

**"CAVEAT CAVEATOR"**

*Real Property Caveats in Victoria*

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**“Laws are always useful to persons of property, and hurtful to those who have none”**

*Jean-Jacques Rousseau*  
Du Contract Social. 1761.

**PART A – CAVEATABLE INTERESTS AND THE LODGMENT OF CAVEATS**

**1. Introduction**

A working knowledge of the law and practice associated with caveats is a valuable asset to commercial and litigation lawyers alike.

Caveats with respect to real property in Victoria, are one of the most commonly used instruments, encountered by legal practitioners when dealing with interests in land, yet at the same time, one of the least fully understood.

Frequently, clients are advised of “caveatable interests”, caveats are lodged, caveats are challenged or ignored, sometimes they are removed and other times they remain.

This paper will explore the basic principles and common pitfalls encountered by Practitioners when dealing with caveats and address some means and methods of best attending to such issues.

**2. Legal and Practical Effects of Caveats**

Caveats operate as a statutory injunction against dealings affecting title. They preserve the status quo pending the determination of the rights asserted by the caveator.

The word "Caveat" has its origins in Latin ("let him beware") and is defined by *The Oxford English Dictionary* as,

*"a legal notice to a court or public officer to suspend a certain proceeding until the notifier is given a hearing" and "any warning or caution".*<sup>1</sup>

The definitive statement of the meaning and purpose of a caveat within the context of the Torrens System, was stated by Barwick CJ in *J & H Just (Holdings) Pty Limited v Bank of New South Wales*.<sup>2</sup>

*"Its [a Caveat's] purpose is to act as an injunction to the Registrar-General to prevent dealings with the land until notice has been given to the caveator. This enables the caveator to pursue such remedies as he may have against the person lodging the dealing for registration. The purpose of the caveat is not to give notice to the world or to persons who may consider dealing with the registered proprietor of the caveator's estate or interest, though if noted on the certificate of title, it may operate to give such notice" and "the purpose of the caveat is protective: it is not to give notice".*

This statement has been repeatedly approved in numerous subsequent Australian authorities and relatively recently by the High Court in *Leros Pty Ltd v Terara Pty Ltd*<sup>3</sup>.

Another formulation, accepted in Victoria, provides:<sup>4</sup>

*"a Caveat as being a notice 'for the purpose of protecting the caveator's interest from being defeated by the registration of a dealing without the caveator having had the opportunity to invoke the assistance of the Court to give effect to his interest'".*

A caveat does not in any way improve or enlarge the existing interest in the property of the caveator, the process simply affords to the caveator the opportunity to protect its interest, as against the registered proprietor of the property, or any other person who may claim an interest in the property, without regard to the interest of the caveator.<sup>5</sup>

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<sup>1</sup> *New Oxford English Dictionary*, Oxford University Press, 1998; It also is described by *Black's Law Dictionary*, as "a warning or proviso".

<sup>2</sup> (1971) 125 CLR 546 at pages 552 and 556.

<sup>3</sup> (1991) 174 CLR 407, per Mason CJ, Dawson and McHugh JJ at page 419.

<sup>4</sup> See: *Lewenberg & Pryles v Direct Acceptance Corporation Ltd* [1981] VR 344, per O'Bryan J, citing with approval the reasons of Holland J in *Kerabee Park Pty Ltd v Daley* [1978] 2 NSWLR 222 at 228.

<sup>5</sup> See: *Butler v Fairclough* (1917) 23 CLR 78 at 84.

Despite the above pronouncements on caveats, in practical terms most caveats serve two purposes, the first being protective (its legal purpose) and the second operating as a notice or warning to the world at large (the practical effect of such legal purpose).

The failure to lodge a caveat can have serious consequences. It may for example result in the postponement of an unregistered interest if there is a later registered interest. It could found a claim for negligence against a solicitor who has failed, omitted or neglected to protect a client's interest by placing or maintaining a caveat on the title.<sup>6</sup>

It is also worth bearing in mind that the retainer to lodge a caveat may extend in some cases to informing clients of the existence of another interest in the property such as a registered mortgage.<sup>7</sup>

### 3. **Types of Caveats**

The Private Caveat is the most common form of caveat used by legal practitioners to protect their clients' interests in land and is the form of caveat which is the focus of this paper.<sup>8</sup>

#### 3.1 **Private Caveats**

The statutory provision which permits the lodgment of a private caveat with the Registrar of Titles ("the Registrar") in Victoria is Section 89 of the *Transfer of Land Act* 1958 (Vic) ("the TLA"). It provides:-

***"89. Caveats temporarily forbidding dealings with lands***

- (1) *Any person claiming any estate or interest in land under any unregistered instrument or dealing or by devolution in law or otherwise or his agent may lodge with the Registrar a caveat in an appropriate approved form forbidding the registration of any person as transferee or proprietor of and of any instrument affecting such estate or interest either absolutely or conditionally and may, at any time, by lodging with the Registrar an instrument in an appropriate approved form, withdraw the caveat as to the whole or any part of the land.*
- (2) *A recording of every caveat lodged under this section must be made in any relevant part of the Register.*

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<sup>6</sup> See for example: *Queanbeyan Leagues' Club Ltd v Poldune* (NSWSC) 17 December 1998 (unreported) – An allegation of negligent withdrawal of a caveat by a solicitor.

