EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number**: NEVHCV2016/0049**

Between

Pinneys Hotel Development Limited
The Nevis Club Company Limited

Claimants

-and-

Hon. Alexis Jeffers,
Minister of Agriculture, Communications, Works, Public Utilities
Theodore Hobson Q.C.
Nevis Island Administration

Defendants

Before: **His Lordship Justice Ermin Moise**

Appearances:

Mrs. Angela Cozier with Mrs. Emily Prentice-Blackett of counsel for the claimants
Mrs. Kimberly Hanley-Bello with Ms Rhonda Nisbett-Browne of counsel for the 1st and 3rd defendants
Ms. Kurlyn Merchant of counsel for the 2nd defendant

2019:	December, 6th
	December 19th (Written Submissions)
2020:	April, 9th

JUDGMENT

[1] **Moise, J:** The claimants have brought this action for compensatory damages pursuant to section 120 of the **Title by Registration Act**[1]. The 2nd claimant also seeks damages against the 1st and 3rd defendants for trespass to its land. In addition, the claimants seek damages for unlawful interference by the 1st and 3rd defendants with respect to a contract for the sale of land between the 1st and 2nd claimants as well as unlawful interference by all defendants with a loan contract

[1] CAP 10.19 of the Laws of Saint Christopher and Nevis

between the 1st claimant and the Saint Kitts-Nevis-Anguilla National Bank Limited. The case centers on a caveat which was lodged against property owned by the 2nd claimant.

The Facts

[2] The 1st claimant is a limited liability company and was represented throughout these proceedings by its secretary, Mr. Dwight Cozier. The 2nd claimant is a social club, registered as a limited liability company. The club was first registered in May, 1941 and was represented in these proceedings by its director, Mr. Spencer Howell. The 2nd claimant is the registered proprietor of a parcel of land situated at Pinneys Estate and registered in Book 6 Folio 69 of the Register of Titles in Nevis.

[3] Sometime in 2010 the 1st claimant made an offer to purchase the 2nd claimant's property. The 1st claimant intended on constructing condominium units for sale under the citizenship by investment program administered by the Federal Government of Saint Christopher and Nevis. It is asserted that on 16th August, 2012 a meeting of the shareholders of the 2nd claimant was convened, at which point the 1st claimant's offer for the purchase of the land was accepted. It was agreed that the property would be purchased for $700,000.00US.

[4] According to Mr. Cozier, sometime in 2010, the 2nd claimant granted the 1st claimant access to the property for the purpose of preparing architectural drawings, surveys and an environmental impact assessment. This was to facilitate an application for planning permission for the construction of the condominium project. In 2011 the 1st claimant retained the services of the architectural firm, Brisbane, O'Garra and Alvaranga, for the preparation of architectural plans for the condominium units. Mr. Cozier states in his witness statement that phase 1 of the project consisted of 3 building blocks, each including 6 condominium units for a total selling price of $8,070,000.00US. These plans were prepared and submitted to the Department of Planning and approval was granted in October, 2011.

[5] Mr. Cozier states that although approval had been granted by the Department of Planning, this was subject to the 1st claimant's ability to satisfy 6 conditions; one of which was the acquisition of title to the property from the 2nd claimant. The other 5 conditions are not generally issues for consideration in this case; save to say that the approval was subject to the satisfaction of all conditions set out in

the letter of October, 2011. The difficulty which the 1st claimant had in meeting the condition of acquiring ownership of the land was that the 2nd claimant company was not in good standing with the registry of companies at the time. Having been registered initially in 1941 as a social club, the company had had its moments of dormancy. As a result of this an application was made before High Court Justice Errol Thomas for an order reinstating the 2nd claimant to the register of companies. This order was granted on 11th March, 2011 and a certificate was duly issued by the registrar of companies in Saint Christopher in keeping with the order of Thomas J. As I understand it, the 2nd claimant had paid in excess of $22,000.00 in outstanding fees for annual returns which had not been filed over the years. A certificate of continuance was issued by the Registrar of Companies for Nevis on 29th August, 2013 according to the provisions of section 365 of the Companies Ordinance in Nevis. This was in keeping with the fact that the federal system of government applicable between Saint Christopher and Nevis necessitated the continuance of the company as a Nevis company even though it had been registered in Saint Christopher prior to the federation coming into effect.

[6] In May of 2014 the claimants executed an agreement for the sale of the property. In keeping with that agreement, the 1st claimant paid the sum of $140,000.00US, representing 20% of the purchase price. The 1st claimant negotiated a loan facility with the St. Kitts-Nevis-Anguilla National bank Ltd for the sum of $476,000.00US. This was approved by the bank on 11th July, 2014. On 29th July, 2014 the sum of $4,847.85US was paid to the bank as a commitment fee. Having obtained approval of the requisite financing, the claimants proceeded to execute a memorandum of transfer of the property in question. Mr. Cozier states that the directors of the 1st claimant signed guarantees for the loan approved by the bank and the sum of $785.79 was paid to the bank for the vetting of the documents by its legal department. In addition to this, an equitable mortgage was executed by the 1st claimant and a caveat lodged on the property to secure payment of the funds from the bank.

[7] Mr. Cozier states in his evidence that on 15th April, 2015, as the bank was in the process of disbursing the funds to the 1st claimant, attorneys for the bank were informed that a caveat had been lodged on the property, prohibiting any dealings with the property. This caveat was lodged on 3rd February, 2015 through the chambers of Theodore Hobson & Associates and was signed by Mr. Eric Evelyn, who was the Permanent Secretary in the Ministry of Agriculture. Mr. Evelyn claimed to

be acting on behalf of the crown. Mr. Theodore Hobson signed as legal practitioner. As a result of this the loan could not be disbursed and the claimants were unable to complete the transaction for the sale of the land without an order for the removal of this caveat.

[8] The caveat, on its face, claimed that the crown had a right to stay any dealings with the property for the following reasons:

(a) No annual returns had been filed by the 2nd claimant for over twenty-five (25) years;

(b) For over twenty-five (25) years no land and house taxes were paid on the said lands and building thereon;

(c) The business of the company was the operation of a club. However the club has been discontinued for over twenty years;

(d) All the original shareholders of the club are deceased;

(e) In March, 2013, a group of persons who had no standing in the company and are not related to the original shareholders purported to reinstate the company under the Companies Act 1996;

(f) The group purported to appoint Spencer Howell as the sole director of the company and Tessa Howell as secretary and restructure the company.

[9] On 13th July, 2015, the 2nd claimant filed an order for the removal of the caveat. It is alleged that the 2nd claimant experienced some difficulty in lodging this order for removal. However, much was not made of this by way of evidence. The effective date of the lodgment of the order for removal is therefore 13th July, 2015. The 3rd defendant did not oblige in seeking such an order. Whilst attempts were made to complete the loan transaction and the sale, this was not possible given that the caveat remained lodged on the certificate of title. In fact, on 6th August, 2015, the office of the 2nd defendant filed an application, on behalf of the 3rd defendant, seeking to maintain the caveat on the grounds outlined in the original document filed by Mr. Evelyn. On 28th October, 2015, the Honourable Justice Lorraine Williams dismissed the application for the maintenance of the caveat and ordered its removal. It is important to outline in some detail the basis on which the 3rd

defendant claimed to have a right to maintain this caveat. This was highlighted in the affidavit of Mr. Eric Evelyn which accompanied the application of 6th August, 2015. In that affidavit he repeats the 6 grounds contained in the caveat which was initially lodge. He went on further to state:

(a) That the order for the removal of the caveat was filed by Spencer Howell, who "describes himself as a director of the Nevis Club Company":

(b) That the order for the removal of the caveat does not name the shareholders of the company;

(c) The original shareholders of the company are all deceased and no executor or administrator of the estate of any of the shareholders has established any claim to their shareholdings;

(d) That the 2nd claimant, Spencer Howell was born in 1931 and therefore could not be an original shareholder of the company, given that it was registered in 1941;

(e) That the Caveator, as representative of the crown, insists that it has a right to file the caveat under section 4(f) of the **Intestate Estate Act**[2] as the true owner of the property comprised in the certificate of title whose original registered proprietor was the Nevis Club Company Limited, as there are no legal successors;

(f) No annual returns were filed in Saint Kitts since 2013 and there is no record of the present shareholders of the company and no land and house tax had been paid for over twenty-five (25) years.

[10] After considering the issues raised in the affidavit of Mr. Evelyn, Williams J dismissed the application to maintain the caveat on the grounds that the applicant did not provide the court with evidence to substantiate its claim and that section 4 of the **Intestate Estates Act** is inapplicable. By that time however, as Mr. Cozier asserts, the approval of the loan for the purchase of the property had lapsed and the facility was no longer available. A new application for financing had to be made; by which point the 2nd defendant had become a member of the board of directors of the bank. As a result of these developments the claimants filed an action on 16th April, 2016. This claim was

[2] CAP 12.06 of the Laws of Saint Christopher and Nevis

amended on 14th June, 2016. The substance of the claim is that there was no reasonable cause for the lodgment of the caveat in the first place and that this action amounts to a trespass of the 2nd claimant's property. Further, the lodgment of the caveat was an unlawful interference with the contract for sale and the loan agreement with the bank. Prior to assessing the law on this issue, it is important to address in some further detail the evidence led by the defence during the current proceedings as it relates to the reasons for the lodgment of the caveat in the first place.

