The Court's Jurisdiction To Remove Caveats

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I INTRODUCTION

Section 137 of the Land Transfer Act 1952 enables any person:

> (a) Claiming to be entitled to or to be beneficially interested in any land, estate, or interest under [the] Act by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied, or otherwise howsoever; or
> (b) Transferring any estate or interest under [the] Act to any other person to be held in trust ...

to lodge with the Registrar a caveat against dealing with that land. Section 141(1) of the Act provides that so long as the caveat remains in force:

> the Registrar shall not make any entry on the register having the effect of charging or transferring or otherwise affecting the estate or interest protected by the caveat.

So a caveat against dealings is just that. While it subsists, no dealings may be registered against the title caveated. Caveats are commonly lodged by:

(a) purchasers under sale and purchase agreements;
(b) mortgagees under agreements to mortgage or unregistered mortgages; and
(c) beneficiaries under trusts.

Caveats offer a degree of protection otherwise not afforded by the Act. But for the registered proprietor of land which has been caveated, the caveat is a nuisance. The land cannot be sold, mortgaged, or otherwise encumbered. A registered proprietor who believes the caveat is not valid will want it removed.

There are two ways to remove the caveat. The first is to apply to the High Court under s 143 of the Land Transfer Act for an order for its removal. The Court may then

"make such order in the premises, either *ex parte* or otherwise, as to the Court seems meet".[1]

Alternatively, s 145 may be used. If application is made for the registration of an instrument affecting the land, estate, or interest protected by the caveat, the Registrar must give notice to the caveator. The caveat will be deemed to have lapsed unless the caveator gives notice to the Registrar within 14 days that application for an order to the contrary has been made to the High Court, and the order is made and served on the Registrar within a further period of 28 days.

What is surprising about ss 143 and 145 is the lack of guidance given to the Court. Its determination whether to remove or extend the caveat is a very important matter. On the one hand, the caveat may be the only means of protection for the caveator's interest, while on the other the caveat prevents the registered proprietor from dealing with the land. Yet s 143 merely directs the Court to make "such order . . . as to the Court seems meet" while s 145 gives no direction at all.

This dearth of statutory guidance has, particularly in recent years, given rise to much uncertainty and conflict in the judicial approach to applications under ss 143 and 145. A few matters are certain:

(a) the caveator will not succeed unless there is an "arguable case" for a caveatable interest;[2]
(b) the onus under both sections rests upon the caveator to show an arguable case;[3]
(c) applications under s 143 and s 145 are not suitable for a final determination of the issues between the parties. Final determinations will not be made unless both parties consent.[4]

What is far from certain is the Court's discretion to refuse to extend the caveat once the caveator has established an arguable case. A number of questions arise:

(a) Is there any discretion under s 143 or s 145 not to extend the caveat once an arguable case has been shown?
(b) If there is a discretion, what test should govern its exercise: the balance of convenience, or something else?
(c) If there is a discretion, is the discretion under s 143 different from that under s 145?
(d) If there is a difference, what is its rationale?

A related issue is whether the Court has the power to impose terms upon orders made under s 143 or s 145. In particular, can the Court impose an undertaking as to damages on the caveator as a term of an extension?

I shall attempt to resolve these questions in two ways. First, the recent development of the law in this area will be traced to determine where the law presently stands. Second, some suggestions will be made as to what the law should be.

1 Section 143(2).
2 See *Holt v Anchorage Management Ltd* [1987] 1 NZLR 108; *Sims v Lowe* [1988] 1 NZLR 656.
3 See *New Zealand Limousin Cattle Breeders Society Inc v Robertson* [1984] 1 NZLR 41; *Sims v Lowe*, ibid.
4 See *Catchpole v Burke* [1974] 1 NZLR 620; *Holt v Anchorage Management*, supra at note 2.

II PRECEDENT

1. Before 1979

Before 1979 the principles upon which the courts were to act in determining applications under s 143 and s 145 were well settled.

(a) Section 143

In *Mall Finance & Investment Co Ltd v Slater*,[5] Richmond P, in his leading judgment, approved *In Re Peychers' Caveat*,[6] which had established that:[7]

> [T]he summary removal of a caveat under s 143 is proper only where it is patently clear there [is] no valid ground for lodging the caveat in the first place, or patently clear that the interest, which in the first place justified the lodging of the caveat, no longer exist[s].

These two principles had first been enunciated in 1906.[8] Richmond P added a third:[9]

> [Where] it is patently clear that the interest protected by the caveat will not be preserved by the court under the Illegal Contracts Act 1970.

This is an unnecessary complication: it really only goes to whether there is a valid ground for the caveat.

The onus of proof was on the person seeking removal of the caveat to show that it was patently clear that there were no grounds for the caveat.[10] If the person seeking removal failed to establish patent clarity, there was no discretion on the Court to order removal; removal was proper *only* when patent clarity was established.

The jurisdiction of the Court to impose terms upon the removal or extension of caveats was unclear. It was well accepted that extension orders could be made on the condition that the caveator bring an action to establish a claim within a reasonable (and usually specified) time.[11] One case, however, held that there was no jurisdiction to order removal on the condition that the applicant give security for the caveator's claim.[12] That case seems peculiar to its facts,[13] and in any case it would seem a moot point whether the Court had jurisdiction to impose terms on removal. Removal was

5 [1976] 2 NZLR 685.
6 [1954] NZLR 285.
7 Supra at note 5, at 686.
8 In *Plimmer Bros v St Maur* (1907) 26 NZLR 294; 9 GLR 57.
9 Supra at note 5, at 686.
10 *In re Peychers' Caveat* [1954] NZLR 285. The onus is now the other way: *Sims v Lowe* [1988] 1 NZLR 656. This requirement cannot be compared directly with the present accepted threshold requirement that the caveator establish an arguable case if the caveat is not to be removed. I would suggest though that they are two ways of saying the same thing. There will be no patent clarity if there is an arguable case, and if there is no arguable case then there will be patent clarity. The only difference is the onus of proof.
11 *Wellington City Corporation v Public Trustee* (1921) 40 NZLR 1086, 1093 per Hosking J.
12 *Concrete Buildings of New Zealand Ltd v Swaysland* [1953] NZLR 997.
13 Hay J said "there is no power *in the circumstances* for the imposition of terms." (emphasis added): ibid, 1000.

only possible if it was patently clear that the caveator had no interest, so there would be no perceived interest for the Court to safeguard by imposing terms.