<sup>7</sup> *Ron Englehart Pty Ltd v Finkelstein* (1996) 12 BPR 405.

<sup>8</sup> Victorian Land Titles Office Approved Form C.

- (3) *The Registrar shall give the registered proprietor of the estate or interest concerned notice of the caveat together with a copy of the caveat or of such particulars thereof as the Registrar deems material to such person*".(our underlining)

The touchstone for the lodgment of a caveat over a title is the requirement that the caveator must have a "caveatable interest", meaning *a legal or equitable estate or interest in the land*. This issue is dealt with in some detail below.

Other means by which a caveator may lodge a caveat (by using the prescribed Form applicable to each such interest which may be claimed as referred to below), to protect his or her interest in land, include where a person claims an interest in such land, which is the subject of:

- an application for such land to be brought under the Transfer of Land Act 1958 (ie. old system land);<sup>9</sup>
- an application for the removal of an easement;<sup>10</sup>
- an action for foreclosure by a Mortgagee;<sup>11</sup> and
- an application to amend the boundaries of the land.<sup>12</sup>

### **3.2 Registrar's and Queen's Caveats over Torrens System Land**

The Registrar is empowered by Section 106(a) of the TLA to lodge caveats on behalf of the Queen or on behalf of any person under a disability such as a minor, a person of unsound mind or a person who is absent from Victoria.

Section 106(a) of the TLA also permits the Registrar to lodge a caveat if:-

- there appears that there is an error by reason of the misdescription of land;  
or
- there is an apprehension of fraud or improper dealing.

Section 106(a) provides:

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<sup>9</sup> Section 12(1) of the *Transfer of Land Act 1958*.

<sup>10</sup> Section 73(4) of the *Transfer of Land Act 1958*.

<sup>11</sup> Section 80(2) of the *Transfer of Land Act 1958*.

<sup>12</sup> Section 100 of the *Transfer of Land Act 1958*.

## **“106. Powers of Registrar**

*The Registrar-*

- (a) *may lodge a caveat, on behalf of Her Majesty or of any person under the disability of minority unsoundness of mind or absence from Victoria, to prohibit dealing with any land belonging to or supposed to belong to any such person, or to prohibit dealing with any land in any case in which it appears that an error has been made by misdescription of such land or otherwise in any folio of the Register or instrument or for the prevention of any fraud or improper dealing.”*

While there are no reported cases in Victoria which consider the operation of s.106(a) of the TLA in any detail, the case of *Guggenheimer v Registrar of Titles*<sup>13</sup> is a relatively recent example of an instance where the Registrar lodged a Queen's caveat for the prevention of fraud or improper dealing.

## **4. Lodgment of Caveats**

### **4.1 Is there a “caveatable interest” – What are the grounds of claim?**

Determining whether or not a client has a legal or equitable estate or interest in the relevant land sufficient to constitute a caveatable interest is sometimes a challenging task which may need to be undertaken with speed so as to ensure a client's rights are protected.

The relevant interest in the land must exist at the time the caveat is lodged.<sup>14</sup>

In *Classic Heights Pty Ltd v Black Hole Enterprises Pty Ltd* (1994) VConvR 54-506 the Supreme Court of Victoria indicated that a caveator must have a registrable instrument or the right to compel the registered proprietor to deliver a registrable instrument in relation to the interest claimed in the caveat. However, some subsequent decisions have questioned the correctness of that requirement.

Interests frequently cited in support of caveats include:

- a purchaser's interest under an agreement for the sale of land of an estate in fee simple;

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<sup>13</sup> [2002] V ConvR 54-658.

<sup>14</sup> *Townsend v Coyne* (1995) 6 BPR 13, 935.

- imperfect (inchoate) interests in land such as an interest that has not yet vested;
- an option to purchase land;
- legal and equitable mortgages;
- a lessee's interest under a proper and executed lease;
- a person entitled to the benefit of an easement or a restrictive covenant (in some but not all circumstances);
- charges – for example a builder's charge over land to secure construction costs;
- profits-a-prendre (for example in the mining industry);
- a unit holder's interest in a unit trust;
- beneficial interests under resulting trusts;
- certain liens including purchaser's liens, builder's liens and vendors liens; and
- certain types of constructive trusts.

More unusual examples of caveatable interests include a person claiming a right to adverse possession where the limitation period has expired and a purchaser under a contract which is to be paid by installment.

Additionally in unusual circumstances, registered proprietors are sometimes known to lodge caveats over land owned by them, where a title deed is lost or stolen or there is reason to fear fraud or forgery has occurred in relation to the land. The question which has arisen in the consideration of this proposition is whether proprietorship alone is sufficient to give one standing to lodge a caveat or something more is required? As discussed below, the authorities on this topic are inconsistent.

In *J & H Just Holdings Pty Ltd v The Bank of New South Wales*<sup>15</sup>, Barwick CJ held that a registered proprietor has standing to lodge a caveat without proof of rights concerning the land over and above that of proprietorship.

