that claim that the Court must be satisfied has or may have substance before making an order. The

[2] Or s 74B, which deals with the lodgement of caveats against primary applications.

> characterisation and description of the nature of the estate, interest or right claimed by a caveator is more than a mere formal requirement of the provisions of the Act, but goes to the heart and substance of their operation, because without a description of the estate, interest or right claimed, neither the Registrar-General nor a person reading the caveat can know whether a dealing would adversely affect the estate claimed, nor can the Court tell whether the caveator's claim has or may have substance.

14 In that case, the applicant caveator described the interest claimed as an "equitable interest … by virtue of the facts…the caveator is the trustee of the bankrupt estate…".

15 His Honour explained that the interest described was insufficiently precise in that "theoretically, the caveator might have either of two types of interest in the subject land…the caveator might claim to be the beneficial owner of the land…pursuant to *Bankruptcy Act* s 120 or s 121; or the caveator might claim an interest, not as beneficial owner but as chargee pursuant to *Bankruptcy Act,* s 139ZR". On the basis that the caveator failed to define the nature of the interest claimed, his Honour could not be satisfied that the caveat "may have" substance and the application was dismissed.

16 *Sutherland v Vale* has subsequently been cited as authority for the proposition that a misdescription of the estate or interest claimed by a caveator is not a "formal requirement" that can be overlooked by operation of s 74L, and instead ought to be considered a matter of substance and amendment of the caveat cannot cure such a fatality: see eg *Ron Medick Properties Pty Limited v McGurk* [2010] NSWSC 552.

17 In *COMSERV (NO 210) PTY LTD v Roberts Ristevski* [2022] NSWSC 821, Williams J came to the same conclusion. In that case, the plaintiff/caveator described the interest claimed as "Estate in Fee Simple" arising by virtue of "Beneficial Interest in Trust". The details set out in support of the claim were inserted on the dealing form as follows:

> Beneficiary of a constructive trust by reason of the Caveator's contribution of $1,372,958.68 towards the construction costs and development of the Property pursuant to a joint venture agreement. It would be unconscionable for the registered proprietor to deny the Caveator a 50% beneficial interest.

18 The plaintiff, who was suing in its capacity as a corporate trustee of a family trust, in the substantive proceedings sought a declaration that the defendant held his interest in the property, or alternatively, the proceeds of sale, subject to a constructive trust in favour of the plaintiff that arose pursuant to an alleged joint venture or endeavour to develop the property. The caveat extension application was brought by notice of motion.

19 At the hearing, counsel conceded that the interest claimed on the dealing was wrongly described, because it was not an estate in fee simple. However, counsel submitted that there was an arguable case on the basis of the description, namely the beneficial interest under a constructive trust. Counsel further submitted that the defect in the estate claimed could be disregarded pursuant to s 74L. Following Brereton J's reasoning in *Sutherland v Vale,* her Honour concluded at [67] that "The misdescription of the estate or interest claimed by the plaintiff in the Property is a matter of substance and not a mere matter of form". Further, her Honour found that:

> If the plaintiffs' submission [sic] were accepted, it would follow that a person examining a caveat would need to form their own opinion about the nature of the estate or interest claimed by the caveator by undertaking their own analysis of the potential consequences at law or in equity of the facts specified in the caveat as the foundation of the claim to the estate or interest specified. That would be an absurd outcome in my opinion, bearing in mind that the person examining the caveat may not be the registered proprietor and may not have any knowledge of or involvement in the facts and circumstances specified in the caveat as giving rise to the estate or interest claimed by the caveator…

20 This can be distinguished from a later decision by Kunc J in *Brose v Slade* [2022] NSWSC 1785. In that case, the plaintiffs/caveators also described the interest claimed in two identical caveats on two separate properties as "Estate in Fee Simple" arising by virtue of "Beneficial Interest in Trust". Attached to the dealings were a document that set out the claim details, which included that "[the caveators] claim an equitable interest in the land in the nature of a constructive trust, arising from a common intention that the Caveators have an interest in the land owner by the registered proprietor…". The defendant submitted that the interest described was plainly wrong because

a constructive trust could not confer an estate in fee simple, and this misdescription was fatal to the validity of the caveats.