(b) Section 145

In 1974, in *Catchpole v Burke,*[14] McCarthy P said of s 145:[15]

> [W]hen it is plain to the Court that the caveator cannot possibly succeed in establishing his claim against the registered proprietor it is proper to refuse to extend the caveat . . . But where there are doubts surrounding the rights of the caveator . . . the proper course is to extend the caveat until the conflicting claims of the different parties are determined in actions brought for that purpose.

The views of the other members of the Court of Appeal[16] in *Catchpole* were in line with that of McCarthy P.[17]

There seemed to be no question of a discretion to let the caveat lapse once an arguable case was established. That is understandable considering that the usual practice was to order an extension for a specified time only, in which time caveators were expected to establish their interest in a full trial.

The view was established in 1909 that:[18]

> [Section 145] does not give power to [impose an undertaking as to damages] and it does not seem to be contemplated. Section [146] is effectual for the protection of the rights of any person sustaining damages if a caveat is lodged without reasonable cause.

Section 146 provides that a person lodging a caveat without reasonable cause is liable to compensate any person thereby sustaining damage.

(c) Summary

Before 1979, the Court's jurisdiction under s 143 and s 145 was very similar. Removal, or a refusal to extend, would not be ordered if an arguable case was shown. There was no discretion to order otherwise. The only terms upon which extensions, or refusals to remove, would be ordered were that the caveator bring an action to establish an interest.

2. 1979–1985

Eng Mee Yong v Letchumanan[19] was a Privy Council appeal from the Federal Court of Malaysia. At issue was an application by the caveatees for the removal of a caveat under s 327(1) of the Malaysian National Land Code:

[14] [1974] 1 NZLR 620.
[15] Ibid, 625.
[16] Wild CJ and Speight J.
[17] It would seem that the threshold requirement for extension, that there be "doubts surrounding the rights of the caveator", is no different to the present arguable case requirement; indeed, Speight J referred to the caveatable interest in *Catchpole* as being "distinctly arguable". Supra at note 14, at 625.
[18] *Ex Parte Seaford Coal Co Ltd* (1909) 12 GLR 400, per Edwards J.
[19] [1980] AC 331.

> Any person or body aggrieved by the existence of a private caveat may at any time apply to the court for an order to its removal, and the court (acting, if the circumstances so require, ex parte) may make such order on the application as it may think just.

Section 327 equates to s 143, except that under the latter it is only the registered proprietor or other person having a registered estate or interest who may apply for removal of the caveat. Otherwise, under both sections application is made to the Court, and the Court is to make a just or meet order.

While only s 327 was in issue on the appeal Lord Diplock (who delivered the judgment of the Board) acknowledged that the appeal was of importance to the principles to be applied under both s 327 and s 326 of the code.[20] Section 326 is essentially equivalent to s 145.

Lord Diplock began by accepting as apt an analogy between a caveat and an interlocutory injunction. One qualification made to the analogy was that a caveat was issued *ex parte* by a Registrar acting in an administrative capacity. However that qualification did not stop the Privy Council from applying the analogy:[21]

> The court's power to grant an interlocutory injunction . . . is discretionary. It may be granted in all cases in which it appears to the court to be just and convenient to do so. Similarly in section 327 it is provided that "the court . . . may make such order on the application as it may think just."

Their Lordships then referred to *American Cyanamid Co v Ethicon Ltd*[22] which had established that a plaintiff seeking an interlocutory injunction must satisfy the court that there is a serious issue to be tried and that the balance of convenience favours the granting of the injunction. So also for s 327 the onus lay upon the caveator, if the caveat was not to be removed, to:[23]

> first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action.

But the onus of showing that the balance of convenience favoured extension of the caveat was minimised somewhat because:[24]

> [O]nce the caveator has met the first requirement . . . the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence.

Their Lordships had earlier expressed their opinion that the same onus lay upon the caveator under s 326 to succeed in an application that the caveat not lapse.[25]

Eng Mee Yong was obviously a large deviation from the law as it then existed in New Zealand. It was a highly persuasive decision that said that the caveator must establish the balance of convenience to successfully contest a s 143 application, as well as first establishing a serious question to be tried, or arguable case. There were also strong obiter comments that the same requirements applied to s 145 applications.

[20] Ibid, 335.
[21] Ibid, 337.
[22] [1975] AC 396; [1975] 2 WLR 316; [1975] 1 All ER 504 (HL).
[23] Supra at note 19, at 337.
[24] Ibid, 338.
[25] Ibid, 336.

Apart from indicating that an element of discretion was conferred on courts entertaining s 143 and s 145 applications, *Eng Mee Yong* was also authority that the onus was on the caveator to establish the serious question to be tried or arguable case. That conflicted with *In Re Peychers' Caveat*,[26] but has now been accepted by the New Zealand Court of Appeal in *Limousin Cattle Breeders Society*[27] and in *Sims v Lowe*.[28]

The discretionary element that *Eng Mee Yong* introduced to ss 143 and 145 applications was given a mixed response by the New Zealand courts. Rather ironically, up to the time of the first Court of Appeal case to consider *Eng Mee Yong*,[29] all the reported cases were s 145 applications, whereas the Privy Council had been considering a s 143 equivalent. Three different responses to *Eng Mee Yong* are apparent from the cases:

(a) *Eng Mee Yong* was not relevant to s 145 applications;[30]
(b) *Eng Mee Yong* did not introduce any discretionary considerations to caveat applications;[31]
(c) *Eng Mee Yong* established that a caveator must show both an arguable case and that the balance of convenience favoured extension of the caveat.[32]

The effect of *Eng Mee Yong* on New Zealand law was first fully considered by the Court of Appeal in *Castle Hill Run Ltd v NZI Finance Ltd*.[33] This was an appeal from a judgment of Heron J dismissing a s 145 application that a caveat be extended. Richardson J, delivering the judgment of the Court, first noted that s 145 gave no guidance as to the circumstances in which the Court may make an order extending a caveat. He referred to the approach taken by the Court of Appeal in *Limousin Cattle Breeders Society*, where it was said that the onus on such an application was on the caveator to establish an arguable case. He compared this to the approach taken by the Privy Council in *Eng Mee Yong*, where interlocutory injunction principles were applied:[34]

> We do not discern any difference of substance between these two approaches. Clearly the first question must be whether there is an arguable case to justify . . . the continuation of the caveat. If so, then in the ordinary course a caveat will be extended until the rights of the parties are determined. *But it is a discretionary decision and accordingly it is appropriate to weigh balance of convenience considerations and other matters bearing on the exercise of the discretion.* (Emphasis added.)