In contrast to Barwick CJ's decision in *J & H Just Holdings.*, the approach of Needham J in *Sinclair v Hope Investments Pty Ltd*<sup>16</sup> held that more than mere

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<sup>15</sup> (1971) 125 CLR 546

<sup>16</sup> [1982] 2 NSWLR 870

proprietorship was required before a registered proprietor has a right to lodge a caveat over land. In that case a mortgagor lodged a caveat to prevent completion of the sale of land by a mortgagee in circumstances where the registered proprietor believed the sale was at a gross undervalue and was in breach of the mortgagee's statutory and fiduciary duty concerning the power of sale. The Court held that the registered proprietor had established matters over and beyond proprietorship which gave rise to an interest in the land and that accordingly the proprietor had a caveatable interest in the land.

#### 4.2 Examples of Interests Which Have Been Held Not to Support a Caveat

The following examples are instances of where the prescribed interest in the form of the caveat, have been held as insufficient to support a caveatable interest.

- The relationship of principal and agent even if the relationship involves the disposition of land, for example an estate agent's entitlement to commission arising out of the sale of a property does not give rise to a caveatable interest;<sup>17</sup>
- A nominee under a contract of sale of real estate;
- In personam rights such as personal contractual rights;
- Interests in the proceeds of the sale of land;
- Judgment creditors' claims (unless they are supported by a charge);
- Licenses;
- Income tax assessment does not create a proprietary interest capable of supporting a caveat;<sup>18</sup>
- The relationship of marriage alone does not create a caveatable interest pursuant to a *Baumgartner*<sup>19</sup> constructive trust; *Bell v Graham*<sup>20</sup>.

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<sup>17</sup> See: *Downie v Kenny* [1986] ANZ ConvR 494.

<sup>18</sup> *Deputy Commissioner of Taxation v Corwest Management Pty Ltd* [1978] WAR 129.

<sup>19</sup> *Baumgartner v Baumgartner* (1987) 164 CLR 137 and see also *Muschinski v Dodds* (1986) 146 CLR 583.

<sup>20</sup> [2000] VSC 142.

### 4.3 What are the requirements of the Approved Form?

Section 89 of the *TLA* stipulates that a caveat must be lodged with the Registrar "in an appropriate approved form". The relevant form is prescribed by the Victorian Land Titles Office and is known as Approved Form C ("Form C").

The requirements of Form C should be carefully adhered to. The notes to Form C provide guidance as to the matters which should be recorded on it. In substance the notes stipulate:-

- Writing is required.
- Caveats lodged must be an original only and must be typed or completed in ink;
- All signatures must be in ink;
- Annexure sheets can be used to record the required information but they must be signed by the parties and be securely attached;
- If the caveat affects only part of the land in the title the lot and plan number or crown description should also be given and any necessary diagram should be endorsed. If the caveat affects a mortgage, charge or lease the type and reference number of that instrument should be given;
- The full name and address of the caveator should be recorded;
- The estate and interest claimed should be recorded e.g. an estate in fee simple, or an interest as a mortgagee.
- The grounds of the claim should specify the declaration of the claim e.g. "as purchaser under a contract of sale from A dated Y" or as "mortgagee under an instrument of mortgage from A dated Z" etc.
- The extent of the prohibition is absolute then the prohibition should be noted as "ABSOLUTELY", otherwise the conditions under which an instrument may be registered should be recorded;
- The full name of the registered proprietor should be recorded, the address is not required;
- The form should be executed by the caveator or his authorised agent. Corporations should conform to the requirements concerning the affixing of the common seal;

- The caveat must be signed off on by the caveator’s solicitor or agent Accordingly, the caveator’s solicitor (as an Officer of the Court), should be fully satisfied of (as should the caveator):
  - . facts and circumstances supporting the grounds of claim;
  - . the estate or interest claimed in the land;
  - . the existence of the caveatable interest; and
  - . the extent of the prohibition; and
- Finally, the stamping of the caveat prior to lodgment should not be overlooked.

Failure to comply with the requirements of Form C may render the caveat susceptible to removal or fail to stop the registration of a competing interest. However, Section 121(1)(b) of the *TLA* in effect provides that the Registrar may register or grant an instrument or application (such as a caveat) that contains departures from the approved form.

If the caveator’s address for service changes it is important that the Registrar is notified and the address is amended. Form 40 prescribed under the *Transfer of Land (General Regulations)* 1984 permits a caveator to amend a caveat to change a caveator’s address. If an incorrect or old address remains on a caveat, service of documents on the nominated address will suffice, as was the case in *National Australia Bank v Dyer & Anor.*<sup>21</sup> In *National Australia Bank v Dyer*, Batt J (as he then was) held that service on solicitors who were nominated in the caveat but no longer acted for the caveator constituted good service.

A question arises as to whether a caveat can be amended to comply with the formal requirements or to change the nature of the interest claimed. It is arguable that in the context of applications for removal of a caveat the court has the power to amend a caveat under Section 89A(7) or Section 90(3) of the *TLA*. Each of those provisions empowers the court to “make such order in relation to the caveat as the Court thinks fit and the Registrar shall give effect thereto”.

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<sup>21</sup> No. 6620/1996, 14 August 1996 (unreported), BC9604041.