21 His Honour found that the facts in *Brose v Slade* differed from the facts in *Comserv* for three key reasons.

(1) First, in *Comserv* counsel for the plaintiff/caveator conceded that the dealing was defective. No such concession was made in *Brose v Slade* and instead his Honour concluded that the nature of the trust asserted, if found, could lead to an interest in "estate in fee simple" due to the specific facts which arose before him.

(2) Secondly, the attachment to the dealings in *Brose v Slade* was significantly more detailed than the explanation for the interest claimed in *Comserv* and, by reading the attachment, the interest claimed by the caveators was made clear.

(3) Finally, there was evidence before Kunc J which indicated that there were limited options available to describe the interest claimed in the drop-down menu on PEXA, and due to this defect in the e-conveyancing platform the caveator was limited in how it could describe its claimed interest when lodging the dealing via PEXA.

22 His Honour ultimately found that the misdescription of the interest claimed as "Estate in Fee Simple" could be disregarded under s 74L RPA because that section:

> Operates to cure the invalidity because the system of conveyance mandated by the "conveyancing rules" has produced a conveyancing system which does not operate in a manner that enables a caveator to comply with the requirements of cl 7 of the *Real Property Regulation 2019* (NSW) and / or schedule 2 of the *Real Property Regulation 2019; and*
>
> Using the language of s 74L, the plaintiffs were not able to "comply strictly" with the "conveyancing rules" and therefore the "court shall disregard" the "failure" to "comply strictly" with the "conveyancing rules".

23 For completeness, it should be noted that his Honour found that the first caveat ought to be extended on the grounds that there existed a serious question to be tried and that the balance of convenience fell in favour of such an order. With respect to the second caveat, his Honour ultimately concluded that the dealing disclosed no arguable claim against the company in the form it was provided. However, his Honour also found that the plaintiffs would likely bring a successful application under s 74O of the Act for leave to file a fresh caveat, in circumstances where relief in the primary proceedings was claimed against all of the land (which included both properties). His Honour granted leave to the plaintiffs under s 74O for a fresh caveat to be filed, on terms.

24 More recently in *ATF Group Pty Limited v Souzan Melek* [2023] NSWSC 333, the Court found that a caveat that described the interest claimed as “Estate in Fee Simple” by virtue of “Agreement dated 01/12/2020” with the supporting details referring to “Mortgage granted pursuant to commercial sublease”. In that case, counsel for the plaintiff submitted that the interest protected by the caveat was in fact an equitable mortgage. The Court considered the factual circumstances to be analogous to those in *Comserv* and found that the caveat was incurably deficient. Further, whilst no application to lodge a fresh caveat pursuant to s 74O was brought, Peden J found (at [49]) that:

> I would not have considered it appropriate in these circumstances to grant leave to the Plaintiff under section 74O to lodge a further caveat. Even if a fresh caveat claiming an interest under an equitable charge or mortgage based on the sub-lease dated 1/12/2020 could be said to be one purporting to be on the same facts, it would not be a caveat in respect of the same estate, interest or right as that claimed in the first caveat.

25 The application was dismissed.

26 Similarly, in *Geneville Constructions Pty Ltd v Odisho-Benjamin* [2024] NSWSC 290 the plaintiff/caveator sought to extend a caveat that claimed its interest as “fee simple”. The facts to support the interest were included in an attachment, which, in summary, set out that the plaintiff had a security interest in the subject property pursuant to a building contract.

27 His Honour drew counsel's attention to the decision in *ATF.* Counsel suggested that the facts were distinguishable, as the facts in support in the present case contained sufficient detail about the nature of the security interest, even if the interest claimed was misdescribed.

28 His Honour rejected this, and said (at [29]-[30]):

> …There can be no real dispute that the part of the caveat which sets out Geneville's claimed interest identifies a completely different interest from that which Geneville actually has.
>
> It is true that the supporting facts stated in Geneville's caveat contain more detail about the security interest than the ATF caveat did. But, in my view, that is not a relevant difference. The essential features of each caveat were relevantly the same. In each case the supporting facts alleged a security interest but the interest claimed was a completely different interest, namely an estate in fee simple.

29 His Honour refused the application to extend the caveat, and further noted (at [32]):

> In my view, this conclusion is reinforced by the structure of schedule 2, which provides for the identification firstly, of the interest claimed, and then, separately and consequentially, the circumstances or instruments by virtue of which it is claimed. It is somewhat ironical that counsel for Geneville relied upon the supporting facts containing all of the details required by regulation 4 for a caveat lodged by a chargee. The claimed interest of an estate in fee simple does not require the particulars identified in regulation 4 at all.