It is submitted that there *is* a difference between the two approaches. *Limousin Cattle Breeders Society* was simply a reaffirmation of what had been said in

[26] [1954] NZLR 285.
[27] [1984] 1 NZLR 41.
[28] [1988] 1 NZLR 656.
[29] *Castle Hill Run Ltd* v *NZI Finance Ltd* [1985] 2 NZLR 104.
[30] I believe *Wyllie Investments Ltd v Lane Abel Holdings Ltd* (1981) NZCPR 268 to be an example of this.
[31] *Re Dick's Caveat* [1985] 2 NZLR 641.
[32] *Leather v Church of the Nazarene* [1984] 1 NZLR 544; *Borlase v Morris* [1985] 2 NZLR 646.
[33] [1985] 2 NZLR 104.
[34] Ibid, 106.

Catchpole v Burke, except that the onus now lay on the caveator to establish an arguable case. There was no question of a discretion to refuse extension once an arguable case had been made out. In any case, it is clear that the Court of Appeal was of the view that a decision under s 145 was discretionary and that the balance of convenience, among other things, was relevant to that decision. Given that *Eng Mee Yong* directly concerned a s 143 equivalent, it was clear that the Court of Appeal believed that the same considerations applied to that section.

One area of uncertainty remaining after *Castle Hill* was the Court's jurisdiction to impose undertakings on extensions or removals. As to that, there were the conflicting decisions of *Leather v Church of Nazarene* (for undertakings) and *Re Dick's Caveat* (against undertakings).

3. 1985 to date

High Court decisions following *Castle Hill* applied the arguable case plus balance of convenience approach. In *Ashby v Lifestyle Homes (New Zealand) Ltd*[35] Smellie J dismissed a s 145 application for extension on the basis that, although the plaintiff had established an arguable case, the balance of convenience favoured removal of the caveat. And on an application for removal under s 143, Heron J in *Dimock v Park Lane Motor Co (Wellington) Ltd*[36] gave regard to the balance of convenience before refusing the application.

But less than two years after *Castle Hill* the Court of Appeal had cause to examine s 145 once more, in *Holt v Anchorage Management Ltd.*[37] This case cast large doubts on what was said in *Castle Hill* regarding the relevance of the balance of convenience. Unfortunately the judgments in *Holt* did not go much further than that; they cast doubt on, without actually rejecting, *Castle Hill.*

To begin with, each of the judges[38] was at pains to emphasise that in *Eng Mee Yong* no New Zealand cases (in particular, *Cathpole v Burke*) were referred to in Lord Diplock's judgment. Second, the judges also pointed out that in both *Eng Mee Yong* and *Castle Hill* the caveator had failed to establish an arguable case, so that the comments regarding the balance of convenience in both cases were, strictly speaking, obiter.

Turning to the separate judgments, McMullin J noted that there was no reference in s 145 to the Court making such order "as it may think just", as there had been in the section before the Privy Council in *Eng Mee Yong*. Therefore:[39]

> In the absence of any contrary indications in s 145 it is entirely consistent with the protective nature of a caveat that once a caveator shows that he has a caveatable interest the caveat should continue in force . . .

McMullin J speaks here of the caveator showing a caveatable interest rather than an

[35] (1987) 4 BCB 175.
[36] (1987) 4 BCB 167.
[37] [1987] 1 NZLR 108.
[38] McMullin, Somers, and Casey JJ.
[39] Supra at note 37, at 115.

arguable case. This may have been due to his conclusion that this caveator had:[40]

> no mere arguable case for [the caveat's] continuation [but]... a positive right to keep it on foot.

For that reason his conclusion that:[41]

> Considerations of balance of convenience have no place in [the caveator's] claim to maintain the caveat on foot ...

should be treated with caution. It is unclear whether McMullin J meant that, had the caveator established only an arguable case, the balance of convenience would have been relevant.

Somers J, although expressing some doubt on the aptness of the analogy between caveats and interlocutory injuctions, did not expressly reject the analogy nor the consequent relevance of the balance of convenience. He did say that:[42]

> It is not easy to imagine circumstances in which it will be convenient to allow an arguable but undecided claim to be left in a state in which it may be defeated.

But matters of convenience in the case before him were so minimal that they did not:[43]

> justify any final decision on whether convenience is a feature of the jurisdiction under s 145.

Casey J, after reviewing *Eng Mee Yong* and *Castle Hill*, accepted that the decision under s 145 was discretionary once an arguable case was shown.[44] But he continued:[45]

> I doubt whether the simple *American Cyanamid* approach of looking merely at the balance of convenience between the caveator and caveatee is adequate. Having regard to the wide scope of the protection intended by [caveats], there must be taken into account potential loss from the actions of third parties through eg lien claims, notices under the Matrimonial Property Act 1976, undisclosed agreements to mortgage, etc, as well as from the foreseeable activities of the registered proprietor. The difficulties inherent in this exercise may render the ordinary concept of balance of convenience of little help in reaching a decision, and suggest that the approach taken by the Court in *Catchpole v Burke* is a more practical solution.

Casey J felt that there was not sufficient analogy between caveats and interlocutory injunctions to make the latter a useful guide in determining applications under s 143 and s 145. But while he rejected the relevance of the balance of convenience, he recognised at least one case where a discretion could be exercised against extension under s 145:[46]

> [Where] a caveator's refusal to consent to a transaction [appears] so unreasonable as to lead to the conclusion that he is not acting bona fide and is using the caveat for purposes other than the genuine protection of his interest in the property.

The Court of Appeal, with the exception of Casey J, could hardly have been more

[40] Ibid, 116.
[41] Ibid, 116.
[42] Ibid, 120.
[43] Ibid, 120.
[44] Ibid, 123.
[45] Ibid, 123.
[46] Ibid, 124.

equivocal in dealing with the relevance of the balance of convenience. Obviously the Court was not happy with the position reached in *Castle Hill*; otherwise they would simply have followed that decision and extended the caveat on the basis that an arguable case had been shown and that the balance of convenience favoured the caveat's extension. But rather than rejecting *Castle Hill* altogether, the Court simply murmured discontent with the analogy between caveats and interlocutory injunctions, and made a point of emphasising that the statements in *Eng Mee Yong* and *Castle Hill* were merely obiter.

Apart from the balance of convenience point, McMullin[47] and Casey JJ[48] made allusions to the possibility that different considerations might apply under s 143. As to the jurisdiction to require an undertaking as to damages, this was only addressed by Somers and Casey JJ, both of whom declined to express a view on the matter as it was not in issue, although Casey J doubted whether any such jurisdiction would extend to requiring undertakings inconsistent with s 146.

Thus *Holt,* rather than resolving any differences of opinion that remained after *Castle Hill,* engendered further uncertainty the results of which are seen in the High Court decisions that followed.