The issue of the court's power to amend was considered by Menhennitt J in *Midwarren Estates Pty Ltd v Retek & Stivik*.<sup>22</sup> In *Midwarren Estates* the caveator initially claimed an equitable estate in fee simple. The caveator sought to amend the caveat so as to claim an equitable estate by way of a lien to secure a sum paid under a contract of sale. His Honour held that Section 90(3) of the *TLA* did not authorise the making of an amendment to the estate claimed. His Honour said:

*"I am not to be taken as deciding that there may not be some inherent power to make amendments to the estate claimed not on the basis of s.90(3), but having regard to some inherent power that may reside in the Court. However, in my view, neither the provisions of s.90(3) nor any other inherent power authorizes an amendment which would result in the substitution of an entirely inconsistent estate or interest".*

In *Kambouris and Anor v Marcopoulos and Anor*<sup>23</sup> it was submitted that the caveat erroneously claimed an estate in fee simple and that the Court was empowered to amend the caveat to claim a lesser interest, namely that of a mortgagee. Coldrey J commented that the argument was appealing and would warrant consideration if the question of the existence of such power was free from authority. However, His Honour was of the view that unless the law was altered by an appellate court, it was appropriate to follow Menhennitt J's decision in the *Midwarren Estates case*.

#### **4.4 How should the Caveator's interest be described?**

It is vital that the caveator's interest in the land is accurately and appropriately described. Failure to do so may result in the interest of the caveator not being adequately protected. Alternatively, if the interest claimed is too broadly cast the caveator may be exposed to a claim for compensation. The following expressions are commonly used to describe caveators' various interests in land:

- " A legal interest in the land pursuant to a lease entered into between [the registered proprietor] and [the caveator], executed on [date]".
- "An equitable interest in the land of an estate in fee simple, pursuant to a Contract of Sale dated [date] and entered into between [caveator] as purchaser and [registered proprietor] as vendor";

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<sup>22</sup> [1975] VR 575.

<sup>23</sup> No 4535/1997, 14 March 1997 (Supreme Court of Victoria, unreported), BC9700760.

- “An equitable interest in the land pursuant to a constructive trust existing between the [registered proprietor] and the [caveator], the defacto spouse of [the registered proprietor]”;
- “An equitable interest in the land pursuant to an option to purchase dated [date] and entered into between the [registered proprietor] and the [caveator].

Descriptions such as “pursuant to a constructive trust” or “pursuant to a joint venture” are usually considered too general and unsatisfactory and in most cases result in the caveat being considered defective.<sup>24</sup>

Caution and accuracy are paramount as a caveator will ordinarily only once be permitted to lodge a caveat with respect to the same interest or estate claimed in the land. If two separate estates or interests in the land are contended, then a caveat ought be lodged with respect to each interest.<sup>25</sup>

#### **4.5 What should be the extent of prohibition against dealings claimed by the Caveator?**

The extent of the prohibition against dealings should be commensurate with the interest claimed by the caveator in the land.

### **5. Benefits and Pitfalls of the use of Caveats**

#### **5.1 When can Caveats be used to effectively protect interests?**

As set out above, there are many interests in land which are capable of supporting a caveat. The following are some brief examples of situations where the caveat regime may be of assistance to clients.

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<sup>24</sup> See: *Ultra Marine Pty Ltd v Misson* (1981) ANZConvR 229.

<sup>25</sup> See: Section 91(4) of the *Transfer of Land Act* 1958 and *Sinn v National Westminster Finance Ltd* [1985] VR 363.

### ***Builders , Property Developers and Joint Venturers***

If pursuant to the terms of a contract a builder has a charge over land in respect of any debt owed to him he may have a caveatable interest.<sup>26</sup>

The mere existence of a debt owed by a registered proprietor of land to a builder will not be sufficient to support a caveat.

The caveatable interest does not arise until there is indebtedness pursuant to the contract<sup>27</sup>.

If parties are engaged in a common undertaking for the joint development of land, a caveatable interest may arise. Whether a party who is not registered on title has a caveatable interest will to a large extent depend on the wording of any joint venture agreement or other memorandum between parties. There are many examples of cases where persons involved in joint ventures have been held by courts to only have an interest in the profits of the venture rather than the requisite interest in land to support a caveat.<sup>28</sup>

It is suggested that the following steps may protect clients who participate in joint ventures:-

- establish an incorporated joint venture vehicle to hold the land as registered proprietor with the parties holding shares in the vehicle in proportion to their respective interests; or
- each of the parties could hold the land as tenants in common in accordance with their respective shares in the property; or
- include a clause in the joint venture agreement in favour of any entity or person not registered on title (usually the Builder), whereby the holder of the land:
  - agrees to create a charge over the land to the extent of monies contributed;

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<sup>26</sup> See for example *Paciullo v VW Vallack Real Estate Pty Ltd & Ors* (1986) NSW ConvR 55-282.

<sup>27</sup> *Nelson v Kimberley Homes Pty Ltd* (1988) NSW ConvR 55-394.

<sup>28</sup> See for example: *Simons v David Bengel Motors Pty Ltd* [1974] VR 585; *Epple v Wilson* [1972] VR 585; *Twenty-Sixth Shackle Pty Ltd v Drever & Ors* (1994) VConvR #54-493; *Chiodo v Murphy & Anor*; *Chiodo v Doherty & Anor* (1993) VConvR #54-531; *Spencer v Spencer & Ors* (SCV, unreported, 16 October 1996) and *Osbourne v Kearney & Ors* (Supreme Court of Victoria, unreported, 11 December 1997).