[11] Mr. Theodore Hobson Q.C. is a senior and well respected member of the legal profession in Nevis. He is the Principal Partner in the law firm of Theodore L. Hobson & Associates. In 2015 he was a special advisor to the Minister of Finance in the Nevis Island Administration (NIA). At the time the portfolio of Minister of Finance was held by the Hon. Vance Amory who was also the Premier of Nevis. Mr. Hobson states in his witness statement that in January, 2015 his office was instructed by the Minister of Finance of the NIA to identify the true owners of a property known as The Nevis Club situated at Pinneys in Nevis. His instructions were that the owners had not paid annual property taxes for over twenty-five years. Further, for twenty-five years no annual returns were filed either in Nevis or St. Christopher. The property was in a state of disrepair, unoccupied and the grounds over grown with shrubs. According to Mr. Hobson, the ministry was anxious that the interest of the NIA was protected and his firm was instructed to take protective action.

[12] Mr. Hobson goes on to state that, as a result of his discussions with Minister Amory, his firm determined that the crown had an interest under the provisions of the **Intestate Estates Act**, since the research indicated that the original shareholders of the Nevis Club were all deceased and no record of any dependents had come forward to make a claim. I note however that, neither before Williams J nor before this court, was any evidence presented to substantiate this assertion. Mr. Hobson states that the club was primarily a lawn tennis and social club incorporated on 28th May, 1941. He formed the view, after consulting with Mr. Colin Dore, Permanent Secretary in the Ministry of Finance, that Mr. Eric Evelyn was the proper person to take action in securing the government's interest as he was the permanent secretary in the ministry with responsibility for lands. He therefore had discussions with Mr. Evelyn and briefed him on the issue. Mr. Hobson states that Mr. Evelyn presented and filed a caveat after acquainting himself with the provisions of the **Intestate Estates Act**. Mr. Hobson insists that the matter had never been discussed with the 1st defendant who was the minister in the Ministry of Lands at the time.

[13] With the exception of Mr. Hobson, none of the individuals who were involved in these discussions were called as witnesses for the defence. In fact, I am of the view that the 3rd defendant did not present any witnesses in the matter at all. I come to that conclusion as although Minister Alexis Jeffers was presented as representing the 3rd defendant, he was quite clear in the witness box that this was not the case. Mr. Amory, upon whose instructions Mr. Hobson is said to have acted, played no part in these proceedings. Mr. Evelyn filed no evidence and no action was taken against him by the claimant; despite the fact that the caveat was lodged by him on behalf of the crown. The 1st defendant, who is the Minister of Lands, said that he was not aware of any of those discussions and played no role in the decision to lodge the caveat. He was unaware of it until after it was lodged. An action was brought against him as the minister as a result of matters of which he had no knowledge.

[14] During the course of case management, Justice Raulston Glasgow, after identifying the issues in this case, made an order that a summons be issued to Mr. Colin Dore, Permanent Secretary in the Ministry of Finance. Mr. Dore appeared at trial and his evidence is crucial as it sheds some light on the procedure adopted by the Department of Finance regarding outstanding property taxes. He states that in all his years working in that ministry he had never heard of the term "caveat". He was unaware of what that meant. When asked if it is the normal process for the ministry to lodge caveats against properties where taxes are owed, he replied in the negative. Mr. Dore indicated that if there was an impending sale of the property, the Inland Revenue had to approve the conveyance. If taxes were owed the department would simply demand that the taxes were paid prior to the approval of the sale. The court also takes judicial notice of the fact that property sales are also subject to a stamp duty, which must be assessed by the Inland Revenue prior to releasing a memorandum of transfer. In fact the evidence suggests that by way of letter dated 25th March, 2015, attorneys acting on behalf of the 2nd claimant had written to the Inland Revenue Department requesting information regarding any outstanding taxes. This letter was in keeping with the pending sale of the property and no doubt appreciated that any outstanding property taxes would have to be settled prior to the completion of the sale. There is no evidence that there was ever a response to this inquiry.

[15] Mr. Dore was the recipient of a letter dated 25th February, 2015 from the Deputy Comptroller of the Inland Revenue Department. In that letter it was stated that the property taxes owed by the 2nd claimant was in fact $659.29. A demand notice dated 15th September, 2014 was attached to the letter. No evidence was presented as to whether this notice was ever served on the 2nd claimant. This was notwithstanding the letter from Mrs. Cozier dated 25th March, 2015 to which there is no evidence of a response. Further to this, there was no assertion by any of the defendants that the 2nd claimant had ever received any demand notices regarding the outstanding taxes in previous years. Essentially, in accordance with Mr. Hobson's evidence, the caveat was lodged to protect the government's interest. That interest, at least insofar as it relates to outstanding taxes, amounts to no more than $659.29 according to the evidence presented in this case.

The Law and its application

[16] There are 3 broad areas of law pleaded by the claimants in this matter. These are firstly, a claim for trespass to land. Secondly, and perhaps more substantively, an action pursuant to section 120 of the **Title by Registration Act** for damages arises from the lodgment of the caveat without reasonable cause. Lastly there is a claim for unlawful interference. I will address each of these in turn.

Trespass to Land

[17] Halsbury's Laws of England describes trespass as ***"a person's unlawful presence on land in the possession of another."*** It is well established that a trespass to land is an infringement of a possessory right. It is for this purpose that a person in lawful possession of property may be entitled to pursue a claim in trespass to land. Halsbury's goes on to state that ***"a person trespasses upon land if he wrongfully sets foot on it, rides or drives over it or takes possession if it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it or in it or he erects or suffers to continue on his own land anything which invades the airspace of others."*** Whilst I do not take this to be an exhaustive list of circumstances giving rise to a claim in trespass, it is clear that a trespass to land involves a direct curtailment of an individual's possessory rights thereof. Our own courts have long recognized this definition as

Thomas J noted in the case of ***Heitz v. Bunche et al***[3] that ***"trespass to land involves entry upon the land unsupported by consent or other authorization."***

[18] There is nothing in the facts of this case which draws me to the conclusion that there was any interference with the possessory rights of anyone in relation to the property in question. This case involved the lodging of a caveat to prevent the registration of any dealings on the certificate of title. It is no doubt an interference with proprietary rights but clearly does not amount to a trespass on the 2nd claimant's land within the meaning of the law. The claim in trespass is therefore dismissed.

Section 120 of the Title by Registration Act

[19] It is important to first highlight the general regime for the lodgment of caveats in Nevis and to determine the particular provisions which are relevant to this case. In their pleadings and legal submissions the 1st and 3rd defendants sought to rely on the provisions of section 16 of the **Title by Registration Act** as the basis for the lodgment of the caveat in February, 2015. The section states as follows:

> ***Any person who claims to be the proprietor of any land, or to be interested in any mortgage or encumbrance, may enter a caveat in the office of the Registrar of Titles, either forbidding the issue of any certificate of title for any land to any specified person, or claiming that a note may be made upon any certificate of title in regard to any mortgage or encumbrance, or in any other manner stating an interest in any land, and such caveat shall be in Form 2 set out in the Second Schedule and the caveator shall be heard before the certificate of title is issued, or the mortgage or encumbrance noted or rejected.***

[20] Counsel for the 1st and 3rd defendants relies on this section as they have argued that the government was making a claim to the land by virtue of the **Intestate Estates Act**. I do not agree with this submission as I am not of the view that this section is applicable to the circumstances of the present case. Section 16 is contained in Part III of the Act which makes provision for "Bringing

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[3] DOMHCV2013/0297

Land Under [the] Act". The land system in Nevis is part registered and part unregistered land. Part III provides the circumstances under which a person may apply for the issue of a certificate of title to unregistered land. This is designed to bring unregistered land within the registration system. It is within this context that section 16 becomes relevant. If a person is claiming to be the proprietor of the land or interested by way of mortgage or other encumbrance, he may enter a caveat forbidding the issue of a certificate **to any specific person** (my emphasis) or to have a note of his interest placed on the certificate when it is issued. Section 16 is very clear that a person lodging a caveat under that section must use Form 2 as prescribed in the legislation. After doing so, the caveator must be heard prior to the issuing of the certificate of title.

[21] On the other hand, section 112 of the **Title by Registration Act** provides that ***"[a]ny person claiming to be entitled to stay the registration of any dealing in land, until his or her rights therein shall be recognised and registered, may present a caveat to the Registrar of Titles."*** According to section 111 a caveator must use form 23 for that purpose. The first observation to be made is that an individual who lodges a caveat under this section must claim to have some right which is capable of being recognized and registered on the certificate of title. This is often referred to as a caveatable interest. He must therefore claim to be entitled to stay any dealings with the land until his rights are recognized and registered. His right is therefore not to merely stay any dealings with the property indefinitely. In accordance with section 115 of the act ***"[a]fter the registration of a caveat, and so long as it remains in force, the Registrar of Titles shall not register any dealing with the land embraced therein, until the caveat is removed."***

[22] In the present case, the caveat was not lodged by the use of Form 2. In fact what was used by the caveator in this case was Form 23, which corresponds with section 111 of the Act. This is the form used for the lodging of a caveat pursuant to section 112 of the Act where a caveator is seeking to prohibit any dealings with registered land. Further, the caveat was not lodged for the purpose of forbidding the issue of a certificate **to any specific person.** Therefore, the caveat lodged in the circumstances of this case was not done pursuant to the provisions of section 16 of the Act but rather within the provisions of section 112. This was expressly stated on the caveat itself as it was stated to have been lodged on behalf of the crown who was claiming to be entitled to stay the registration of any dealing in the land in question. I therefore do not accept the submissions of

counsel for the 1st and 3rd defendants and hold that section 16 of the Act is of no relevance to the issues this court is called upon to determine.