30 The application was dismissed, and no further applications to cure the defect by bringing a fresh caveat were made.

31 It Is clear from these recent authorities that the misdescription of the estate or interest claimed by a caveator is a matter of substance which may render a caveat defective. In circumstances where a caveator may in fact have an arguable claim, the fatality of such a misdescription may curtail the ability of the caveator to assert its rights, as s 74O RPA operates to prevent the lodgement of successive caveats that are brought in relation to the "same estate, interest or right and purporting to be based on the same facts as the first caveat" without leave of the Court.

The validity of notices to complete

32 If time is not of the essence for completion of a contract for sale of land, as it is not under the 2022 standard form contract for the sale and purchase of land in NSW, then it must be made of the essence before the contract can be terminated for a failure to complete. As is well-known, the usual way in which time is made of the essence is by issuing a notice to complete.

33 The function of notices to complete was usefully described by Powell J in *Taylor v Raglan Developments Pty Ltd* at 131 as follows:[3]

> The true function of a notice to complete, so it seems to me is, not substantive, ie to vary existing contractual rights and liabilities, but evidentiary, ie to enable the innocent party to demonstrate, by reference to the other party's non-compliance with the notice to complete, viewed in the light of the past history, that the other party has repudiated his obligations under the contract, thus entitling the innocent party to terminate it.

34 The right to issue a notice to complete is also preserved in clause 15 of the standard form contract for sale of land, which provides that the parties to the contract must complete by the date for completion and, if they do not, that a party can serve a notice to complete if that party is otherwise entitled to do so.

35 The apparent simplicity of the procedure described in clause 15 – and of the mechanism of the notice to complete more generally – is, however, deceptive. The law concerning the validity of notices to complete can be complex and it is essential to understand when advising clients in relation to contracts for the sale and purchase of land.

36 The onus of proving the validity of a notice to complete rests with the party asserting its validity, whether that is the plaintiff or the defendant: see *Sandpiper Kooragang Pty Ltd v Fortis Products Pty Ltd* at [64] (Darke J) and the authorities cited therein.[4]

[3] [1981] 2 NSWLR 117.
[4] [2020] NSWSC 1256.

37 There are, in turn, three primary requirements which must be met to establish a valid notice to:

(1) First, the recipient of the notice must be in breach of the contract, or guilty of unreasonable delay: *Neeta (Epping) Pty Ltd v Phillips* (1974) 131 CLR 286 at 299 (Barwick CJ and Jacobs J).

(2) Second, the giver of the notice must not be in breach, and must be ready, willing and able to complete at the time identified in the notice: *Carrapetta v Rado* (2012) [2012] NSWCA 202 (*Carrapetta v Rado*) at [27] (Barrett JA, Beazley and Hoeben JJA agreeing).

(3) Third, the notice to complete must stipulate a reasonable time for completion: *Sindel v Georgiou* (1984) 154 CLR 661 at 670 (Mason, Murphy, Wilson, Brennan and Dawson JJ).

First requirement – Recipient must be in breach

38 In most cases, the requirement that a purchaser must be in breach before a notice to complete can be issued will be readily satisfied, since the need to issue a notice to complete will arise only on failure by a party to complete by the date for completion.

39 However, issues can arise as to whether the requirement has been satisfied in circumstances where one of the parties has failed to perform an antecedent obligation under the contract. In such cases, a relevant question is whether the date for completion under the contract has been postponed as a result of the antecedent breach. This, in turn, is a question of construction.

40 An example is furnished by the decision of McLelland J in *Jillinda Pty Ltd v McCourt*.[5] The contract in that case required the vendor to provide the purchaser with a certificate, pursuant to the now repealed s 70(1)(c) *Strata Titles Act* 1973, “not less than seven days prior to completion”. The date for

[5] [1983] NSW ConvR ¶55-145.

completion under the contract was fixed as 19 February 1983. However, the certificate was produced by the vendor on 18 February 1983. The purchaser failed to complete on 19 February, and the vendor issued a notice to complete on 22 February 1983.