- agrees to execute an instrument in registrable form evidencing such a charge (ie a mortgage); and
- consents to the unregistered person or entity lodging a caveat over the land to secure the interest pursuant to the charge.

### ***Beneficiary Under a Will***

If a beneficiary under a will is the subject of a specific bequest of real property under a will, then the beneficiary will clearly have a caveatable interest in that real property. However, the rights of beneficiaries to lodge a caveat are questionable if the beneficiary is one of many and/or the land which forms part of the estate is one of many assets of the estate. In those circumstances the beneficiary's interest may not be in the land, but in the estate itself.

It should be noted that courts are disinclined to allow a beneficiary's caveat to remain if it would prevent the Executor or Trustee from dealing with the land in pursuit of the due administration of the estate.<sup>29</sup>

### ***Purchasers Under Conditional Contracts***

Often contracts for the sale of land are expressed to be subject to the fulfillment of certain conditions. For example contracts subject to the purchaser obtaining finance are common. Does a purchaser under a conditional contract have a caveatable interest prior to the satisfaction of the condition?

Brownie J considered the matter in *Jessica Holdings v Anglican Property Trust*.<sup>30</sup> In *Jessica Holdings*, two contracts for the sale of land were conditional upon the vendor obtaining registration of a subdivision and subject to a certain easement being created. The purchaser contended that the easement sought to be created by the vendor was inconsistent with the easement provided for in the contract of sale. The purchaser placed a caveat over the property effectively preventing the registration of the plan of subdivision by the vendor. Inter alia the vendor asserted that the purchaser did not have a legal or equitable interest in the land to support a caveat

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<sup>29</sup> See: *Costa & Duppe Properties Pty Ltd v Duppe & Ors* [1986] VR 90 per Brooking J at pp 93 to 95 and *Ceda Nominees Pty Ltd v Registrar of Titles and Compton Nominees Pty Ltd* (1982) ANZ ConvR 524.

<sup>30</sup> (1992) 27 NSWLR 140.

as the purchaser's interest was conditional upon the registration of the plan of subdivision.

Brownie J described the question of whether a conditional contract for the sale of land gives rise to a caveatable interest as a "vexed question".<sup>31</sup> His Honour held that in "appropriate circumstances" where a purchaser of land under a contract which contains a condition requiring a third party to give some consent or take some other step before the contract can be regarded as conditional, then the purchaser should be treated as having an interest which may be protected by a caveat.

### ***De-Facto Relationships***

Often in cases of a de-facto relationship, a constructive or resulting trust may arise with respect to each party's financial and non-financial contributions to the relationship, upon its demise.<sup>32</sup>

Where one of the principal assets acquired/held by either party in the course of the relationship is land, each case requires careful examination of the facts in order to ascertain whether there exists a caveatable interest in the land.

Where land is one of the key assets of the relationship, Lawyers acting for the non-registered party will often lodge a caveat over the property as a matter of course, in an attempt to protect their client's interests. However, such an interest may not necessarily be one in the land itself, but in the Trust and its proper administration.

Careful thought must be given prior to the lodgment of the caveat as to how it can be contended that the non-registered party, has not only an interest in the constructive/resulting trust itself, but whether that person also can establish an interest in the land itself.

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<sup>31</sup> Ibid at 144 to 152.

<sup>32</sup> See: *National Australia Bank Ltd v Maher & Anor* [1995] 1VR 318; *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Cooke v Cooke* [1987] VR 625; *Muschinski v Dodds* (1986) 146 CLR 583 and *Calverley v Green* (1984) 155 CLR 242.

## 5.2 When is it inappropriate or inadvisable to lodge a caveat?

### ***Successive caveats***

The *TLA* precludes the lodging of successive caveats in respect of the same interests. Section 91(4) of the *TLA* provides:-

*91(4) A caveat that has lapsed or been removed shall not be renewed by or on behalf of the same person in respect of the same interest.*

Whether a second caveat is in “respect of the same interest” so as to attract the operation of Section 91(4) of the *TLA* can be a deceptively complex question. Tadgell J observed in *Sinn v National Westminster Finance Ltd*<sup>33</sup> that the provision is “not a model of clarity”. His Honour expressed the view that the section was intended to convey that:

*“a person by whom or on whose behalf a caveat has been lodged that has lapsed or been removed shall not lodge or have lodged on his behalf another caveat in respect of the same interest as that in respect of which the first interest was lodged...a person may not claim and specify by a caveat an interest which is the same interest as that which he has claimed and specified by a caveat that has lapsed or been removed.”*<sup>34</sup>

### ***Caveats Lodged Without Reasonable Cause or for a Collateral Purpose***

Caveats lodged without reasonable cause or for some other improper form of collateral purpose are not only likely to be rejected by the Registrar, or by the Court on the appropriate application being made, but also render the caveator vulnerable to a claim in damages.

These consequences are discussed below under paragraph 7.

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<sup>33</sup> [1985] VR 363 at 366. See also: *R & L Bell Pty Ltd v Casbault* (2003) 6 VR 271.

<sup>34</sup> See also *Layrill Pty Limited v Furlap Constructions Pty Limited* [2002] VSC 51.