In *Muollo v Natoli*[49] Davison CJ considered that *Holt* had established that the only onus resting on a caveator under s 145 was to establish an arguable case for a caveatable interest. His sentiments were echoed by Greig J in *Van Der Lubbe v Riamki Society Inc*:[50]

> All that [the caveator] needs to show [on a s 145 application] is that he has an arguable case for a caveatable interest.

Similarly Heron J in *Action Finance Ltd v Skyline Finance Ltd*[51] thought that after *Holt* the overriding consideration was whether an arguable case existed. Inconvenience caused by the continuance of the caveat was irrelevant.

By contrast, in *Harwood v McKenzie*[52] Williamson J, obiter, clearly thought that a discretion of some sort remained under s 145, notwithstanding *Holt.* And in *Skyline Finance Ltd v Capitalcorp Properties Ltd*[53] Tipping J was of the view that a s 145 order was discretionary. He relied on the judgments of Somers and Casey JJ in *Holt* for that view.

At the same time, in what appeared to be two rare s 143 applications, a discretion under that section was recognised. In *Begley v Bravo*[54] Master Towle emphasised that the more recent New Zealand decisions, and in particular *Holt,* were all s 145 applications, and thus obiter when it came to s 143 applications. He therefore concluded that he was bound by *Eng Mee Yong,* and applied the arguable case plus

[47] Ibid, 115.
[48] Ibid, 122.
[49] (1988) 4 BCB 242.
[50] [1988] BCL 531.
[51] (1987) 4 BCB 243.
[52] (1987) 4 BCB 244.
[53] (1988) 4 BCB 265.
[54] (1988) 4 BCB 265.

balance of convenience test, although in the end holding for the caveator. He also found, relying on the analogy between caveats and interlocutory injunctions drawn in *Eng Mee Yong*, that he had a jurisdiction to require an undertaking as to damages. And in *Superannuation Investments Ltd v Camelot Licensed Steak House Ltd*[55] McGechan J accepted counsel's submission that the words of s 143 gave the Court a discretion sufficient to at least order removal of a caveat notwithstanding an arguable case, to allow registration of a transfer, on the basis that the Court would then grant leave under s 148 to the caveator to lodge a second caveat.

Clearly the Court of Appeal in *Holt* had done nothing to introduce certainty into this area of the law. Two opportunities arose during 1988 to resolve some of the difficulties. Both were s 143 applications.

In *Varney v Anderson*[56] the caveator appealed from a decision of Chilwell J ordering the removal of a caveat. The caveator was a purchaser under a sale and purchase agreement dated April 1985. He had sued for specific performance in April 1986. Chilwell J ordered removal of the caveat in June 1987 for the reason that the caveator had been guilty of unsatisfactory delay in prosecuting the specific performance action.

On appeal, it was not in dispute that the appellant had an arguable case for a caveatable interest. Cooke P, delivering the judgment of the Court, set out the concluding words of s 143 and commented:[57]

> This in terms gives the Court a wide discretion. We have no doubt that the Judge was right in regarding delay as a relevant factor to be weighed in the exercise of that discretion. Whether the same applies under s 145 does not now arise for decision; that question, if and when it does arise, will require consideration of, inter alia, [*Holt*], although we note that delay was not in issue in that case. As to s 143 we think that [counsel for the respondent] correctly stated an established practice when he said that in the case of a caveat by a party claiming to be a purchaser the Court has always insisted on the diligent prosecution of specific proceedings as the price of preserving the caveat . . .

The Court was firmly of the opinion that the establishment of an arguable case did not automatically lead to refusal of an order for removal:[58]

> [Counsel for the appellant submitted] that wherever the caveator has a chance of succeeding in pending specific performance proceedings, he is entitled to retain his caveat. It is true that delay is not necessarily a bar to specific performance . . . . We think it fallacious, however, to convert the possibility of obtaining a specific performance decree into an invariable and automatic ground for preserving a caveat, no matter what the delay.

So, while there was no discussion as to other considerations which might bear on the exercise of the court's discretion under s 143 (such as the balance of convenience), there was a clear holding that s 143 applications involved a discretion, and that a dilatory caveator may have that discretion exercised against him or her. On the facts however, the delay was partly explicable, and there had been no specific prejudice to the registered proprietor, so the caveat was reinstated.

[55] (1988) 5 BCB 21.
[56] [1988] 1 NZLR 478.
[57] Ibid, 479.
[58] Ibid, 481.

Section 143 was before the Court of Appeal again in *Sims v Lowe*.[59] The facts are not important. Somers J delivered the substantive judgment of the Court. He noted that the procedure outlined in s 143 was wholly unsuitable for the determination of disputed questions of fact:[60]

> From this it follows, and has been consistently held, that an order for the removal of such a caveat will not be made under s 143 unless it is patently clear that . . . there was no valid ground for lodging it or that such valid ground as then existed no longer does so . . . . *The patent clarity referred to will not exist where the caveator has a reasonably arguable case in support of the interest claimed. Catchpole v Burke, New Zealand Limousin Cattle Breeders Society Inc v Robertson . . . and Holt v Anchorage Management Ltd . . . show that the same test applies to both s 143 and s 145.* (Emphasis added.)

Eng Mee Yong is not mentioned. There is no reference to a discretion under either s 143 or s 145: if the caveator has an arguable case, there will be no patent clarity; if there is no patent clarity, the caveat cannot be removed. *Varney v Anderson*, the judgment of which had been delivered less than two months previously, either escaped the attention of the Court or was ignored by it. Probably the latter, as Bisson and Gallen JJ sat on both appeals.

One wonders, with all due respect, exactly what the Court of Appeal was trying to do in *Sims v Lowe*. The passage highlighted above is a bare reaffirmation of the law as it stood prior to *Eng Mee Yong*. Perhaps the Court was of the opinion that this was the ideal state of the law, and that all that had passed since then in the form of *Eng Mee Yong, Castle Hill, Holt,* and *Varney v Anderson* should now be forgotten. If so, then it is suggested that detailed discussion of these cases, and of relevant principle, was necessary to arrive at that conclusion. As it stands, *Sims v Lowe* is a rather shaky foundation on which to rest argument regarding the Court's jurisdiction under s 143 and s 145. For, with its dearth of reasoning and disregard of authority, it is quite possible that the Court of Appeal might on another occasion choose to dismiss what was said in it.

Since *Varney v Anderson* and *Sims v Lowe* there have been few decisions of note.