41 McLelland J held the notice to complete was not validly issued, *inter alia,* because, on a proper construction of the contract, the purchaser's obligation to complete was contingent on the vendor having issued the certificate no less than 7 days prior to the date for completion. Because the notice to complete was issued by the vendor only 4 days after the provision of a certificate, his Honour considered that the purchaser was not in breach of the contract by failing to complete on the date for completion. Because the purchaser was not in breach, the notice to complete was invalid.

42 The decision in *Jillinda* can be contrasted with the decision of Austin J in *Wilde v Anstee.*[6] The contract there contained a special condition requiring the vendor to ensure that the subject property was "adjacent to and contiguous with" an adjoining boundary by registration of a new plan. The vendor was required to perform this obligation "prior to completion", but no particular time prior to completion was fixed. The date for completion under the contract was 19 December, and the vendor complied with the condition on 18 December. When then the purchase failed to complete the next day, the vendor issued a notice to complete on 20 December.

43 Austin J found that the notice to complete was validly issued. His Honour distinguished the case from *Jillinda* on the basis that the contract before him did not require the vendor to perform its obligation at any specific time prior to completion. His Honour further rejected a submission to the effect that the purchaser was, at the least, entitled to reasonable notice of the fact of the vendor's compliance, so as to enable him to "get the paperwork together" for completion. Finding that the entitlements of the parties were governed by the express terms of the contract for sale, his Honour reasoned:

[6] (1999) 48 NSWLR 387.

> … the first defendant agreed to complete on 19 December if at any time prior to that day, the vendor complied (inter alia) with special condition 6. By entering into a contract in those terms, the first defendant agreed, in effect, that he would not need any additional time to "get the paperwork together" if special condition 6 was complied with at the last minute. Given the speed of searching the computerised land titles register, that is not an unreasonable or surprising agreement to make.

44 The obvious distinction between these cases is that in *Jillinda,* the contract for sale specified a particular time before completion by which the vendor was to perform its obligation, whereas in *Wilde* performance was merely to occur prior to completion. However, one should not draw from this the proposition that, so long as the contract specifies a particular time before completion, by which an obligation must be performed, breach of that obligation will disentitle a vendor from issuing a valid notice to complete. In each case, construction of the particular terms of the contract remains essential.

Second requirement – purchaser must be ready, willing and able

45 The second requirement for a valid notice to complete is that the vendor must not be in breach, and must be ready, willing and able to complete at the time identified in the notice. The operation of this requirement was described in *Carrapetta v Rado* at [27] (Barrett JA, Beazley and Hoeben JJA agreeing):

> The underlying concept is that a party who gives a notice to complete and thereby calls on the other party to adhere to the contract must be in a state of both present and prospective adherence to the contract. When it is the vendor who serves the notice, he or she must be seen to be willing and able to perform, on the day the notice fixes for completion, the obligations that the vendor is required to perform on completion … and to have adopted up to the time of service of the notice a stance consistent with that future performance. …

46 However, it is also well-established that not every antecedent breach of contract will disentitle a party from issuing a notice to produce. In *McNally v Waitzer* at 300-301, for example, Hutley JA observed that trivial breaches of contract, and breaches which have been waived by the innocent party, do not disentitle a party from issuing a notice to complete.

47 An example of a "trivial" breach was furnished in obiter by Richmond J in *Hawkes Menangle Pty Ltd v Brennan* at [60]. In that case, the vendors were in

breach for having failed to serve a land tax certificate 14 days before completion.[7] When the land certificate was eventually served, however, it showed that the land was free of any charge for land tax. On this basis, his Honour would have found that the breach was trivial, so as not to prevent the vendors from issuing a valid notice to produce.

48 Further exceptions to proposition that an antecedent breach disentitles a party from issuing a notice to produce have also been identified. In *Carrapetta v Rado* at [25], for instance, Barrett JA endorsed Young CJ in Eq's statement of principle in *Malouf v Sterling Estates Development Corporation Pty Ltd* at [36] that a party may only issue a notice to complete (emphasis added) "if it is free from any relevant breach of contract *which may have provided the purchaser a good excuse not to complete by the due date*".[8]

49 In *HG & R Securities Pty Ltd v Sayer* at [98], Ward J (as the President then was) similarly emphasised the relevance of there being a link between the breach complained of and the securing of completion. Her Honour observed:[9]

> The nature of a breach which disentitles the issuer of notice to complete was said to be one which is relevant to or connected with the securing of completion (*Neeta*). In *Collingridge v Sontor* it was said that a party's breach disentitles that party from giving a notice to complete only where it goes to time or to completion. (So, for example, in Lindgren, *Time in the Performance of Contracts* (2nd ed) it is said that a party's breach will not preclude that party from giving a valid notice to complete where the breach has ceased to be of any operative effect in the progress towards completion or cannot reasonably be said to be the cause of the other party's failure to complete.)