## **PART B - REMOVAL OF CAVEATS AND RELATED LITIGATION**

### **6. Removal for Caveat**

#### **6.1 Lapsing of Caveat**

Where the caveator has not commenced Court proceedings in order to determine the interest claimed in the caveat, within 35 days of receiving a Notice from the Registrar of Titles under Section 89A of the *TLA*, the caveat will lapse and thereafter be of no effect.

Alternatively, where a dealing is lodged with the Registrar of Titles subsequent to the noting of the interest claimed in the caveat, the caveator again is required to make application to the Court in order to determine the interest claimed in the caveat, this time within 30 days of receiving Notice from the Registrar under Section 90(1) of the *TLA*, otherwise the caveat will lapse and thereafter be of no effect.

Finally, where the caveator eventually registers the estate or interest claimed in the caveat, pursuant to Section 90(5) of the *TLA*, the caveat will thereafter lapse upon registration pursuant to Section 90(6).

#### **6.2 Application to the Registrar of Titles pursuant to Section 89A of the *Transfer of Land Act 1958***

Section 89A of the *TLA* provides:

##### **89A. Removal of caveat on application to Registrar**

- (1) Subject to the provisions of this section, where a recording of a caveat (not being a caveat lodged by the Registrar) has been made pursuant to section 89(2), any person interested in the land affected thereby or in any part thereof may make application in an appropriate approved form to the Registrar for the service of a notice pursuant to sub-section (3).*
- (2) An application under this section shall—*
  - (a) specify the land and the estate or interest therein in respect of which it is made; and*
  - (b) be supported by a certificate signed by a person for the time being engaged in legal practice in Victoria, referring to the caveat and stating his opinion that, as regards the land and the estate or interest therein in respect of which the application is made, the caveator does not have the estate or interest claimed by him.*

- (3) *Upon receiving any such application and certificate and upon being satisfied that the applicant has an interest in the land in respect of which the application is made, the Registrar shall give notice to the caveator that the caveat will lapse as to the land and the estate or interest therein in respect of which the application is made on a day specified in the notice unless in the meantime either—*
- (a) *the application is abandoned by notice in writing given to the Registrar by or on behalf of the applicant; or*
  - (b) *notice in writing is given to the Registrar that proceedings in a court of competent jurisdiction to substantiate the claim of the caveator in relation to the land and the estate or interest therein in respect of which the application is made are on foot.*
- (4) *The Registrar shall not cause a day to be specified in the notice that is less than 35 days after the day on which the notice is served or, if the notice is sent by post, the day on which it is introduced into the course of post.*
- (5) *Upon the specified day, unless—*
- (a) *the application has been abandoned as aforesaid; or*
  - (b) *notice in writing has been given to the Registrar that proceedings as aforesaid are on foot—*
- the caveat shall lapse as to the land and the estate or interest therein to which the application then relates, and the Registrar shall make all necessary amendments in the Register.*
- (6) *An application under this section may be abandoned either wholly or as to part of the land or the estate or interest therein in respect of which it is made either before or after notice is given pursuant to sub-section (3), but where notice has been given, only with the consent of the caveator or his agent.*
- (7) *Where notice in writing of the kind referred to in paragraph (b) of sub-section (3) is given to the Registrar—*
- (a) *if in the proceedings in question the claim of the caveator is not substantiated to the satisfaction of the Court—the Court may make such order in relation to the caveat as the Court thinks fit and the Registrar shall give effect thereto;*
  - (b) *if there is subsequently served upon the Registrar a copy of any notice, or an office copy of any order of the Court, disclosing that the proceedings in question have been discontinued, withdrawn or struck out—the caveat shall lapse as to the land and the estate or interest therein to which the application then relates, and the Registrar shall make all necessary amendments to the Register.*

By making application for removal by this means, the following should be considered:

- the Solicitor on making the application to the Registrar must sign a certificate (upon which the Registrar will rely), stating that the caveator does not have a caveatable interest; and

- accordingly, because of the exposure for the solicitor in providing the Certificate, Section 89A should only be invoked in the clearest of all cases.

### **6.3 Application to the Court under:**

#### **6.3.1 Section 103(1) of the *Transfer of Land Act 1958***

Section 103(1) of the TLA provides:

**103.        *General provision as to correction of errors etc.***

*(1) In any proceeding in the Court relating to any land or any instrument or dealing in respect thereof if the Court directs the Registrar to make any amendments to the Register or otherwise to do any act or make any recordings necessary to give effect to any judgment decree or order of the Court the Registrar shall obey such direction.*

Although there exists the provision for an applicant to seek an Order under Section 103(1) of the *TLA*, that the Registrar of Titles be directed to refuse to make a recording of the caveat, where it is apprehended that the caveator may not have a caveatable interest in the land, the circumstances where such application would be made are limited.

Only the caveatable interest itself can be determined by this route. Discretionary considerations do not come into play under Section 103(1).

The better means of agitating such an issue is via Section 90(3) which affords to the applicant a wider ground upon which it may put its case.<sup>35</sup>

#### **6.3.2 Section 90(3) of the *Transfer of Land Act 1958***

Section 90(3) of the *TLA* provides:

*Any person who is adversely affected by any such caveat may bring proceedings in the Court against the caveator for the removal of the caveat and the Court may make such order as the Court thinks fit.*

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<sup>35</sup> See: *Layrill Pty Limited v Furlap Constructions Pty Ltd & Anor* [2002] VSC 51.