[23] After lodging a caveat, the caveator may withdraw the caveat in keeping with the provisions of section 116 of the Act. On the other hand, the caveatee may give an order for the removal of the caveat in keeping with the provisions of section 117. Whether the caveator has been served with this order or not, he or she may apply within the provisions of section 118 for the caveat to be maintained ***"either until some question of right has been determined between the caveator and the caveatee, or till such time and in such manner as may be ordered by the Court, and the Court, after such notice to the caveatee or service upon him or her as may appear sufficient, may proceed to hear the parties, or, in the absence of the caveatee if he or she does not appear, to deal with the case as may appear just."***

[24] Essentially, it was within these provisions that Williams J came to consider the application to maintain the caveat. She was of the view that the caveator presented no evidence to substantiate the assertions being made regarding the government's interest in the property and that section 4 of the **Intestate Estates Act** was not applicable. There has been no appeal against that order. Further, for reasons which I will explain later, I am of the view that Williams J was entirely correct in the views she expressed regarding section 4 of the **Intestate Estates Act**. She was also of the view that no evidence had been presented by the caveator to substantiate the other claims being made as to the government's interest in the property in question. Insofar as that is the case, I express some doubt as to whether the defendants are entitled to revisit these issues in these proceedings. Certainly the evidence of the caveatable interest ought to have been presented to the judge during the hearing in October, 2015. I will nonetheless examine the issues in the event that my doubts are not well founded.

[25] As stated by Kunc J in the New South Wales case of ***Guirgis v JEA Developments Pty Limited***[4]***, "[l]odging a caveat is not a trivial act to be undertaken lightly."*** The judge went on to note that the lodging of a caveat "***has immediate legal effect and can have significant commercial and financial consequences".*** It is perhaps for this reason section 120 was introduced into the Act in order to address circumstances where the lodgment of a caveat was done without reasonable

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4 [2019] NSWSC 164

cause. The section enables any person to bring an action for damages he or she has suffered in such circumstances. The provisions of this section are critical to the issues this court is called upon to consider. The section states as follows:

> ***Any person lodging any caveat with the Registrar without reasonable cause shall be liable to make any person who may have sustained damage thereby such compensation as may be just, and such compensation shall be recoverable in an action at law by the person who has sustained damage from the person who lodged the caveat.***

[26] It is obvious that this section creates a cause of action in law in favour of any person who has sustained damages as a result of a caveat lodged without reasonable cause. That person is not limited to the registered proprietor. One can argue that the section creates a statutory duty on persons lodging caveats to ensure that this is only done if he or she has a reasonable cause for doing so. Insofar as that is the case I am in agreement with Kunc J in his own decision where he states that ***"[l]egal practitioners and licensed conveyancers who advise on, prepare and certify caveats that are lodged electronically have an important role to ensure that obviously unmeritorious caveats are not lodged."*** Whilst caveats are not lodged electronically in Nevis, the general proposition put forward by this statement is fully endorsed. In a more recent case from New South Wales, ***New Galaxy Investments Pty Ltd v Thomson & Ors***[5] Basten JA noted that ***"[t]he importance of maintaining the integrity of the register of land ownership requires that the terms of s 74P of the Real Property Act be conscientiously applied so as to provide a realistic deterrent against the lodgment of inappropriate caveats, preventing dealings in land by the owners."*** The relevance of a comment of this nature is no doubt appreciated.

[27] The legislation gives no discretion to the Registrar as it relates to the lodgment of caveats. Once it is lodged, all dealings with the property are stayed with the potential for serious economic consequences for the caveatee and others who are dealing with the caveatee. There is no judicial supervision of the initial process. Unlike an ex parte injunction for example, the caveator does not have to prove in any way the interest which he claims to have at the point at which the caveat is

[5] [2017] NSWCA 153

lodged. Even if he has such an interest, there is no requirement for the Registrar to determine whether, on balance, it is reasonable to lodge the caveat in the first place. But doing so would prohibit a registered land owner from any further dealings with his own property. This is a powerful tool, but a potentially damaging one.

[28] In the Privy Council case of ***Eng Mee Yong et al v. Letchumanan s/o Valeyutham***[6] the board sought to elaborate on the nature of the caveat in a full Torrens System of registration. Their Lordships stated as follows:

> ***"The caveat under the Torrens system has often been likened to a statutory injunction of an interlocutory nature restraining the caveatee from dealing with the land pending the determination by the court of the caveator's claim to title to the land, in an ordinary action brought by the caveator against the caveatee for that purpose. Their lordships accept that this is an apt analogy with its corollary that caveats are available in appropriate cases, for the interim protection of rights to title to land or registerable interests in land that are alleged by the caveator but not yet proved. Nevertheless their lordships would point out that the issue of a caveat differs from the grant of an interlocutory injunction in that it is issued ex parte by the Registrar acting in an administrative capacity without the intervention of the court and is wholly unsupported by any evidence at all…"***

[29] In the preceding paragraph, their Lordships were also deliberate in pointing out that the lodgment of a caveat is a "***very grave curtailment of the rights of the proprietor, yet it can be imposed at the instance of anyone who makes a claim to title to the land, however baseless that claim may turn out to be."*** A person's right to the full enjoyment of his property is protected by the provisions of the constitution itself and further enshrined in section 10 of the **Title by Registration Act**. To my mind the onus is therefore on those who lodge caveats to be aware of the necessary implications of doing so. Solicitors must also properly advise their clients on the likely consequences of lodging caveats if it is later deemed to have been done without reasonable cause.

[6] Privy Council Appeal No. 25 of 1977

[30] The issue for consideration therefore is whether the caveat lodged in this case was done without reasonable cause. If the answer to that question is yes, then the court must consider whether the claimants have suffered damages as a result and who should pay those damages if it is just to do so. The difficulty facing this court is that there is a dearth of authority in this jurisdiction as to the manner in which section 120 of the Act is to be interpreted. The only case presented by any of the parties was that of ***Lilian Riley v. Christopher Gerald et al***[7] in which Leigertwood-Octave J considered briefly a question of compensation in circumstances where someone lodges or maintains a caution wrongfully and without reasonable cause. The learned judge noted that ***"[w]hat is imperative is that it must be proven on a balance of probabilities that the cautioner … lodged the caution wrongfully and without reasonable cause. The onus falls on [the claimant] to discharge this burden."*** On the facts of that case it was found that the claimant had provided evidence of the damages she suffered, but no evidence regarding the issue of whether the caution was lodged wrongfully and without reasonable cause. The judge did not go into much detail regarding the test to be applied in determining what constitutes reasonable cause and, for that reason, I do not find it to be much of an authority on which reliance can be placed.

[31] Counsel for the 1st and 3rd defendants refers the court to the test outlined in the case of ***Bedford Properties PTY Ltd v. Surgo Pty Ltd***[8]. This case was decided in Queensland, Australia where Wooten J noted the following:

> ***"I think the foundation for reasonable cause must be, not the actual possession of a caveatable interest, but an honest belief on reasonable ground that the caveator had such an interest."***

[32] By virtue of that test the court must be satisfied that not only did the caveator have an honest belief that he had a caveatable interest, but that this belief was based on reasonable grounds. However, in the case of ***Re Brooks' Caveat***[9] Henry J provided a more in depth analysis of how the test established in the Bedford Properties case had been assessed and applied in subsequent years in various courts in Australia. Wooten J was assessing legislative provisions similar to those in force in New South Wales. Whilst there did not appear to be much controversy surrounding the test referred

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[7] MNIHCV2004/0009
[8] [1981] 1 NSWLR 106
[9] [2014] QSC 76

to in paragraph 31 above, there emerged divergent views regarding certain aspects of Wooten J's decision. In the Bedford Properties case itself, Wooten J relied on the authority of ***Young v Rydalmere Credits Pty Ltd***[10] to assert that even where a caveatable interest exists a caveat may still be deemed to have been lodged without reasonable cause if it was lodged for an ulterior purpose other than the protection of the caveator's interest. This seemed to have established a notion that even where the caveator has an interest, that alone would not absolve him from paying damages if he lodged the caveat for an ulterior and improper purpose. That would depend on the circumstances of the case.