In *Holmes v Australasian Holdings Ltd*[61] (actually between the two Court of Appeal decisions) Wallace J addressed in detail the Court's jurisdiction to require an undertaking as to damages under s 145. Although his comments were in the end strictly obiter, his discussion is nonetheless valuable. After referring to the conflict of judicial opinion on the matter, he concluded that as a matter of principle and practice such jurisdiction did exist. It was justified in principle because:[62]

> [I]t is clear that a registered proprietor and other parties can suffer very severe loss as a result of the lodging of a caveat which . . . may not have been lodged without reasonable cause but yet is ultimately found not to have been justified. It would seem consistent with justice for the Court to have a discretion to require an undertaking in those circumstances.

The practical justification was that identified by Chilwell J in *Borlase v Morris*:[63]

[59] [1988] 1 NZLR 656.
[60] Ibid, 659.
[61] [1988] 2 NZLR 303.
[62] Ibid, 313.
[63] [1985] 2 NZLR 646, 651.

> [The discretion to require an undertaking] must encompass protection to registered proprietors in a proper case which may go beyond the compensation criteria in s 146. I say that because the Court has intervened; whereas s 146 compensation can arise without Court intervention to preserve or terminate a caveat.

Wallace J found support for his view in English and New South Wales practice, where courts can require undertakings under similar provisions. He was careful to say that an undertaking would only be imposed in "appropriate circumstances,"[64] but made no attempt to describe what circumstances would be appropriate.

This point has recently been considered in similar detail by Barker J in *BP Oil New Zealand Limited v Van Beers Motors Limited*,[65] another s 145 application. Barker J reviewed the various High Court decisions and concluded that there was jurisdiction to require an undertaking, following *Holmes*.

As for the court's general jurisdiction under ss 143 and 145, there have been three recent decisions. In *Gillan v Scoular*[66] Ellis J considered an application for removal under s 143. He turned to *Catchpole v Burke* and *Castle Hill Run* for guidance as to the principles to be applied, concluding that s 143 conferred a discretion that enabled him to take into account the balance of convenience. He relied on *Sims v Lowe* as establishing that the onus was on the caveator to establish an arguable case, but clearly did not think that there the Court of Appeal had ruled out the balance of convenience as a relevant consideration.

By contrast, in *Edwards v Holtrop*,[67] a s 143 application, Master Hansen referred to *Sims v Lowe* and concluded:[68]

> I take from that passage that it is now clear that once a reasonably arguable case for sustaining the caveat is made out under either a Section 143 or 145 application, balance of convenience is no longer a relevant consideration.

He also took support from Somers and Casey JJ's judgments in *Holt*, which had expressed doubt about the balance of convenience. But Master Hansen thought there was a discretion of some kind under s 145:[69]

> I do not read the penultimate paragraph of Casey J's decision at p.124 of *Holt*, to mean that the balance of convenience still applies. I take it to outline circumstances and situations where the Court may refuse to exercise its discretion in favour of the applicant.

The paragraph referred to was where Casey J suggested that where a caveat was used for purposes other than the genuine protection of an interest in the property, the court could be justified in exercising a discretion to remove it or let it lapse.

In *Smith v Akeroyd*[70] Fisher J considered whether the balance of convenience was a relevant consideration in a s 145 application. He said:[71]

64 Supra at note 61, at 313.
65 Unreported, Barker J, High Court, New Plymouth, M75/90, 2 May 1991.
66 (1988) 5 BCB 41.
67 (1989) 5 BCB 129.
68 At p. 12 of his judgment.
69 Ibid.
70 Unreported, Fisher J, High Court, Rotorua, M 111/90, 4 September 1990.
71 Ibid.

> I take the view that in *Holt v Anchorage Management Limited* the existence of such a discretion was viewed with disfavour, even though no final decision was made upon it. The presence of such a discretion was rejected in more forthright terms in *Wyllie Investments* . . . by Holland J. I propose to follow *Wyllie Investments* and the broad indications in *Holt*, and to assume that the balance of convenience is not relevant on the present application.

Summary

1. Is there a discretion?

Do the above cases establish that there is a discretion to remove or to refuse to extend a caveat under s 143 or s 145 once the caveator has established an arguable case?

(a) Section 143

It is suggested that *Varney v Anderson* is the authoritative case on this point. The Court of Appeal there clearly felt that what was said in *Holt* was limited to s 145 applications. They expressly concluded that s 143 gave the court a wide discretion, and that therefore the establishment of an arguable case was not automatically fatal to the caveatee's application for removal.

Varney v Anderson, in recognising a discretion, is in accord with High Court decisions under s 143 such as *Begley v Bravo,*[72] *Superannuation Investments Ltd v Camelot,*[73] and *Gillan v Scoular.*[74] Importantly, it is at least partly in accord with *Eng Mee Yong.*

Sims v Lowe of course casts some doubt on *Varney v Anderson.* The conclusion that "[t]he patent clarity [necessary for the removal of the caveat] will not exist where the caveator has a reasonably arguable case in support of the interest claimed"[75] is clearly inconsistent with *Varney v Anderson.* A choice has to be made between the two. *Varney v Anderson* should be preferred, not only because it is in accord with *Eng Mee Yong* and High Court decisions, but also because it accords with principle (as to which see below). *Sims v Lowe,* apart from lacking these qualities, also contains no discussion of *Varney v Anderson* and other incompatible precedents.

(b) Section 145

Holt still has to be considered the leading case on s 145. The Court of Appeal was careful to restrict their comments to s 143 in *Varney v Anderson.* In *Sims v Lowe* it was concluded that the same test applied to both s 143 and s 145 (and that therefore there is also no discretion under s 145). But for the same reasons as above, and given that the comments regarding s 145 were obiter authority, *Sims v Lowe* should be treated as dubious. Therefore neither of these decisions detract from *Holt.*

[72] (1988) 4 BCB 265.
[73] (1988) 5 BCB 21.
[74] (1988) 5 BCB 41.
[75] [1988] 1 NZLR 656, 660.

Holt being the leading case on s 145 applications creates difficulties. Few things can be said with certainty about *Holt*. It is true that all three judges cast doubts of some sort on the relevance of the balance of convenience to s 145 applications, but only Casey J expressly rejected its relevance. And even he acknowledged that there might be some circumstances where a discretion could be exercised against a caveator.

Perhaps the safe conclusion from *Holt* is that there is a discretion of some sort under s 145, but that the balance of convenience is not relevant to it. It is only, for instance, where the caveator is acting in bad faith that the discretion will arise.

Even this conclusion has its problems. First, of the subsequent High Court decisions, only *Edwards v Holtrop*[76] would seem to provide clear support. Other decisions seem either to reject altogether any discretion,[77] or to accept a discretion which includes the relevance of the balance of convenience.[78] Second, there has been no indication from the courts as to when the discretion will be exercised, other than the obiter comment of Casey J in *Holt*.