On such an application to the Court, the following matters may be agitated:

- The existence of a “caveatable interest”;
- The nature of the estate or interest claimed;
- The grounds of the claim;
- The extent of the prohibition;
- The formal requirements/defects of the caveat (ie. substantive defects which can prove fatal to a caveat remaining); and
- Over-riding discretionary factors.

In cases where there is a caveatable interest, the Court may still order that the caveat be removed where it considers it is in the interests of justice to do so. In doing so, the Court will consider the balance of convenience and also the preservation of the status quo in deciding whether or not to lift the caveat. The consideration is similar to that applied on seeking an interlocutory injunction.<sup>36</sup>

One way a registered proprietor can influence the Court’s discretion is that where there is an amount of money in dispute which may be subject to a Builder’s charge, the caveat will be removed if the Builder pays the amount in dispute into Court, or otherwise secures such sum to the satisfaction of the caveator.<sup>37</sup>

In persuading the Court for the caveat to remain on the Title, the onus rests with the caveator.<sup>38</sup>

For the caveat to remain the Court may require from the caveator, an undertaking as to damages, despite the caveator’s liability to those

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<sup>36</sup> See: *Eng Mee Yong v Letchuman* [1980] AC 331; *Lewenberg & Pryles v Direct Acceptance Corporation Ltd* [1981] VR 344; *Smith v Callegari* (1988) VConvR #54-300; *Commercial Bank of Australia v Scheirholter* [1981] VR 292; *Australian and New Zealand Banking Group v Oak Pty Ltd* (1991) VConvR #54-423 and *Trowmet Pty Ltd v Lew* (1992) VConvR #54-427; *Kings Creek Properties Ltd (In Liq) v Palmer* [2002] VSC 591; *Mitrangas v Makalias* [2003] VSC 251 and *Dominion Lifestyle Tower Apartment Pty Ltd v Global Capital Corp Pty Ltd* (2005) V ConvR 54-696; [2004] VSC 307.

<sup>37</sup> See: *Henery Property Development Pty Ltd v McLennan* (1992) VConvR #54-300.

<sup>38</sup> See: *Smith v Callegari* (1988) VConvR #54-300.

adversely effected by the caveat, had it been lodged improperly. Clear instructions to extend such an undertaking should always be obtained from clients before charging off to Court to defend a caveat (as they should with any interlocutory injunction).

#### **6.4 Alternative remedy of Injunction against Caveator**

Even if the "caveator" does not have a caveatable interest, then the interest of such person (assuming that such interests are in need of protection) while not able to be protected by the lodgment of a caveat, may be able to be protected by the alternative relief of a grant of an interlocutory injunction (ie. restraining a Trustee/Executor from acting in breach of the Trust/Will; restraining a party to a joint venture from acting in breach of the joint venture; a mareva injunction against an unscrupulous registered proprietor who is about to improperly sell a property where say a partner may have been entitled to a share in the proceeds realised upon sale, etc).

The fact that there is land involved and that there may not be a caveatable interest, does not in all cases necessarily mean the end of the road for the 'caveator' whose overall interests may be adversely effected by the registered proprietor of the land or some other related party.

#### **6.5 Procedural Considerations**

Application for the removal of a caveat is made to the Supreme Court of Victoria (Section 4(1) of the *TLA*) and is usually by way of Originating Motion and supporting Affidavit material, which should be made on notice, by serving the application by all persons who may be effected by any order the Court may make on the Originating Motion.

The court on a further return of the application may require the case to be pleaded should there be competing issues, which extend beyond the removal of the caveat itself.

Costs usually follow the event on the determination by the Court of a removal application and are payable by the unsuccessful party.

## 7. Wrongful Lodgment of Caveat

### 7.1 For the Caveator

Section 118 of the *TLA* provides:

#### **118. Compensation for lodging caveat without reasonable cause**

*Any person lodging with the Registrar without reasonable cause any caveat under this Act shall be liable to make to any person who sustains damage thereby such compensation as the Court deems just and orders.*

A person wrongfully lodging a caveat may be liable to any person in damages for any loss such person may suffer.

Often caveats are lodged for “tactical” purposes and without valid grounds. Such instances can render the caveator liable in damages to the aggrieved party.<sup>39</sup>

The onus in such an action rests with the Plaintiff to show that the caveator acted without reasonable cause in the lodgment of the caveat. Further, the usual trite principles applicable to the mitigation of loss apply to a Plaintiff in bringing such an application for damages.

In *Commonwealth Bank of Australia v Baranyay*,<sup>40</sup> Hayne J considered the meaning of “without reasonable cause” in the context of Section 118 of the *TLA*. The case concerned a claim by a mortgagee bank under Section 118. A lessee placed a caveat on the mortgaged property. The lease was found to be void as against the bank due to the mortgagor not having held the bank’s consent to lease the property. His Honour held<sup>41</sup> that the onus of proof was on the Plaintiff bank to show the caveator acted without reasonable cause. Hayne J also noted<sup>42</sup> that it is not sufficient that the

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<sup>39</sup> See: *Dykstra & Anor v Dykstra* (1991) 22 NSWLR 556; *Bedford Properties Pty Ltd v Surgo Pty Ltd* (1981) NSW ConvR #55-013 and *Young v Rydalmere Credits Pty Ltd* (1964) 80 WN NSW 1463.