[33] However, this approach was not approved in certain judgments emanating from New South Wales in particular. In the case of ***Beca Developments v Idameneo***[11] it was felt that the mere existence of the caveatable interest establishes that the caveat was lodged for a reasonable cause. Proof of an ulterior motive does not undermine this assumption. I do observe however, that at the time of the decision in ***Beca Developments v. Idameneo*** the legislation included the additional requirement of the caveat being "wrongfully" entered in conjunction with there being "no reasonable cause". That may very well explain the judge's conclusion that ***"[t]he existence of the interest provides the reasonable cause."*** However, in the more recent case of ***New Galaxy Investments Pty Ltd v Thomson & Ors***[12] the court of appeal of New South Wales outlined the applicable test as follows:

> ***Accordingly, with one qualification, the correct understanding of the phrase "without reasonable cause" is that accepted in Mahendran v Chase Enterprises Pty Ltd,[13] adopting the reasoning of Biscoe AJ in Natuna Pty Ltd v Cook:[14]***
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> > ***"'Reasonable cause' for the lodgement of a caveat exists where the caveator has an honest belief, based upon reasonable grounds, that the caveator has a caveatable interest."***

[34] This test would necessarily mean two things. Firstly, if it is established that there is no caveatable interest then the caveator would not be liable to pay damages if he had an honest belief on

[10] (1963) 80 WN (NSW) 1463
[11] (1990) 21 NSWLR 459
[12] See reference No. 5 above
[13] [2013] NSWCA 280; 17 BPR 32,733 at [52] (Barrett JA, Emmett and Gleeson JJA agreeing).
[14] [2007] NSWSC 121 at [195].

reasonable grounds that he had such an interest. Secondly, once it was established that the caveatable interest exists then there is no liability to pay damages as his belief would have been fortified in fact. This approach found favour in the courts in Victoria. In the case of ***KB Corporate Pty Ltd v Sayfe & Anor***[15] the approach in the New Galaxy Investments case was sited with approval. In that case a number of propositions were put forward regarding the manner in which the court is to proceed in addressing its mind to the issue of reasonable cause. These are as follows:

(a) the applicant must show the caveator had no caveatable interest;

(b) the applicant must show the caveator did not have an honest belief based on reasonable grounds that a caveatable interest existed;

(c) the test is partially subjective and partially objective;

(d) the subjective component requires an examination of the caveator's belief and whether it was honestly held;

(e) it is objective in that it requires that the belief is held on reasonable grounds;

(f) it is a fallacy is to think that the absence of a caveatable interest at the time when the caveat was lodged establishes that the caveator did not have a reasonable basis for a belief that it was entitled to lodge a caveat; and

(g) legal advice that the caveator was entitled to lodge the caveat may be of considerable significance in determining whether the claimant has established that the caveat was lodged without reasonable cause, but the content and accuracy of the legal advice must be evaluated with all other relevant circumstances.

[35] However, as was noted in the case of **Re Brooks' Caveat**, the legislature in Queensland intervened and amended the law to put the confusion to rest. The applicable provision in Queensland, section 130, now states as follows:

"Compensation for improper caveat

(1) A person who lodges or continues a caveat without reasonable cause must compensate anyone else who suffers loss or damage as a result.

[15] [2017] VSC 623

...

> ***(3) In a proceeding for compensation under subsection (1), it must be presumed that the caveat was lodged or continued without reasonable cause unless the person who lodged or continued it proves that it was lodged or continued with reasonable cause."***

[36] Insofar as the specific wording of the legislation is concerned, Henry J outlined the applicable test in Queensland as follows:

> ***"… it is unnecessary to resolve the above discussed divergence of views in other states as to whether the existence of a caveatable interest of itself provides proof of reasonable cause or whether, even if a caveator has a caveatable interest, the caveator will not have acted with reasonable cause if motivated by an ulterior or improper purpose. Both views introduce absolute assumptions which are not warranted by the relevant Queensland provision. The question pursuant to s 130(3) is not whether the caveator had a caveatable interest but whether it has been proved the caveator had reasonable cause for lodging or continuing the caveat. The existence of a caveatable interest may often afford proof of reasonable cause but, again, the circumstances of individual cases are potentially so variable that it cannot be assumed proof of a caveatable interest will of itself always be sufficient to prove reasonable cause. In the same vein, the presence of an ulterior or improper purpose on the part of the caveator with a caveatable interest may bespeak an absence of reasonable cause but whether it in fact does so is dependent upon the individual circumstances of the case, particularly if it is a case where a caveator has a mixture of motivating purposes.***

[37] It will immediately be observed that section 120 of the **Title by Registration Act** in Nevis does not contain a provision similar to subsection (3) of the Queensland legislation. Subsection (1) is however entirely compatible with the provisions of section 120. There can therefore be no doubt that where the caveator is proven to have no caveatable interest, he is liable to pay damages if it is established that he had no honest belief on reasonable grounds that he had such an interest. The question is whether or not the establishment of a caveatable interest proves outright the reasonable cause which is necessary to negate any claim pursuant to section 120 of the Act. It would seem that

the authorities in New South Wales and Victoria indicate that this is the case. The Queensland authorities seemed to have differed with that view. However, the legislature intervened with an amendment to the relevant section.

[38] I am of the view that a close assessment of the decision of Henry J in ***Re Brooks' Caveat*** shows that the inclusion of subsection (3) in the Queensland legislation was for the purpose of placing beyond doubt the fact that proof of a caveatable interest does not automatically negate a claim for damages for the lodgment of a caveat without reasonable cause. It also shifts the burden of proof to the caveator to prove that the caveat was lodged for a reasonable cause. There was obviously a divergent view prior to that amendment and its purpose appears to have been to put the debate to rest. It therefore does not mean that the absence of a similar provision to subsection (3) prohibits this court from interpreting section 120 of the **Title by Registration Act** in the same manner. Given the dearth of authority in our own jurisdiction on the matter, it is open to this court to be persuaded by the proposition put forward in ***Bedford Properties PTY Ltd v. Surgo Pty Ltd*** in the judge's reliance on ***Young***. I am so persuaded.

[39] To my mind the mere establishment of a caveatable interest does not prove that the caveat was lodged with reasonable cause. As Kunc J noted ***"[l]odging a caveat is not a trivial act to be undertaken lightly."*** Doing so "***has immediate legal effect and can have significant commercial and financial consequences".*** It cannot be the case therefore, that the mere establishment of the caveatable interest, at a minimum, negates the unreasonableness of having it lodged in the first place. In order for section 120 of the Act to have full meaning and effect it must be appreciated that although ***"all things are lawful… not all are expedient"***. The Privy Council was quite prepared to liken a caveat to an interim injunction. In another case their Lordships also noted that ***"the purpose of a private caveat is to preserve the status quo pending the taking of timeous steps by the applicant to enforce his claim to an interest in the land by proceedings in court."***[16] It seems to me that if he fails to take timeous steps to the point that the caveat is set aside without him ever presenting the necessary evidence to the court, then he ought to be liable for the financial damages caused by his actions. I doubt that he is entitled to defend subsequent

[16] Registrar of Titles et al v. Temenggong Securities Ltd et al, Privy Council Appeal NO. 38 of 1975

proceedings by seeking to establish that caveatable interest as a matter of fact; as is attempted in this case.

[40] Consider the fact that a court in determining whether to grant an interim injunction must go on to examine more than the mere rights of the applicant but whether it is just and convenient to order the injunction. The judge must also consider the balance of convenience and assess whether the rights or the cause of action which the applicant claims is such that it would be appropriate to place an injunction on the respondent's dealings with his property in one way shape or form. Even then, in this process of judicial supervision, the applicant must still undertake to pay damages which may have been occasioned by the granting of an injunction. I fail therefore to see a rational argument being made that the term "reasonable cause" in accordance with section 120 of the Act would be limited to the mere establishment of a caveatable interest or an honest belief on reasonable grounds that there was such an interest. Surely the question of whether a caveat, which is a purely administrative act, was lodged for reasonable cause must mean more than the caveator having some right which is registerable. The reasonableness of lodging the caveat must be a balancing exercise in fairness. It is not merely a question of whether it is lawful, but rather whether the cause for lodging the caveat was reasonable. In fact in the Australian case of ***Mryoslav Piroshenko v. Belleli King et al***[17] the Supreme Court of Victoria assessed the test to be applied when considering an application to remove or maintain a caveat. In that regard the court stated the following:

> ***"Caveats under the Torrens system are treated by the courts as analogous to applications for interlocutory injunctive relief. Insofar as their registration is an administrative act, it is when application is made for their removal that the onus falls on the caveator to satisfy the two stage test used by the court when deciding whether to exercise its discretion to grant interlocutory injunctive relief. … This two stage approach requires the caveator to establish that there is a serious question to be tried that they have the estate or interest which they claim in the land in question, and having done so, to establish that the balance of convenience favours the maintenance of the caveat on the Register of Titles until trial."***

[17] [2010] VSC 240

[41] Clearly then, the courts have treated the issue of caveats in much the same way that it has addressed its mind to injunctions. The grant of an injunction has always been deemed to be the exercise of the court's equitable jurisdiction. It is a question of what is fair. In fact in considering whether to maintain a caveat the court is given broad powers to determine what would be the most just order to make. The legislation itself seems to contemplate an approach of balance and fairness in considering this issue. In a case like the present for example, the defendants turned up to a hearing before Williams J with no proof of the allegations made on the caveat. Yet, without appealing that order, the caveator appears in this court to say, "we had a caveatable interest on the basis of the state's power to collect taxes. That is enough to answer any question of whether the caveat was lodged with reasonable cause." I doubt that very much. In my view the order of the judge is enough to say that no caveatable interest exists. However, if I am wrong about that and the defendants are right then I am simply not of the view that the mere fact that a caveatable interest exists is enough to answer any claim in damages incurred by the lodging of a caveat without reasonable cause.

