

INTERLOCUTORY PROHIBITIVE INJUNCTION

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Basis of Application for Interlocutory Prohibitive Injunction

1. The basis upon which an interlocutory prohibitive injunction may be granted is that:
 - a. there is a serious question to be tried; and
 - b. the balance of convenience favours the grant of injunction because, either:
 - i. damages would be an inadequate remedy; or
 - ii. it is otherwise just in all the circumstances: ¹

A Serious Question to be Tried

2. A "serious question" is one which is reasonably arguable, such argument being of substance and not frivolous. In determination of the "serious question", the Court must have regard to all of the evidence before it, including evidentiary material from which it can conclude that the defence will succeed: ²

¹ *Patrick Stevedores Operation No. 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 24; *National Mutual Life v G. T. V.* [1989] VR 747, at 764 (Full Court).

² *National Mutual Life v G. T. V.* [1989] VR 747, Ormiston J at 751-754.

3. If the parties objectively purported to agree to different forms of extension (time stipulation in Rescission Notice versus settlement date in the contract of sale) then there has been a mutual mistake and it would be unconscionable in the circumstances for a party to rely on that mistake and maintain the alleged agreement to vary the contract settlement date, in which case that party remains in default of the Rescission Notice: ³
4. A party's right to terminate a contract that arises a failure to comply with the time stipulations of a Rescission Notice as extended by agreement, and not from a breach of the a contract: ⁴ The notice procedure is evidentiary in character: a party's failure to comply with a Rescission Notice is evidence of a fundamental breach or repudiation.⁵
5. In those circumstances, an injunction should be not granted "...in accordance with the general rule that injunctions should be granted only in very clear cases":⁶

Balance of Convenience – Sufficiency of Damages

6. Where an award of damages would sufficiently compensate for any loss caused, and the defendant is likely to be able to meet them, an injunction should ordinarily be refused, no matter how strong the case appears at the early stage: ⁷
7. The sufficiency of damages as a remedy means that the balance of convenience favours a refusal to grant an injunction. ⁸

Balance of Convenience – Just in all the circumstances

³ see *Taylor v Johnson* (1983) 151 CLR 422.

⁴ see *Louinder v Leis* (1982) 149 CLR 509, Mason J at 526.

⁵ see *Ciavarella v Balmer* (1983) 153 CLR 438, the Court at 446; and see also Carter, J. W. *Contract Law in Australia* (Sydney: Butterworths, 4th edn, 2002), at para. [1964].

⁶ *Stocker v McElhinney (No. 2)* [1961] N.S.W.R. 1043, Walsh J at 1049, applied in *National Mutual Life v G. T. V.* [1989] VR 747, Ormiston J at 754 and approved by the Full Court (same citation).

⁷ *Nicholas John Holdings Pty Ltd and Ors v Australia and New Zealand Banking Group Ltd and Others* [1992] 2 VR 715, Hedigan J at 722-723.

⁸ see *Southern Cross Pumps and Irrigation Pty Ltd v Nicholls & Anor.* (1996) 39 NSWLR 501, Young J at 504. See also *State Transport Authority v Apex Quarries Ltd* [1988] VR 187, Kaye J at 193.

8. It would not be just in all the circumstances to grant an injunction because: (identify the grounds).
9. For the reasons outlined in paragraph 10 above it would not be just in all the circumstances to grant an injunction and the balance of convenience favours an exercise of the Court's discretion by refusing to do so.

SUMMARY REMOVAL OF CAVEAT

No Caveatable Interest

10. Where an agreement for sale and purchase has been cancelled and the rights of the purchaser terminated, there can remain no legitimate interest to protect unless there is some other right by way of specific performance or right to relief against forfeiture which ought to be protected.⁹
11. Where the rights of the purchaser have been converted into a simple money claim, such as for damages, the grounds for a caveatable interest will be lost:¹⁰

Principles Governing Court's Discretion

12. In an application for removal of a caveat, the Courts apply tests equivalent to those applied in an application for an interlocutory injunction. Accordingly, the first inquiry is whether the evidence presented indicates that there is a serious question to be tried.¹¹
13. The onus of proof in an application for the removal of a caveat lies upon the caveator as the person asserting the claim:¹²
14. If it is clear that the caveator is not entitled to maintain the caveat, there is no serious question to be tried. The application should succeed and the caveat removed:¹³
15. There is no serious question to be tried in relation to the maintenance of the caveat where the caveat has been renewed by or on behalf of the same person in respect of the same interest or estate in contravention of section 91(4) of the *Transfer of Land Act 1958*:¹⁴

⁹ *Location Properties Ltd v G H Lincoln Properties Ltd* [1988] 1 NZLR 307, Grieg J at 317. See also *Gurwitz v Gurwitz* (1988) V ConvR 54-317.

¹⁰ *Re Incentive Programmes Pty Ltd*, unreported, Full Court of the Supreme Court of Queensland, Andrews S.P.J., Kelly and Shepherdson JJ, 14/12/84. See also General Condition 7 of the contract.

¹¹ *Martyn v Glennan* [1979] 2 NSWLR 234; *Eng Mee Yong v Letchumanan* [1980] AC 331.

¹² see *Eng Mee Yong v Letchumanan* [1980] AC 331, Diplock LJ at 341; and *Commercial Bank of Australia v Schierholter* [1982] VR 292.

¹³ see *Gurwitz v Gurwitz* (1988) V ConvR 54-317. See also Colbran, S., Jackson, S. *Caveats* [Australia: FT Asia 1996], at 343 and 469.

¹⁴ see *Sinn v National Westminster Finance Ltd* [1985] VR 366.

16. Otherwise, the facts in this matter are practically undisputed such that there is no serious question to be tried:¹⁵

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¹⁵ see Young CJ in *Craig Devon Properties Pty Ltd v McIntosh Homes Pty Ltd* (unreported), Supreme Court of Victoria, No. 8236 of 1990, 25.7.90, transcript at 11.