<sup>40</sup> [1993] 1 VR 589.

<sup>41</sup> *Ibid* at 596 and 600.

<sup>42</sup> *Ibid* at at 600.

Plaintiff merely show the caveator did not have a caveatable interest and that it may be that a caveator's honest belief in their entitlement on reasonable grounds is sufficient to support a finding that there was reasonable cause for the lodgment of a caveat.

In February 2005 the Victorian Court of Appeal delivered a judgment in the consolidated proceedings of *Edmonds & Ors v Donovan & Ors; Discronics Ltd v Kingston Links Country Club Pty Ltd*<sup>43</sup> which considered Section 118. Inter alia the case concerned whether Kingston Links was entitled to compensation pursuant to Section 118 in circumstances where Discronics lodged a caveat over a golf course prior to its sale to a third party on the grounds that it had a constructive trust over the proceeds of sale. The third party entered into the contract of sale with Kingston Links subject to the removal of the caveat. After several extensions of the settlement date, the third party served a notice of rescission. Ultimately Kingston Links paid the third party purchaser \$100,000 to settle the dispute concerning the rescission notice and resold the property. At the trial of the matter, Warren CJ, found Discronics to have no claim to relief and therefore no caveatable interest. It was ordered that Discronics pay \$100,000 in compensation pursuant to Section 118.

Phillips J.A (with whom Winneke P and Charles JA concurred) held that the trial judge had erred in finding Discronics had lodged the caveat without reasonable cause given the complexity of the litigation and the interests to be determined. His Honour noted:<sup>44</sup>

*“...the matter was sufficiently complex to warrant the caveat for the protection of the respondent's interests and I cannot think it determinative that the caveat named the company as caveator, even if, in the final analysis and in hindsight, the company was held to have no caveatable interest of its own”.*

In the course of his reasons, Phillips J.A observed that there was a serious question as to whether the sum of \$100,000 which had been paid by the vendor to the purchaser could be characterised as a loss suffered by reason of the caveat.<sup>45</sup>

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<sup>43</sup> No.2053/2001, 22 February 2005 (Victorian Court of Appeal, unreported) BC200500581.

<sup>44</sup> At paragraph [96].

<sup>45</sup> Ibid at 99 to 102.

There is a paucity of authority in Victoria on the issue of the right to compensation under Section 118 of the *TLA* in cases where there was reasonable cause to lodge a caveat, but the caveat is maintained when the reasonable cause ceases to exist. The Court of Appeal expressly reserved that question in *Edmonds*.<sup>46</sup>

Finally, it is not appropriate to lodge a caveat for a collateral purpose such as a bargaining chip where there are other proceedings on foot. Dodds Streeton J., observed at paragraphs 38 and 42 in *Goldstraw v Goldstraw & Anor* that:<sup>47</sup>

*“A caveat has a significant potential to obstruct the rights, and to damage the interests, of the registered proprietor and other parties”*. Her Honour went on to note *“If a widespread practice developed of lodging caveats as bargaining chips in such contexts, it would undermine the operation of an essential feature of the Torrens System”*.

In *Weingarten v Fletcher*,<sup>48</sup> Habersberger J referred to the remarks of Dodds Streeton J., in *Goldstraw*. In *Weingarten* there was no claim for compensation made under Section 118 of the *TLA*, however His Honour ordered indemnity costs on the basis that there had been an unwarranted interference with the registered proprietor’s rights by reason of the lodgment of a caveat.

## **7.2 For the Practitioner**

Not only is it in some cases arguable for the Practitioner to be equally liable for the wrongful lodgment of a caveat, as the client, by reason of the practitioner “signing off” on the Form C document, but the Practitioner can also be liable for costs on a removal application under Section 89A, where the Certificate accompanying the application has been made recklessly or without reasonable cause. A practitioner can also be liable for costs personally in the course of litigation, where the parties to that litigation have incurred cost and expense as a result of the reckless or grossly negligent conduct of the practitioner concerned.

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<sup>46</sup> At paragraph [98].

<sup>47</sup> No.7731/2002, 14 November 2002, (Supreme Court of Victoria, Unreported) at paragraphs [38] and [42], BC 200208479.

<sup>48</sup> No.8398/2003, 20 October 2003, (Supreme Court of Victoria, Unreported), BC 200306836.

Practitioners being Officers of the Court are expected to give matters of importance such as caveats their full and proper consideration and to not abuse the process afforded to them as Officers of the Court for the benefit of their clients through the ill-considered lodgment of caveats.

Finally, of course there always remains the ever-looming danger of liability in negligence to the client, where the Practitioner has ventured advice on a caveat or its removal and that advice proves incorrect and the client suffers loss as a result.

## 8. **CONCLUSION**

When conversant with the basic principles of the legal basis of caveats and their application to everyday real property transactions or disputes, the judicious consideration of caveats, be it with the lodgment of a caveat, or the instigation of a challenge to its existence, will serve to not only reward and protect the client, but also the Practitioner.

*“A Lawyer’s dream of heaven – every man reclaimed his property at the resurrection, and each tried to recover it from all his forefathers”*

*Samuel Butler 1612-1680.*

*W.H. Auden and Louis Kronenberger  
“The Viking Book of Aphorisms” 1962.*

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