[42] In my view, a person lodging a caveat must balance the possible financial effect of the caveat with the nature of the right he claims to have. Given that the caveat is filed on an ex parte basis, if called upon to do so, the caveator must carry some of the burden in proving that it was reasonable for him to have lodged the caveat in the first place. In any event, the evidence presented in this case allows the court to consider this issue in the round without necessarily shifting the burden to the defendants. The test is not limited to whether a caveatable interest exists, but whether in all of the circumstances of the case it was lodged with reasonable cause. Take for example a caveator who insists on lodging a caveat despite the fact that the caveatee had taken all steps to satisfy the outstanding interest which the caveator claims to have. There would seem to me to be no reasonable cause to have lodged the caveat if it had been proven that his caveatable interest would have been extinguished, or perhaps satisfied, by reasonable efforts on the caveator's part to engage the caveatee prior to lodging the caveat. If this court is to accept that the government has a caveatable interest by way of its power to collect taxes, then consider for a moment a citizen who calls on the Inland Revenue Department to enquire as to the status of his taxes with an intention to pay. He receives little to no information which enables him to satisfy his obligations to the government. Would it then be said that the government should lodge a caveat to "protect its

interests" in the face of a citizen who is attempting to satisfy his obligations? Surely a caveat lodged in these circumstances cannot be said to have been lodged for reasonable cause even if it is found that the caveatable interest exists.

[43] In my view therefore, there are two broad circumstances under which section 120 of the Act becomes applicable. They are:

(a) If no caveatable interest is found to have existed at the time the caveat was lodged, then the caveator can only avoid liability to pay damages if it is proven that he held an honest belief on reasonable grounds that he had such an interest and that was the basis of the lodgment of the caveat. That is of course if the caveatee proves that he has suffered damages and it is just to order compensation of the amount claimed. Under this heading the propositions put forward in the case of ***KB Corporate Pty Ltd v Sayfe & Anor*** are all applicable.

(b) Even if a caveatable interest exists the caveator may be liable to pay damages if the caveat was lodged for a purpose other than that which is clearly provided for in the Act. I appreciate that liability under this heading may be rare, but it is nonetheless possible, given the wide range of circumstances under which caveats are lodged.

[44] I turn now to consider in some detail the grounds upon which the caveat was lodged in the first place. Williams J had already decided that section 4 of the **Intestate Estates Act** was not applicable and I am of the view that this issue is no longer up for consideration as there was no appeal of that order. She would have therefore determined that reliance on that section did not provide a caveatable interest. However, for the sake of completeness I will outline the basis upon which I have agreed with that order as this would shed some light on the conclusions I have come to in a broad sense. Section 4(f) of that Act states as follows:

> ***"in default of any person taking an absolute interest under the foregoing provisions, the residuary estate of the intestate shall belong to the Crown as bona vacantia, and in lieu of any right to escheat."***

[45] Essentially, the caveator suggested that all of the original shareholders in the 2nd claimant company were deceased and no one had come forward to declare an interest in their shareholdings. There are two rather obvious reasons why reliance on this section of the **Intestate Estates Act** was completely untenable. Firstly, neither before Williams J nor before this court was any evidence presented as to precisely who these persons were. It cannot be said as a matter of fact that no one had come forward to stake a claim in relation to persons who had simply never been identified. Even if some of the shareholders had been deceased, that is not enough to prove that they had died intestate or that their estates remained unadministered. All it would prove is that the shares in the 2nd claimant had not been transferred to anyone in those estates. The government can simply not claim a basis to rely on the principle of bona vacantia in relation to estates of unidentified individuals in this way; at least not on the peculiar circumstances of this case. The caveator kept insisting that all the original shareholders were dead but provided no basis upon which that assertion was made. Not even evidence of the issuing of shares had been presented to the court. This is simply not good enough.

[46] Secondly, and even more importantly, the caveator had simply ignored a fundamental principle of corporate law which has existed from as far back as 1896. Almost 120 years prior to the lodging of this caveat the case of ***Salomon v* A *Salomon* & Co**[18] had firmly established the principle that a limited liability company is a separate and distinct personality from its shareholders. Imbedded in that doctrine is the principle that the company is a going concern which outlives its shareholders. The death of a shareholder doesn't give his estate a direct interest in the company's property. At most there is an interest in the shareholding which may pass to the estate. The company continues and its right to its property is not fettered by the death of its shareholders. Therefore, even if there was evidence to suggest that these shareholders were deceased, the principle of bona vacantia would apply solely to the property belonging to the estate of these individuals. At most this would be an interest in the shareholding, not a direct interest in the property belonging to the company sufficient for there to be reasonable cause to have lodged this caveat. The caveator insisted that there were no legal successors. However, there can't be legal successors to the property of the company as it operates as a going concern and continues to be the registered proprietor of the property to this day.

[18] [1896] UKHL 1

[47] What the evidence establishes is that in 2011 a judge of the Supreme Court was satisfied that Mr. Spencer Howell was entitled to bring an application to have the 2nd defendant reinstated on the register of companies. The evidence suggests that after the order of the court in 2011 the 2nd claimant paid in excess of $22,000.00 to clear off the arrears which had mounted due to its failure to file annual returns prior to that. The Registrar of Companies in Saint Christopher thereafter issued a certificate of registration to Mr. Howell in 2013. In keeping with the new federal system and the provisions of the Nevis Ordinance, the company was continued in Nevis and registered with the Registry of Companies at the instance of Mr. Howell. None of these actions were challenged. At that point the company was fully functional and the caveator took no steps to challenge this registration and to stake any claim in the company. Yet it thought it fit to lodge a caveat for reasons which are inexplicable. Even then, 8 months later no steps were taken to claim an interest and no evidence was presented to Williams J in that regard.

[48] It is also obvious that the failure of the company to file annual returns cannot amount to a caveatable interest on the part of the government. I say so for a number of reasons. Firstly, the legislature has already made clear and adequate provisions as to how the requirement to file annual returns is to be enforced. Section 72 of the **Companies Act** states that a company failing to file annual returns is ***"liable to be struck off the register of companies in accordance with section 206, the provisions of which shall apply accordingly; and in the case of an offence under paragraph (b) of subsection (1), is liable to a fine not exceeding one half of the prescribed filing fee for each day the offence is permitted to continue."*** The power to enforce this provision rests with the Registrar of Companies and in the circumstances of this case that authority was duly exercised.

[49] The company had in fact been struck off the register prior to 2011. What transpired thereafter is that an application had been made to have the company reinstated. This was done by order of the court in 2011. A certificate was issued by the Registrar of Companies in Saint Christopher thereafter. In addition to that the company was continued in Nevis in 2013. The caveator has argued that in March, 2013, a group of persons who had no standing in the company and are not related to the original shareholders purported to reinstate the company under the Companies Act 1996. It was also stated that the group purported to appoint Spencer Howell as the sole director of the company

and Tessa Howell as secretary and restructure the company. No evidence had been presented to Williams J or this court sufficient to justify the Caveator's skepticism. In any event, I am of the view that this would not have been an appropriate forum within which to establish such a claim.

[50] In addition, in closing submissions counsel for the 1st and 3rd defendants sought to argue that Mr. Howell had no standing to bring this claim because he had not proven that he was an original shareholder of the 2nd defendant company. This argument is entirely misconceived. Mr. Howell brings this action on behalf of the company as its director and he is duly recorded as such in the registry of companies. The last annual returns filed in 2013 clearly indicate that he is a director of the company. In fact, Mr. Howell would have had no standing if he had attempted to bring this action as a shareholder, given that the company is distinct from its shareholders. The management of the company and the right to act on its behalf is vested in its directorship. In any event, the duty to determine whether the reinstatement of the company was justified rested with the High Court judge and the Registrar of Companies; not the Caveator. This skepticism is therefore of no relevance. There was no intervention in that process. In addition to this, it is more than doubtful that these issues give any interest to the government in what are the affairs of a private limited company. None of these grounds give rise to a caveatable interest on the part of the government and certainly could not have been a proper basis for the lodgment of the caveat in the first place.

[51] Of the 6 grounds outlined in the caveat lodged on 5th February, 2015, the claim for outstanding taxes is the only one which may possibly amount to a caveatable interest. Counsel for the 2nd defendant refers the court to section 35 (1) and (2) of the **Title by Registration Act** which makes provisions relating to property taxes. The section states as follows:

> ***(1) Property tax now imposed, or hereafter to be imposed, by any Act shall be a first charge on the land on which the said tax is made payable by the said Act, where such land is now held under, or is hereafter brought under, this Act.***
>
> ***(2) Such charge shall rank before all mortgages, encumbrances and interest already created and constituted, or hereafter to be created and constituted, by and under this Act and the Government may take all such proceedings under this Act for the recovery of land tax now due and unpaid, or hereafter becoming due and unpaid,***

by sale or otherwise of the land or estate on which the tax is so made payable, as a mortgagee or encumbrancee may now take under this Act when a mortgagor or encumbrancer has failed to perform the conditions of a mortgage or encumbrance, or as when a mortgagee or encumbrancee may lawfully demand the repayment of the sum lent on mortgage, or the amount or provision secured by an encumbrance.