2. What is the discretion?

If there is a discretion under either section, how is it to be exercised? In other words, what factors should the Court take into account in exercising the discretion?

(a) Section 143

The Court of Appeal in *Varney v Anderson* said that s 143 conferred a "wide discretion". The case established at least one factor to be considered in the exercise of that discretion: delay by the caveator (although obviously this factor will not be relevant to every caveatable interest). The Court of Appeal made no reference to the relevance or otherwise of the balance of convenience. In my view *Eng Mee Yong* still provides highly persuasive authority that the balance of convenience is a relevant consideration under s 143. This view has support in *Begley v Bravo*.[79]

There is little worth in attempting to list the factors which might be relevant under s 143. The Court of Appeal has noted that the section confers a wide discretion. Without emphasising the analogy between caveats and interlocutory injunctions, it is relevant to quote the Court's comments in *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd*:[80]

> In this Court we have drawn attention from time to time to the importance of not seeking the answer to an interlocutory injunction application in the rigid application of a formula .... the two heads [whether there is a serious question to be tried and the balance of convenience] are not exhaustive. Marshalling considerations under them is an aid to determining, as regards the grant or refusal of an interim injunction, where overall justice lies.

[76] (1989) 5 BCB 129.
[77] See, for example, *Muollo v Natoli* (1988) 4 BCB 242; *Smith v Akeroyd*; supra at note 70.
[78] See, for example, *Harwood v McKenzie* (1987) 4 BCB 244.
[79] (1988) 4 BCB 265.
[80] [1985] 2 NZLR 129, 142.

This suggests that the Court of Appeal will not attempt a rigid classification of the considerations relevant to the exercise of the s 143 discretion.

(b) Section 145

As already indicated, there has been little indication from courts as to how the s 145 discretion is to be exercised. Since *Holt* it must be safe to say that the discretion is not to be exercised on a consideration of the balance of convenience. It seems therefore that the Court's discretion here is narrower than under s 143. But there has yet to be any indication (other than from Casey J in *Holt*) as to when the discretion will be exercised. It may be difficult to separate factors that merely go to the balance of convenience (and are therefore irrelevant) and factors which go to the narrower discretion.

3. Undertakings

The Court of Appeal has yet to determine whether a court has jurisdiction under either s 143 or s 145 to impose an undertaking as to damages. This leaves us with a divergence of High Court opinion on the matter. *Holmes v Australasian Holdings Ltd*[81] is the most valuable precedent. Although Wallace J's statements were only obiter, his conclusions were fully reasoned and contained reference to the previous divergent authorities. Moreover, his conclusion has now been followed by Barker J in *BP Oil v Van Beers*.[82]

4. Qualification

The above conclusions as to the present state of the law are offered subject to the obvious qualification that there is very little clear authority for any of the points. Caveat applications will continue to be made in a state of uncertainty.

III PRINCIPLES

The case law shows that two major issues are uncertain. First, whether the Court has a discretion under either section, and if so what it is. Second, whether the Court has the power to impose an undertaking as to damages on the caveator.

Discretion

The question asked in the cases is whether there is a discretion to remove the caveat once an arguable case for its existence has been shown. That however, is not precisely the issue. There are really two questions. First, does the Court have a discretion to makes its orders upon terms (the remedial discretion)? Second, is there a discretion to order that the claimed interest not be protected once an arguable case for the interest has been shown (the substantive discretion)?

[81] [1988] 2 NZLR 303.
[82] Supra, at note 65.

It is with the substantive discretion that the cases have been mostly concerned. I have framed it in terms of ordering that the claimed interest not be protected, rather than ordering removal of the caveat, because the latter ignores the possibility that the caveator's interest may be protected even when removal is ordered. This possibility arises when the caveator claims a security interest in the land. The Court is able in such cases to order removal of the caveat on terms that the caveatee pay a sum of money into court equal to the caveator's claimed security. Such an order was made by Tipping J in *Skyline Finance Ltd v Capitalcorp Properties Ltd.*[83] There he found that the caveator had established an arguable case for the existence of a charge over the land as security for a $10,000 debt. He nonetheless ordered that the caveat be allowed to lapse, but only as soon as the caveatee paid into Court the sum of $10,000. The $10,000 would then be the subject of an action brought for the purpose of determining the existence or otherwise of the charge.

Whether or not the Court has jurisdiction to make such an order as made by Tipping J is an issue of remedial discretion. Few cases have actually addressed the remedial discretion, concentrating rather on the existence or otherwise of the substantive one. But they are two separate issues.

Before proceeding to discuss each question separately, one immediate point of contrast between s 143 and s 145 should be emphasised:

(a) s 143 directs the Court to determine applications by making such order as appears meet;
(b) s 145 gives no direction as to how the Court is to determine applications.

An initial conclusion then is that, whatever the Court's discretion under either section, the legislature must have intended that it be different under s 143 to that under s 145. And obviously the direction to make such order as appears meet contemplates that there is a wider discretion under s 143.

This difference between s 143 and s 145 may seem peculiar at first glance, given that the effect of an order under either section is the same: the caveat will either be removed or be extended. This similarity in effect seems to have driven courts in the past to conclude that the same principles applied under both sections.[84] But the difference in statutory wording should not be ignored. This is particularly so, since there is a justification for the difference. The justification was identified by Brennan,[85] and is that there are important procedural differences in s 145:

(a) the caveat can lapse automatically without order of the Court if the caveator takes no action to extend it within 14 days; and
(b) a statutory guarantee is effectively provided that an application for extension will be determined within 42 days.

The summary procedure contained in s 145 is obviously beneficial to the person lodging the instrument for registration. It is detrimental to the caveator. The *quid pro*

[83] (1988) 4 BCB 265.
[84] *Catchpole*, supra at note 4; *Mall Finance*, supra at note 5.
[85] "Caveats Revisited" (1988) 4 BCB 265.

quo for the caveator should be that it is easier to obtain an order for the protection of his or her claimed interest.

This procedural difference only justifies a difference between the substantive discretion in the two sections. A more summary procedure does not necessitate narrower remedial choices. I suggest therefore that the closing words of s 143 indicate only that the Court's substantive discretion is wider under that section. Those words do not give the Court a wider discretion in forming its orders. The Court's remedial discretion is the same under s 143 and s 145.

That being so, it will be useful to determine the remedial discretion at this stage, before examining the substantive discretion. Clearly, only two broad orders are open to the Court: to remove (or allow to lapse), or not to remove (or extend). The discretionary aspect of these orders is the terms upon which they may be made. It seems that there should be only two limits upon the Court's jurisdiction to impose terms:

(a) the Court's jurisdiction to impose terms under the general law; and
(b) (possibly) s 146.