50 *HG & R Securities Pty Ltd v Sayer* offers an example of when a breach is not sufficiently connected to completion to invalidate a notice to complete. The vendor in that case failed to comply with a special condition requiring it to provide a tax invoice to the purchaser 7 days prior to settlement. Ward J rejected a submission that breach of this non-essential term prevented the issuing a valid notice to complete, since there was nothing to suggest the vendor's breach "impeded the purchaser's ability to settle": at [104]. Her

[7] [2023] NSWSC 1095.
[8] [2002] NSWSC 920.
[9] (2009) 14 BPR 27,045; [2009] NSWSC 427.

Honour also rejected a submission that the vendor's failure to respond to a requisition for the provision of cheque directions invalidated the notice. Again, her Honour was not persuaded "this in any way prevented the purchaser from attending settlement or delayed completion": at [105].

51 It is worth emphasising here that the special condition in issue in *HG & R Securities Pty Ltd v Sayer* required compliance "at least 7 days prior to settlement". Her Honour's conclusion – that breach of this condition to not disentitle the vendor from issuing a valid notice to complete – therefore illustrates the point made above, that identification of a particular time prior to completion by which compliance by the vendor with some obligation must occur does not necessarily mean the result in *Jillinda* will follow, that breach of that condition prevents a valid notice to complete.

52 The fact a vendor's obligations are expressed to continue up to and after completion may also be relevant to the validity of a notice to complete. In *Chandos Developments Pty Ltd v Mulkearns* [2008] NSWCA 62, for example, the contract required the vendor to undertake repairs to the roof of the subject property in accordance with an obligation owed under an existing lease. Under the contract, the vendor was required to comply with any obligation under the lease "to the extent it is to be complied with by completion". However, the parties' rights under this clause were also said to "continue after completion".

53 Giles JA (Beazley and McColl JJA agreeing) rejected a submission that a notice to complete issued by the vendor was invalid, since the vendor had not at that stage repaired the roof. Insofar as the vendor's obligation was to repair the roof "by completion", his Honour considered the vendor was not in breach of contract at the time the notice was issued, since the obligation could still be met before or at completion: at [78]. Because the obligation was expressed to "continue after completion", his Honour also found that satisfaction of the obligation was "not a condition precedent to performance of the purchaser's obligation to complete by payment of the purchase price": at [103].

54 Issues of this sort recently arose in the Real Property List in the case of *Bavulo Pty Limited v Zhang Property Pty Limited*.[10] The purchaser in that case challenged the validity of a notice to complete on the basis of various alleged antecedent breaches of contract. Most significantly, the vendor was in admitted breach of clause 24.4.3 of the standard form contract, which required it to provide the purchaser "at least 2 business days before the date for completion, a proper notice of transfer (an attornment notice) addressed to the tenant, to be held by the purchaser in escrow until completion".

55 The Court held that breach of clause 24.4.3 did not mean that it was not ready, willing and able to complete and could not issue a notice to complete. This construction of the contract was supported by cl 20.8, which provides that rights under various clauses, including cl 24, continue after completion, as well as cl 20.12, which provides that each party “must do whatever is necessary after completion to carry out the party’s obligations under this contract”. Insofar as these clauses anticipated that performance of cl 24 could occur after completion, they told against a construction that a breach of clause 24.4.3 was intended to amount to a breach which may have provided the purchaser with a good excuse not to complete by the due date.

56 This construction was also supported by cl 24.4.3, which the Court anticipated that the notice of attornment would be held in escrow, indicating, in turn, that it had no practical work to do until after completion, and so was not a pre-requisite to completion. It was also relevant that, under special condition 52.6(b), the vendor was required to pay any sums received from the tenant after completion to the purchaser. The Court observed that this meant that the purchaser interests would be protected if the attornment notice was not received on time. For these reasons, the Court considered that promise to provide the notice of attornment could not have any effect on the purchaser completing on time.