[52] Counsel therefore submits that this section does not contain any limitation regarding the value of the taxes owed. What it does is to amount to a 1st charge on the property and that the government may take all such proceedings under the Act for the recovery of its taxes. Insofar as that is the case, it is argued that the government had a right to lodge the caveat in order to protect its interest in collecting outstanding property taxes from the 2nd claimant. In my view however, counsel may have overlooked the provisions of subsections (3) and (4) of that very section and their relevance to the issues at hand. They state as follows:

> ***(3) The Registrar of Titles shall make the following noting, as a first noting, on all certificates of title hereafter issued by him or her:***
>
> ***"Charge in favour of the Government for land tax now due or hereafter becoming due."***
>
> ***(4) Every certificate of title heretofore issued by the Registrar shall be deemed and taken to be noted with the noting specified in subsection (3).***

[53] In light of these provisions it is important to be reminded of the basis contained in the legislation for the lodgment of a caveat in the first place. Section 112 states that ***"[a]ny person claiming to be entitled to stay the registration of any dealing in land, until his or her rights therein shall be recognised and registered, may present a caveat to the Registrar of Titles."*** The first observation to be made is that the basis of an entitlement to stay the registration of any dealings is to ensure that the caveator's right is recognized and registered. A caveat is not lodged as a process for proving rights and interests. It is merely injunctive; and temporarily so. In most instances, where there is a genuine dispute as to the rights and interest, this may very well be pursued elsewhere by separate proceedings. The caveat is lodged for the sole purpose of staying any dealings until the

right of the caveator is recognized and registered. Further to this, as noted by Warren CJ in the case of ***Piroshenko v. Grosman et al***[19] ***"[a] caveat is not a 'bargaining chip'. It is not sufficient for the caveator to establish a prima facie case that they have contractual, equitable or statutory rights against the caveatee; their interest or rights must attach to the property with respect to which the caveat has been lodged."***

[54] By virtue of the very provisions of section 35 of the Act, the rights of the government to collect taxes are already recognized and registered on the face of the certificate of title as a matter of course or by implied notation. I find it difficult to appreciate the circumstances under which a caveat should be lodged for the recognition and registration of rights which are already registered on the certificate of title or are implied by the force of the law. As it stands, by virtue of section 35 of the Act, any person dealing in registered land must be taken to be on notice that he is doing so subject to the government's right to collect its taxes. No transfer of the property can be registered without the intervention of the Inland Revenue department. In these circumstances I am not of the view that section 35 creates a caveatable interest as the government has no basis for staying any dealing with the property until its rights are recognized and registered. This is already effected by the provisions of section 35 of the Act.

[55] In the event that I am wrong and section 35 does create a caveatable interest, I am still of the view that this caveat was not lodged for a reasonable cause. The circumstances of the case in general and the actions of the caveator both before and after the lodging of the caveat are factors to take into consideration in determining the purpose of the lodging of the caveat and whether it was reasonable to do so. In a case like the present for example, where the government is claiming that the 2nd claimant owes a mere $659 in taxes, it is doubtful that the lawfulness of the lodgment of the caveat, if it is so, answers the question of whether it was lodged without reasonable cause. Added to that is the fact that an application had been filed to have the caveat maintained and almost 8 months after the lodgment of the caveat the Caveator turned up at a hearing before a judge of the Supreme Court with no evidence to substantiate the basis upon which the caveat was lodged in the first place. Williams J found that to be the case and there has been no appeal of her findings.

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[19] [2010] VSC 240

[56] The evidence of Mr. Colin Dore is very critical to this issue. He states that the practice of the Inland Revenue department was to demand payment of any outstanding taxes prior to the release of any memorandum of transfer for registration. This seems to be a policy in keeping with the provisions of section 35 of the Act. By virtue of that section, any person purchasing property must do so subject to the payment of government taxes. From Mr. Dore's evidence, I take the practice to be that prior to the registration of a deed of transfer the document must first be approved by the Inland Revenue department. If taxes are outstanding they are either paid or an arrangement is made to have them paid prior to the release of the document for registration. Mr. Dore did not even know what a caveat was and provided evidence to the effect that it has never been the practice of the Inland Revenue Department to lodge caveats as a means of securing the payment of property taxes.

[57] Added to that is the evidence of the 2nd defendant. He states that he was instructed by the Minister of Finance to pursue properties which had become derelict and which had owed property taxes to the government. Yet in cross examination he was unaware of any other property on which a caveat had been lodged for that purpose. He was not very much aware of exactly how much taxes were owed. He insisted that it was more than $659 as interest had to be added to the demand notice. On the face of the demand notice however, there is a section for the inclusion of interest. It remains blank. To this day there is no evidence that any demand notice had been served on the 2nd claimant. Nothing had been done either before or after the lodging of the caveat to properly communicate with the 2nd claimant with a view to collecting any taxes. This notwithstanding the fact that counsel acting for the 2nd claimant had written the Comptroller of the Inland Revenue in March of 2015 enquiring as to the status of the property tax owed by the 2nd claimant. There was no response to that letter.

[58] I find it more than odd that the defendants would turn up at the trial of this matter, some five years later, still somewhat confused as to precisely how much tax was owed to the government and yet thought it necessary to lodge a caveat to protect that very interest. Surely reasonableness would dictate that the government is to properly communicate with a proprietor as to exactly what is owed before seeking to prohibit him from dealing with his property as he wishes. Or at the very least, soon after lodging the caveat the caveatee should be provided with some information as to exactly what

is owed. In fact in the case of ***Scott Darren Pascoe v. Michael James et al***[20], the court in New South Wales noted the following:

> ***"… the failure of the various caveators… to deal with the registered proprietors and the lack of any explanation as to how an equitable interest arises out of the invoices relied upon, are all bases to conclude that these caveators have no caveatable interest, had no actual belief that there was a caveatable interest in the land and no reasonable grounds for holding such a belief."***

[59] These facts lead me to draw two conclusions as it relates to this action brought pursuant to section 120 of the Act. Firstly, there was no caveatable interest. In light of that I find that even if there was an honest belief that there was such an interest then it was not held on reasonable grounds. Any assessment of the provisions of section 112 in conjunction with section 35 of the **Title by Registration Act** would have made it palpably clear that a caveatable interest did not exist and that the outstanding taxes was not a basis upon which a caveat ought to have been lodged in the first place. With the greatest respect, the advice given by Mr. Hobson was clearly wrong and I am not satisfied that the caveator can hide behind the cloak of the legal advice received in the circumstances of this case. This was not a transaction of any sophistication and the instructions to pursue this matter emerged from the Ministry of Finance for which the 3rd defendant must bear responsibility. Taking all of the circumstances of this case together I am satisfied that even reliance on that advice would not establish an honest belief on reasonable grounds that a caveatable interest existed.

[60] Secondly, if I am wrong about the fact that there was no caveatable interest, I am still of the view that the caveat was lodged without reasonable cause. The facts taken as a whole indicate that the caveat could not have reasonably been lodged and maintained for the purpose of collecting outstanding taxes. There was already a reasonable and effective procedure in place within the Inland Revenue Department for that purpose. Section 35 of the Act already ensured that the government's interest was protected on the face of the certificate or at least by implication. There is no evidence that any attempt had ever been made on the part of the government to collect these taxes either before or after the caveat was lodged; even up until the point of trial. When one

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[20] [2013] NSWC 1602

balances the significant financial consequences of lodging a caveat against the fact that a mere $659 was owed to the government in circumstances where an adequate policy was already in place for the collection of these taxes, I am of the firm view that the lodging of this caveat was entirely unreasonable. Even more so was the application to maintain the caveat with no proper attempt made by the caveator to present any evidence to the judge even 8 months later to substantiate the claims that it made regarding its interest. The mere fact that the government, or anyone for that matter, has the power to lodge a caveat, does not mean that it is reasonable to do so or that it was lodged with reasonable cause. If the land registration system is to be effective, no caveator should be allowed to behave in this manner regarding anyone's property; even more so one who claims to be acting on behalf of the government.

Who is liable?

[61] I turn now to consider the question of who is liable in damages to the claimants. The claimants assert that all three defendants are liable to pay damages for the lodgment of this caveat. However, in my view, this issue must be determined by an examination of the legislation in question. Section 120 is very clear as to who is liable to pay and that is "a person lodging a caveat". The section does not extend to the concepts of "aiding and abetting". Therefore in order for any of the defendants to be liable it must be proven that they fall within that narrow definition. Even in the interpretation of that issue there appears to have been divergent views in at least two commonwealth jurisdictions. In the New Zealand case of ***Gordon v Treadwell Stacey Smith***[21] the court seemed to accept that a solicitor can be liable for lodging a caveat on behalf of his client; although the judgment seems to have qualified that liability based on the nature of the instructions received from the client. The Australian authorities have differed with this view; and for reasons which I will explain I am persuaded that the Australian position is correct.