As to the Court's general jurisdiction, rule 263 of the High Court Rules provides that:

> An order made on an interlocutory application may be limited to have effect for such time and on such terms and conditions and subject to such undertakings as the Court thinks just.

An application under s 143 or s 145 is not an interlocutory application in terms of the Rules, but Rule 263 applies to such applications by virtue of Rule 458F(1). The remedial discretion provided by Rule 263 is obviously wide. Therefore under both s 143 and s 145 the Court may, for example, order:

(a) that the caveat remain only if the caveator within a specified time institutes an action to establish his or her claim;
(b) that the caveat remain only if the caveator consents to the registration of a particular transaction;
(c) that the caveat be removed only if the caveatee pays a sum of money into Court;
(d) that the caveat be removed and that the caveator be granted leave under s 148 to lodge a second caveat.

Other forms of order may be necessary according to the circumstances.

In considering the Court's substantive discretion under each section, I will ask two questions:

(a) Is there a discretion?
(b) If there is a discretion, what is it?[86]

Section 143

In *Eng Mee Yong* the Privy Council emphasised that a caveat can be lodged by any

[86] Although the question is not whether the court can remove the caveat, but whether the court can order that the interest claimed not be protected, I shall refer to the former, for reasons of simplicity.

person making a claim to title to land. As long as the caveat is in the correct form, the Registrar is required to enter it on the register. The Registrar acts in an administrative capacity only: he or she does not enquire into the validity of the caveator's claim. There is therefore a need for:[87]

> some speedy procedure open to the registered proprietor to get the caveat set aside where the caveator's claim is baseless or frivolous or vexatious.

Section 143 provides such a procedure. If the caveator's claim is baseless, frivolous, or vexatious (that is, if there is no arguable case) then the caveatee will obtain an order for removal.

Importantly though, s 143 goes further than providing a vehicle for the removal of caveats that are unsupported by arguable cases. The direction to make a meet order is superfluous if the only purpose of s 143 is to enable the caveatee to remove such caveats. The conclusion is that the caveatee can obtain an order for removal in other instances as well; that the Court does have a discretion to order removal notwithstanding the existence of an arguable case.

Establishing that a discretion exists is easy; that conclusion seems to follow naturally from the concluding words of s 143. More difficult is determining how that discretion is to be exercised.

The starting point is that the direction in s 143 is very general. The legislature has not listed those factors which they consider are relevant to s 143 applications. Therefore the discretion must be wide, in the sense that a wide range of factors can be considered by the Court.

There is little to be gained in attempting to more accurately describe the factors that are relevant to the s 143 discretion: the Court simply has to determine which factors are relevant according to the circumstances of each case. While such a description appears unsatisfactory on its face, it does go some way to answering the question posed: it can be said that there are no factors (such as inconvenience to the caveatee) which are inherently irrelevant.

Determining which factors are relevant to the discretion is only part of the answer. What is more important is determining how much weight should be attached to these factors in determining whether it is meet to remove a caveat notwithstanding the existence of an arguable case. In this respect it is useful to examine the analogy with interlocutory injunctions.

The analogy is an apt one. The effect of an order extending a caveat is very similar to that of an interlocutory injunction to restrain the disposition of property.[88] The

[87] [1980] AC 331, 336.

[88] There are differences of course. First, the caveat is entered by the Registrar acting in an administrative capacity. But that is hardly a meaningful distinction, because the analogy is with the *order* to extend the caveat, not with the entry of the caveat in the first place. Second, the caveat has a wider effect than an injunction; a caveat prevents third parties from obtaining legal interests in the land. An injunction only affects third parties with notice. But again that distinction does not justify any difference in the approach of the courts to s 143 applications from interlocutory injunction applications, because any persons in a position to be affected by the former would be in a position to be subject to notice of the latter.

analogy allows the importation of interlocutory injunction principles into the consideration of s 143 applications. This is not an instance of the judiciary rewriting the statute. Section 143 requires a meet order. What is considered meet or just in one area of the law should also be considered in a similar area.

There is, however, one difference of substance between caveats and interlocutory injunctions which justifies a qualification to the analogy. Caveats have a statutory endorsement: s 143 has to be considered against the scheme of the Act. Two of the fundamental principles of the Land Transfer Act are that the registered proprietor's title is indefeasible and that purchasers need not enquire into the vendor's title. In furtherance of these principles the Act does not allow trusts or unregistered agreements to be noted on the register. Therefore the caveat procedure is very important as being the only effective method of protecting the interests of trust beneficiaries and holders of unregistered agreements. It can be seen as a balancing mechanism in favour of persons holding such interests against the rigours of indefeasibility.

This background should be reflected in the Court's approach to s 143 applications. The indefeasibility provisions of the Land Transfer Act put equitable titleholders in a less secure position than they held under the general law. The *quid pro quo* for such titleholders should be that it is easy to protect their interest through the caveat procedure. This means that in considering a s 143 application, greater weight should be accorded to the establishment of an arguable case than would be accorded in an interlocutory injunction application.

While use of such a relative term as "greater weight" may dissatisfy those searching for strict formulations of the law, the answer to cases such as these should not be determined by the rigid application of a formula.[89] Judges are perfectly capable of determining whether it is just to remove or to extend a caveat having regard to the legislature's intention, expressed in the scheme of the Act, that especial importance be attached to the establishment of an arguable case.

To summarise then, the Court should exercise its substantive discretion under s 143 in the same way as its exercises its discretion in considering interlocutory injunction applications, with the one qualification that the establishment of an arguable case is to be accorded greater weight under s 143. There are no factors that are inherently irrelevant to the exercise of this discretion.

Section 145

Again, the first question is whether there is a discretion under this section. It has already been noted that there is a wider discretion under s 143. But does this mean that discretion under s 145 is a narrower one, or that there is no discretion at all?

It seems to me that there should be no discretion under s 145. The s 145 procedure is very summary. The caveator is given only a short time to apply for an order that the caveat not lapse. Then the Court is to determine the application within 28 days.

[89] *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129, 142.

Obviously the Court is not expected to make a final adjudication as to the substantive issue. But that is the same under s 143. It seems to me that the summary nature of s 145 dictates that the caveator should be able to resist the challenge to the caveat merely by establishing an arguable case. This view is supported by the total absence of any words indicating a discretion in s 145.