[10] [2024] NSWSC 879.

Third requirement – Reasonable period of time must be identified

57 The final substantive requirement for a valid notice to complete is that the notice must stipulate a reasonable time for completion. The nature of the "reasonable time" condition was explained by Campbell JA in *Zaccardi v Caunt* (Allsop P and Barr J agreeing) as follows:[11]

> What counts as "a reasonable time", for the purpose of a Notice to Complete, is a time such that an equity court would not intervene to grant specific performance, or relief against forfeiture, if a Notice had been served and the time allowed by it had elapsed without the required action being taken.

58 As a general proposition, 14 days is the minimum reasonable period of time which can be stipulated by a notice to complete: *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd*.[12] This is enforced strictly. In *Sindel v Georgiou*, for example, the High Court upheld a finding that a notice to complete which allowed a 13 day period was invalid. In reaching this conclusion, the High Court observed that "strong circumstances must be shown to justify the giving of a notice to complete which allows less than fourteen days for completion."[13]

59 In determining whether sufficiently "strong circumstances" exist to justify the specification of less than a fourteen day period, regard must be had "not merely to what remains to be done at the date of the notice, but all the circumstances of the case, including the previous delay on the part of [the party in breach], and the [innocent party's] attitude to it": *Fiske v Sterling Investment Co Pty Ltd*.[14]

60 In *Castle Hill Tyres Pty Ltd v Luxspice Pty Ltd*, Young J considered that sufficiently strong circumstances could exist where, *inter alia*, "there have been previous notices to complete, or there has been a very long period of delay, or there has already been ample time for the allegedly defaulting party to do

[11] [2008] NSWCA 202 at [88].
[12] (1989) 166 CLR 623 at 640.
[13] (1984) 154 CLR 661.
[14] (1977) 1 BPR 9219 at 9222.

everything that needs to be done".[15] There are, however, very few cases in which in a lesser period of time has been held to be justified.

61 In circumstances where a one day difference in the time allowed can be the difference between a valid and invalid notice to complete, the way in which time is calculated is clearly of essential importance. In this respect, the position appears to be that 14 *clear days* must be allowed.

62 In *Velik v Steingold*, for example, the contract for sale incorporated a clause which entrenched the general law position, by providing that "fourteen (14) days from the date the notice is served will be reasonable both at law and equity …". A notice to complete issued by the vendor at 12.25pm on 1 March 2010 required the purchaser to complete "on or before 3.00 pm on 15 March 2010".[16] Sackville AJA (McColl and Gleeson JJA agreeing) held that the notice was invalid, on the basis that it allowed "only 13 clear days" for the purchaser to complete.

Costs issues in the Real Property List

63 Before finishing, there are two discrete costs issue which have recently arisen in the Real Property List which I wish to mention:

(1) the cost consequences of commencing or continuing proceedings in the wrong jurisdiction; and

(2) the supervisory jurisdiction of the Court in relation to the remuneration of its officers.

Appropriate jurisdiction

64 Under r 42.34 UCPR, if a plaintiff in Supreme Court proceedings obtains a judgment against a defendant in an amount less than $500,000, then an order for costs in the plaintiff's favour will not normally be made, unless the Supreme

[15] (1996) 7 BPR 14,959.
[16] [2013] NSWCA 303.

Court is satisfied that the commencement and continuation of the proceedings in the Supreme Court, rather than the District or Local Court, was warranted.

65 It sometimes happens that a plaintiff brings a claim which warrants the commencement of proceedings in the Supreme Court, but in a subsequent legitimate amendment abandons the claim which made the Supreme Court an appropriate forum. In Real Property List proceedings, for example, it is not uncommon for plaintiffs to include an order for possession as part of the suit of relief sought. Because the District Court cannot make an order for possession, the Supreme Court is the appropriate forum for such proceedings. To the extent that the possession claim is subsequently abandoned (for example because the defendant vacates), however, the continuation of the proceedings in the Supreme Court may still justify there no orders as to costs being made under r 42.34.

66 Similarly, it is not uncommon for plaintiffs to include a claim for pure declaratory relief in Real Property Proceedings. To the extent that there is genuine utility for the plaintiff in obtaining the declaratory relief sought, it is uncontroversial that the commencement and continuation of proceedings in the Supreme Court will be warranted, since the District Court does not have jurisdiction to grant purely declaratory relief.