[62] In ***Windlock Pty Ltd v Velibor Davidovic & Ors***[22] it was determined that the section ***"only makes liable any person who lodges a caveat."*** The court went on to consider that although there may be persons other than the caveator who may be liable for the lodging of a caveat, such as an

[21] [1996] 3 NZLR 281
[22] [2014] NSWSC 269

executor to an estate, the section does not include solicitors or filing clerks. In the circumstances of that case the court was not prepared to hold the person signing the statutory declaration liable for lodging the caveat.

[63] In the Australian case of ***Lanciana v Alderuccio***[23] the claimant lodged a claim against the defendants pursuant to section 118 of the *Transfer of Land Act.* The section is similar to that of section 120 of the Nevis legislation. The defendants were both solicitors lodging the caveat on behalf of a client. Insofar as it relates to the claimant's contention that the attorney is to be held liable for lodging the caveat on behalf of his client, the judge in that case went on to state that "***I consider that express words would be required to support the plaintiff's construction of s 118 as conveying a departure from fundamental agency principles by exposing an agent to liability for the act of their caveator principal."*** He went on further in the judgment to state that the ***"defendants as solicitors acting as agents in lodging the 2005 caveats were not 'a person' lodging a caveat with the Registrar for the purposes of s 118 of the Act."***

[64] I entirely agree with that sentiment. An attorney lodging a caveat is operating in an overt agency on behalf of his client. The claimant would be fully aware as to whom the caveator was and there is no need in such circumstances to hold the agent liable on behalf of a principal who is fully identified. Counsel for the claimant referred to the Australian authority of ***Pearl Lingerie Australia Pty Ltd v TGY Pty Ltd***[24] in support of its claim directly against the 2nd defendant. Reliance was also placed on the case of ***Legal Services Commissioner v Kotsifas***[25]. However, none of these cases were brought on the basis of liability for the lodgment of a caveat without reasonable cause. These authorities establish the fact that the Australian courts have been prepared to rule that a solicitor should pay indemnity costs if he was involved in lodging a caveat without reasonable cause. Even then this depends on the individual circumstances of the case. Further, the courts have also decided that a solicitor may be referred to a disciplinary tribunal in such circumstances.

[65] In her submissions filed after trial counsel for the claimants also referred the court to the case of **White and another v. Jones and another**[26]**.** Again I find this authority to be unhelpful. That case

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[23] [2019] VSC 198
[24] [2012] VSC 451
[25] [2014] VCAT 1615
[26] [1995] 2 WLR 187

addresses a circumstance where the court was prepared to allow a beneficiary of an estate to pursue an action against the solicitor who acted for the testator. The solicitor's negligence in failing to prepare the last will and testament prior to the death of the testator was determined to have given rise to a cause of action as the damages to the intended beneficiary was reasonably foreseeable. This is entirely distinguishable from the circumstances of the present case as the beneficiaries would have had a direct relationship with the testator. Here the only relationship of proximity which exists is that of Mr. Hobson's relationship with his client. This is not a claim founded in negligence. Even if that were the case, then liability for negligent advice would be a matter for the 3rd defendant to pursue. In the statement of claim, much was made of Mr. Hobson's "statutory duty". It was alleged that he had a duty to research the law and properly advise his client on whether the caveat ought to have been lodged. I am not at all sure as to what statutory enactment the claimants are referring to. Certainly, Mr. Hobson would have had a duty to properly advise his client. If he failed to do so then he opens his client up to liability. However, it is the client who bares that duty pursuant to section 120 of the Act.

[66] In my view, the 2nd defendant is not liable to pay damages for the caveat lodged in February of 2015. He is not a person lodging the caveat for the purpose of section 120 of the Act. Further, I can also find no reason to hold the 1st defendant liable either. Counsel for the claimant insists that the 1st defendant is liable purely because the caveat was lodged by the Permanent Secretary in his ministry. She seeks to move the court to rely on the Carltona Principle. However, the minister was completely unaware of these issues. The instructions emerged from the Ministry of Finance. Mr. Hobson clearly thought that the permanent secretary in the Ministry of Lands ought to have lodged the caveat. However, for reasons I have explained that advice was wrong. The lodging of this caveat was not in any way part and parcel of the functions of the Minister of Lands sufficient to state that the minister "ought to have known" about it or to be responsible for what transpired; even if vicariously. The claims against the 1st and 2nd defendants are therefore dismissed. The claim against the 3rd defendant is established. However, before addressing my mind to the damages payable under section 120 of the Act I will address the claim for unlawful interference.

Unlawful Interference

[67] In support of its claim for unlawful interference, counsel for the claimant refers the court to the well-known case of ***Douglas v. Hello***[27]***.*** In particular, counsel refers to the judgment of Lord Hoffman where he references the following dicta from the case of ***Quinn v Leathem***[28]***:***

> ***"… a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffer from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact – in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified – the whole aspect of the case is changed: the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done."***

[68] Counsel refers the court further to paragraph 47 where Lord Hoffman states that ***"the essence of the tort therefore appears to be (a) a wrongful interference with the actions of a third party in which the claimant has an economic interest and (b) an intention to cause loss to the claimant."*** Counsel therefore argues that in lodging the caveat, the defendants prevented the 2nd claimant from transferring the property to the 1st claimant. Further, the caveat also prevented the 1st claimant from obtaining a loan with the Saint Kitts-Nevis-Anguilla National Bank. This, it is argued was done in "scant regard" for the freedom of the 1st claimant to contract with the 2nd claimant.

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[27] [2002] UKHL 21

[28] [1901] AC 495, 534

[69] The parties do not generally dispute the legal principles applicable to the issues at hand. However, counsel for the 1st and 3rd defendants referred the court to the case of ***Mertz Investments N.V et al v. ACP Limited***[29] et al where Lady Justice Arden noted that in a claim for unlawful interference ***"it is not enough that there is an intention to do an act which in fact causes loss. That act must be done with the intention that it will cause loss."*** Counsel therefore argues that there was no action on the part of the defendants which was done with the intention to cause loss of the nature alleged by the claimants. In light of that counsel for the defendants argue a number of issues in defence of the claim for unlawful interference. Firstly that the defendants had no knowledge of the contract for the sale of the land when the caveat was lodged. Secondly, in that regard there can be no intent to cause loss to the claimants without knowledge of the existence of the contract. Lastly, counsel for the 2nd defendant in particular, argues that the contract for the sale of the property had itself expired as the date for completion of the sale as contained in the agreement between the claimants had elapsed. For my part, I do not agree with these submissions.

[70] Whilst I accept that there is insufficient evidence that either defendant had any knowledge of the contract for the sale of the land at the time of the lodgment of caveat, that fact would have been apparent to the 3rd defendant, at least, at the time in which the 2nd claimant sought to have the caveat removed. It was clear from the document lodged by the 2nd claimant in July, 2015, that there was an impending sale of the property at the time. With full disclosure of that fact, the Caveator made an application to maintain the caveat. On its face the very basis for the application was to prohibit any dealings with the property. At that point the Caveator would have had a direct intent to ensure that the 2nd claimant was not in a position to fulfill its obligations under the contract as the caveat was lodged for the direct purpose of prohibiting such an act.

[71] In addition to that, the evidence establishes that the Inland Revenue Department had received a letter from an attorney acting on behalf of the 2nd claimant in March, 2015 seeking information regarding any outstanding property taxes. It would have been clear from that letter that there was a pending sale of the property. Mr. Dore, who is the Permanent Secretary in whose ministry the Inland Revenue Department falls was informed of the nature of the outstanding taxes and was part of the discussions between Minister Amory and the 2nd defendant when issues relating to the 2nd

[29] [2007] ECWA Civ. 1303

claimant's property were discussed. I do not accept that the relevant agents of the government can claim no knowledge of the pending sale of the property as submitted by counsel for the 1st and 3rd defendants. With knowledge of that sale there would have naturally been an intention to prohibit that sale and the 3rd defendant, at least, must bear responsibility for the loss suffered as a result of a clear interference with that transaction by the application to maintain the caveat.

[72] As it relates to the claim for unlawful interference with the 1st claimant's contract with the bank, I am satisfied that there is insufficient evidence that either defendant had any knowledge of that fact to ground a successful claim. Counsel for the 1st claimant argues that the 2nd defendant was a member of the board of directors of the bank at the time. However, Mr. Hobson indicated that he became a member of the board in April, 2015. Not only was this after the lodgment of the caveat but also after the board had already approved the loan application put forward by the 1st claimant. Further to this, Mr. Hobson indicated in evidence that the loan application never came to the board during his tenure there. In addition to that he was not always present during that period given his health issues at the time. I accept that evidence. The 1st claimant's own evidence establishes that the loan application had been approved by the board prior to that and that all that was left to complete the transaction were clerical and administrative in nature. On balance I am not satisfied that the necessary intent has been proven sufficient to establish unlawful interference with the 1st claimant's contract with the bank.

[73] However, in my view, whatever losses may have been suffered as a result of the inability to process the loan are recoverable in damages for the unlawful interference with the contract for the sale of the land. I say this as I am of the view that such damages would not be too remote. It would be reasonably foreseeable that a purchaser in such circumstances may be seeking loan financing to complete this transaction and that interference with the sale would cause some loss to the purchaser. I am of the view that not only there was an intentional interference with the contract for the sale of the property in question, but that interference was wrongful. Such liability would attach to the actions of the 3rd defendant through its official Mr. Evelyn. I would however find that on balance there is insufficient evidence to prove the unlawful interference with the loan agreement between the 1st claimant and the St. Kitts-Nevis-Anguilla National Bank but that such damages are recoverable on the claim of unlawful interference with the contract for sale of the property.