This conclusion does not mean that the Court's jurisdiction under s 145 is vastly different from that under s 143. The s 143 discretion would rarely be exercised against a caveator, because of the weight to be attached to the establishment of an arguable case. So the establishment of an arguable case is the major hurdle for the caveator to overcome under s 143. Also, the absence of a discretion does not give the caveator an easy option under s 145. He or she still has to establish an arguable case. The difficulty in doing this should not be overlooked.

Undertakings as to damages

The Court's power to impose an undertaking as to damages, if it has one, will arise under its remedial discretion. It has already been concluded that this discretion is the same for both s 143 and s 145. Therefore the discussion below applies equally to both sections.

Leaving s 146 aside for the moment, in principle the Court should be able to impose undertakings. This is for the obvious reason that:[90]

> a registered proprietor and other parties can suffer very severe loss as a result of the lodging of a caveat which . . . is ultimately found not to be justified.

There is no express jurisdiction in either section conferring a power on theCourt to impose an undertaking as to damages, but that does not matter. The suggestion has already been made that the Court's jurisdiction to make s 143 or s 145 orders subject to terms is the same as under the general law. In *Holmes v Australasian Holdings Ltd*[91] Wallace J thought that Rule 263 of the High Court Rules gave the Court jurisdiction to impose an undertaking. Rule 263 provides:

> An order made on an interlocutory application may be . . . subject to such undertakings as the Court thinks just.

Applications under s 143 and s 145 are proceedings rather than interlocutory injunctions,[92] but Rule 263 applies to s 143 and s 145 applications by virtue of Rule 458F(1). Rule 485F(2) however provides that:

> Notwithstanding anything in subclause (1) the provisions of R.263 shall, in their application to any originating application, be subject to the Act under which the originating application is made.

Thus Rule 263 is subject to any provision in the Land Transfer Act that precludes the imposition of undertakings.

A number of cases have held that s 146 precludes the imposition of a general undertaking. It provides:

[90] *Holmes v Australasian Holdings Ltd* [1988] 2 NZLR 303, 313 per Wallace J.
[91] Ibid.
[92] See Rules 3 and 448B.

> Any person lodging a caveat without reasonable cause is liable to make to any person who may have sustained damage thereby such compensation as may be just.

The rationale behind the cases is that:[93]

> [Section 146 imports] a different principle from that which has been developed in interim injunctions. There a person who obtains an interim injunction must give an undertaking that damages will be paid, and is not excused from paying those damages if it is held that the injunction should not have been granted by an argument that he had reasonable cause for obtaining the injunction.

The argument is that s 146 affords the caveator protection:[94]

> The primary consideration urged by [counsel for the caveator] in favour of the contention that there is no discretion to require an undertaking was that s 146 is the statutory remedy provided by the legislature and is a clear indication of legislative intent that s 146 is the only protection that injured parties should have. That contention possibly encompasses the view that caveators need protection from the very wide scope of the liability which they might otherwise incur, both to the registered proprietor and to third parties affected by the caveat.

But s 146 does not protect the caveator at all. Rather, it is submitted that it provides for a potentially wider liability than would be the case without the section. Had s 146 not been enacted, it is suggested that the common law would have imposed liability in negligence on those who lodged caveats without reasonable cause. At common law the careless caveator would only be liable to all those to whom he or she owed a duty of care. But under s 146 the caveator who does not have reasonable cause will be liable to "any person who may have sustained damage thereby." There is no requirement that a duty of care be owed, so the potential liability is wider under s 146 than it would have been at common law.

Section 146 only appears to offer protection because it is being compared with the liability that a general undertaking as to damages can impose. But that is an inappropriate comparison, because the latter form of liability could never arise from the mere lodging of a caveat.

If s 146 is not intended to offer caveators protection, then it should not be used to justify protection of the caveator when an order extending a caveat is made. Section 146 appears rather to be aimed at preventing the lodging of caveats based on frivolous or baseless claims. This aim will not be furthered by limiting the Court's jurisdiction to impose an undertaking.

IV CONCLUSION

Section 143

As a matter of principle the Court has a substantive and remedial discretion in considering s 143 applications. It is suggested therefore that the view of the Court of Appeal in *Varney v Anderson*, recognising a discretion, is to be preferred to that Court's view in *Sims v Lowe*.

[93] *Re Dick's Caveat* [1985] 2 NZLR 641, 644 per Hillyer J.
[94] *Holt*, supra at note 81, at 312.

The substantive discretion is wide; no factors are inherently irrelevant to the discretion. The discretion is to be exercised upon interlocutory injunction principles, although greater weight should be accorded to the establishment of an arguable case, in accordance with the legislative intent.

This does not mean that a strict arguable case plus balance of convenience approach is to be used. Section 143 directs the Court to make a meet order. Thus the ultimate search is for "where overall justice lies".[95]

This suggested approach is not expressly supported in the authorities. However the Court of Appeal in *Varney v Anderson* described the s 143 discretion as wide. And *Eng Mee Yong* remains highly persuasive authority that s 143 applications are to be determined upon interlocutory injunction principles. Therefore the suggested approach is at the least not inconsistent with the authorities.

The remedial discretion is also wide. The order made under s 143 may be on such terms or conditions or subject to such undertakings as seem just to effectuate the Court's determination on the question of whether the caveator's claim should be protected. In particular, the Court has jurisdiction to require an undertaking as to damages as a term of an order for extension. This view has the support of principle, as well as of the most recent High Court determination on the matter.

Section 145

In principle theCourt should have no substantive discretion in determining s 145 applications. Once the caveator has established an arguable case, he or she should be granted an extension of the caveat pending final determination of his or her claim. The justification for this is that the procedure under s 145 is very summary. The onus on the caveator should therefore be low.

This view does not have the support of precedent. The leading Court of Appeal authority, *Holt*, does suggest that s 145 applications are not to be disposed of on interlocutory injunction principles. But there was no total rejection of a discretion in *Holt*. Casey J even suggested one instance where a discretion could arise.

Some High Court decisions since *Holt* support the thesis that there is no discretion at all.[96] But others, such as *Edwards v Holtrop*,[97] assume that there is a discretion of some sort, although it is not the balance of convenience.

This notwithstanding, it can at least be said that the Court of Appeal has not rejected the possibility that there is no discretion under s 145. The proposition, having the support of principle, must therefore be strongly arguable.

The court's remedial discretion under s 145 is the same as under s 143. In particular, the Court has jurisdiction to require an undertaking as to damages from the caveator.

[95] *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129, 142.

[96] *Muollo v Natoli* (1988) 4 BCB 242; *Van Der Lubbe v Riamaki Society Inc* [1988] BCL 531; *Smith v Akeroyd*, supra at note 70.

[97] (1989) 5 BCB 129.