67 However, practitioners should be alive to the possibility that declarations need not actually be made for the plaintiff to obtain the relief it seeks. Where declaratory relief is not essential in this sense, its inclusion in a pleading will not suffice to warrant the commencement or continuation of proceedings in the Supreme Court. The remarks of McColl JA, Sackville AJA and Emmett AJA in *Gladio Pty Ltd v Buckworth* at [26] are apposite in this respect:[17]

> While a declaration that a contract has been rescinded may be a common prayer for relief in a vendor/purchaser suit, it is by no means essential that a declaration be made. Moreover, the mere fact that Gladio sought a type of relief, being a declaration, that could only be granted by the Supreme Court does not for the purposes of r 42.34, of itself, make the commencement and continuation of the proceedings in the Supreme Court warranted. The real relief

[17] [2016] NSWCA 321.

> sought by Gladio was return of the deposit. Whether it was entitled to that relief depended on the proper construction of the Sale Agreement. There is no reason why the District Court could not have granted that relief. …

68 On the other hand, the mere fact proceedings could have been run in the District or Local Court will not always mean that commencing or continuing in the proceedings in the Supreme Court was not warranted. Thus, in *State of New South Wales v Quirk*, the Court of Appeal made clear that the complexity of the legal and factual issues involved can warrant the commencement or continuation of the proceedings in the Supreme Court, as can the fact that the plaintiff if successful is likely to be entitled to a monetary amount approach $500,000 (even if something less than that amount is ultimately obtained).

Supervisory jurisdiction

69 The final topic to touch upon is the inherent supervisory jurisdiction of the Court to control the remuneration of solicitors. This topic assumed importance in the Real Property List in the recent case of *Bell v Hartnett Lawyers (No 3)*,[18] which raised an issued to which Young J had averred over 20 years ago: the issue of mortgagees paying "more for a service than one otherwise would because it is going to be paid out of someone else's money".

70 Mr Hartnett, a Queensland solicitor, charged his elderly mortgagee client $288,601.03 to act in uncontested possession proceedings to enforce a $30,000 mortgage. The secured property was worth approximately $300,000. After the property was sold, Mr Hartnett's client signed a trust account authority, which authorised payment to the mortgagee of the full mortgage sum plus interest, and payment to Mr Harnett of his own invoiced legal fees, on the basis that the mortgagee was entitled to be reimbursed all enforcement costs out of the sale of the secured property. This left the mortgagor to a remainder sum from the proceeds of sale of only $33,834.45.

71 After being appointed the executor of the mortgagor, Mr Bell sought an assessment of the costs of the work Mr Hartnett performed, which assessment

[18] [2022] NSWSC 1204.

resulted in a sum of $37,345.50. Mr Bell brought proceedings against Mr Hartnett, seeking a declaration that he held $287,551.30 on trust for him and an order that Mr Bell pay him that amount. The question which arose was whether the inherent jurisdiction of the Court provided a remedy to the mortgagor in relation to the exorbitant fees.

72 The Court answered this question in the affirmative. It was uncontroversial that an overcharging solicitor could, pursuant to the inherent jurisdiction of the Court, be ordered to repay monies to their client. However, no previous authority was identified in which the inherent jurisdiction had been used to order an overcharging solicitor to pay monies to a person other than their client.

73 Nevertheless, the Court explained that inherent jurisdiction of the Court to regulate the remuneration of its officers was incapable of being confined to defined categories. The key question was whether one of its officers should be held to ethical and honourable behaviour. Here, it was clear that holding Mr Hartnett to proper standards of ethical and honourable behaviour required him to repay the exorbitantly charged costs to the person who bore suffered them, which was the mortgagor's estate, not his client. The Court therefore ordered Mr Hartnett to pay Mr Bell $251,255.53, being the difference between what Mr Hartnett had been paid and costs assessment.

74 An appeal against the decision was dismissed.[19] Bell CJ, with whom Adamson JA and Griffiths AJA agreed, explained at [133] that "[the] highest standards of integrity are expected of members of the legal profession" and such standards focus the application of the inherent supervisory jurisdiction. The Chief Justice also noted at [131] that exorbitant charging by legal practitioners is apt to debase the reputation of the legal profession and subject clients, or others, to unwarranted costs.

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[19] [2023] NSWCA 244; 112 NSWLR 463