[74] Lastly, I do not agree with the submission of counsel for the 2nd defendant that the sale agreement between the claimants had expired. Certainly the contract itself contained a date for closure. However, it is well settled that the court is entitled to take the actions of the parties into consideration when interpreting a contract and determining whether one exists. Surely, the evidence suggests that notwithstanding the expiration of the closing date, the claimants continued with their intention to complete the sale. In any event, I rather doubt that the 2nd defendant can intervene in that relationship by making an argument for the rescission of the contract in that manner. I am satisfied that the contract for sale continued to exist at the point at which this caveat was lodged and that the lodgment of the caveat interfered with that contractual relationship.

Compensation/Damages

[75] I turn now to consider the issue of compensation pursuant to section 120 of the Title by Registration Act. The first point to be made is that section 120 does not establish a carte blanche right to compensation for all losses incurred as a result of the lodgment of the caveat. What the section does is to empower the court to award ***such compensation as may be just.*** In the Jamaican case of ***Leighton Mc. Knight et al v. Jamaica Mortgage Bank***[30] the court was concerned with an assessment of damages in circumstances similar to the present case. Brown J noted that ***"there must be a causal link between the damage claimed and the lodgment of the caveat. Further, only such compensation as is just shall be ordered."*** The judge also noted that ***"… the court is concerned with how the caveat can be shown to have changed the course of events during its subsistence and thereafter, insofar as those losses can be said to have been foreseeable."*** Therefore, in order to establish a claim for the damages which the claimants seek, the following must be proven:

(a) That there is a causal link between the damages claimed and the lodgment of the caveat;

(b) That the damages were foreseeable; and

(c) That it is just to award the compensation which is being sought.

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[76] On the question of whether it is just to award the compensation claimed, the court must also consider what occurred during the time in which the caveat was lodged and thereafter. The question is how the lodgment of the caveat has affected the claimants to the extent that it has changed the course of events. I am of the view that based on the number of issues raised in the pleadings and the cross examination, coupled with the court's express duty to do what is just, the claimant's would have had to establish the extent of the losses suffered. It is not enough merely to put receipts and invoices before the court. Was must be established is that the lodgment has caused these losses and it is just to make such an award.

[77] In that regard I find the facts of the case of ***Leighton Mc. Knight et al v. Jamaica Mortgage Bank*** to be of some assistance. In that case the claimants had engaged in negotiations with a new developer to complete a building project. Financing was also in place. The claimants argued that the caveat derailed the arrangements as no financer was willing to proceed until the caveat was removed. It would seem from the facts of that case that what was claimed in compensation were the damages incurred as a result of the delay in obtaining alternative financing for the project. This, according to the judge, would have included the increase in the costs of completing the project and the losses suffered as a result of this delay. This would include issues such as interest and whether changed in the market would have affected the cost of financing the project.

[78] On the contrary, in the case now before me, there appears to be little to no evidence concerning what transpired after the caveat was removed insofar as it relates to the contract between the claimants. I am of the view that the contract subsisted at the time the caveat was lodged. The claimants do not speak to the question of whether the contract had been repudiated on account of the caveat being lodged. All that was stated was that the 1st claimant would have had to resubmit the application for financing. Whilst the court accepts that there would have been some apprehension in doing so, with the 2nd defendant now being on the board of directors of the bank, it is unclear to me as to whether any other institution would have been willing to finance the sale of the property. No doubt this would lead to some delay in the process but that is not enough to prove that the course of events were so altered so as to make the fulfillment of the contract impossible. Given that this claim was lodged some 6 months after the caveat was removed, it would not be unreasonable to demand that the claimants prove that it was not possible or even advisable to seek

alternative financing in order to complete the transaction. In fact, what the facts show is that there had already been some delay in completing this transaction as the agreement for sale was signed in 2014 and approval for the condominium project had been granted on certain conditions as far back as 2011.

[79] What appears to have transpired is that a claim was filed in which the 1st claimant seeks, among other things, compensation for the costs of preparing architectural, engineering and electrical plans as well as topographical and quantitative surveys, condominium plans, fees to the department of planning and preparation of an environmental impact assessment. All of this relates to actions of the 1st claimant in furtherance of its desire to construct condominium units on the property. I am not of the view that it would be just to award these in damages on the basis of the evidence presented in this case. I also doubt that these losses were foreseeable. The 1st claimant also seeks compensation from the defendants for the deposit paid in furtherance of the purchase price and a property valuation and auditing of its accounts. As pleaded, the claimants state that the 1st claimant was unable to construct the condominium project as a result of the lodgment of the caveat. It also states that the 2nd claimant was unable to enjoy the benefit of the balance of the purchase price. To my mind, the evidence presented in this case does not establish these as pleaded.

[80] What is clear is that the lodgment of the caveat delayed the completion of the sale, but that is not enough to state that the 1st claimant was unable to complete the condominium project altogether. Nor is it an indication that the sale of the property was completely frustrated. The property has not been sold to anyone else and neither claimant has addressed the status of the contract between them after the removal of the caveat. Without any evidence indicating whether an alternative source of financing was unavailable or that the 2nd claimant was no longer able and willing to complete the sale of the property after the caveat was removed, I am not of the view that much of what has been claimed are recoverable in damages. In addition, the 1st claimant claims the sum $46,200.00 in legal fees for the conveyance of the property. I am unable to find any documentary evidence which is sufficient to substantiate that claim; especially considering the fact that the conveyance did not take place.

[81] Of the damages claimed however, I am satisfied that the 1st claimant has suffered and ought to recover the following losses:

(a) The sum of $13,101.80 in commitment fees to the bank; and

(b) $785.79 in legal fees to the bank.

[82] As it relates to the pleadings and evidence of the 2nd claimant, this too has left much to be desired. The 2nd claimant claims $5,155.90 in administrative expenses. Further, the sum of $33,169.50 is claimed in legal fees in addition to $315.90 in advertising costs. Even after reviewing the evidence and the pleadings, I am still unclear as to precisely why these are recoverable. An invoice dated 23rd September, 2013 was presented in which the sum of $5,155.90 was claimed. However, this relates to club meetings held as far back as 2011 and 2013. It is not clear as to whether these had anything to do with the sale of the property. In any event, the company is under an obligation to meet to address issues of concern to its members. The evidence suggests that the company had remained in a state of dormancy for quite some time. No doubt the sale of the property would have prompted some action to put things right with the Registry of Companies. But these are obligations which the company had a duty to fulfill even outside of the impending sale. In addition, invoices were presented regarding the publication of notices of meetings, including the Annual General Meeting of the 2nd claimant. I am not of the view that there has been a sufficient link drawn between these company expenses and the lodgment of the caveat. There is also not much of an explanation as to what the legal fees claimed relate to and I am not of the view that this should be granted on such scant evidence. A party who claims damages must surely be in a better position than this to prove that these damages are recoverable.

[83] As it relates to the claim of damages for unlawful interference, I share the same view as I expressed in paragraphs 81 and 82 above. The interference no doubt affected the 1st claimant. However, that is only insofar as it would have caused a delay in the process. The evidence is simply insufficient to hold that the contract was derailed altogether and that it was not possible to seek alternative funding in order to complete this sale and pursue the project. An approach as taken in ***Leighton Mc. Knight et al v. Jamaica Mortgage Bank*** would have been the proper course of action to pursue. If alternative financing was proven to have been unavailable, then the court would

accept that the interference with the contract resulted in the losses claimed by the claimant as it would have certainly frustrated the contract in light of the fact that financing had already been approved.

[84] In the circumstances I make the following declarations and orders:

(a) All claims as against the 1st and 2nd defendants are dismissed. The remaining orders, save as to costs, relate to the claims against the 3rd defendant;

(b) The claim in trespass is dismissed;

(c) The claim of unlawful interference with the agreement for sale between the claimants is upheld;

(d) The claim of unlawful interference with the 1st claimant's agreement with the bank is dismissed;

(e) The caveat lodged on 3rd February, 2015 was not lodged with reasonable cause and the 3rd defendant is liable to pay such damages as are just;

(f) The 1st claimant is entitled to damages in the sum of $13,887.59 together with interest at a rate of 6% per annum from the date of the filing of the claim;

(g) The 2nd claimant has not provided sufficient proof of the damages claimed and is therefore not awarded damages in this claim;

(h) Costs;

(i) The 3rd defendant will pay costs to the claimants to be assessed upon application by the claimant if not agreed within 21 days from the date of this judgment;

(ii) Given that the 1st and 2nd defendants were successful in their defences the court considers the issue of an award of costs against the claimants. As it relates to the 1st defendant I would make no order as to costs, given the manner in which this case was defended. He was initially presented as representing the 3rd defendant and therefore did not seek separate legal representation.

As it relates to the claim against the 2nd defendant, the claimant will pay costs to be assessed upon application by the 2nd defendant if not agreed within 21 days from the date of this judgment.

Ermin Moise
High Court Judge

By the Court

Registrar