

CAVEATS – SOME BASICS – NICHOLE'S FAMILY LAW

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1. What is a caveat?

n. "A warning or proviso of specific conditions, limitations or stipulations e.g. there are a number of caveats which concern the validity of the assessment results."

Synonyms – a warning, caution, admonition, red flag, alarm bell, also a proviso, condition, provision, rider, qualification, reservation.

In law, a notice that certain actions may not be taken without informing the person who gave the notice.

Origin – from the Latin word, to "let a person beware": E.g. caveat emptor ("let the buyer beware").

2. Registration systems facilitate caveats

In Australia, Torrens Title is used for recording and registering interests in land. Land registration aids efficient use of land by simplifying identification of, and dealings in, interests in land.

Compare "old system" and Greek and Roman title systems.

Registration in Victoria is established by the Transfer of Land Act 1958 (Vic) (**Act**).

Legal interests in land are recorded in a register. Changes in interests in land are made by lodgment of instruments with the Registrar of Titles, who makes changes to the register accordingly and is responsible for maintaining the register.

A caveat is a notice that any person with an interest in land (but one which cannot presently be registered) can lodge at the office of the Registrar of Titles. It operates as a notice to the Registrar, not to make any entries in the register with respect to the land in which the caveator claims an interest, except in circumstances that the caveator specifies.

When the Registrar receives a caveat, a note of its existence is made in the register, and appears on the title when searched. A copy of the caveat notice can be obtained by any person searching the title.

3. What is a Caveatable interest?

Section 89A of the Act provides:

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.*

(3) *The Registrar shall give to 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.*

(4) *Every notice relating to any such caveat and any proceedings in respect thereof if served at the address specified in the caveat shall be deemed to be duly served.*

A caveatable interest is any interest of land which is:

- (a) capable of being registered on title (registrable interest);
- (b) capable, by enforcement, of being converted into a registrable interest in land;
- (c) capable of being upheld by a Court giving relief against the land itself, whether or not the relief includes provision of a registrable instrument.¹

Common examples:

- an interest of a purchaser in land pursuant to an executory contract of sale.
- an interest under a charge (where the chargee has an interest in land subject of the charge).

¹ *Composite Buyers v Soong* (1995) 38 NSWLR 286

- an interest under an unregistered mortgage in land.
- a life estate in land.
- a beneficial interest in land under a trust.
- a beneficial interest in land under a constructive or resulting trust (e.g. matrimonial);
- a vendor's lien
- an agreement to permit a lender to lodge a caveat to secure a loan.

There is no limit on the range of interest in land that are caveatable, provided that the interest in question is capable of being converted into a registerable interest in land, or capable of court protection.

Some claims that are inappropriate or insufficient to support a caveat include:

- a debt, by itself:
 - No interest arises unless the creditor has a right to an interest in the land held by the registered proprietor as a means of recovering the debt.
 - There must be evidence in writing that provides for the land to be charged with liability to pay the debt.
- An unsuccessful bidder at an auction.
- A purchaser relying on an oral agreement to purchase land.
- A lender claiming costs where a loan did not proceed, where the loan agreement does not provide for any security for those costs over the land.
- An agreement for the purchase of land where the vendor did not have the ability to transfer title.
- An interest granted in the proceeds of sale of land

In the Family Law Context:

- An interest claimed by reason only of a section 79 application does not give rise to a caveatable interest: see *Rossi v Si* [2016] NSWSC 368, *Dembitzer v Mills* [\[1980\] 2 NSWLR 697](#) and *In the Marriage of Stevens* [\(1991\) 15 Fam LR 51](#) ; *Australian Eagle Insurance Co Ltd v Parry* (1992) ANZ Conv R 166.

- In such a case, a party seeking to preserve property could not lodge a caveat but instead would have to obtain an injunction from the family Court pending the marital cause;
- But equitable interests can exist along side interests created by the FamCA by exercise of s79 and those interests can be protected by a caveat – see *Re Sabri; Ex parte Brien v ANZ Banking Group Ltd* (1997) 21 Fam LR 213. Eg a constructive trust arising from contributions.
- In relation to bankruptcy, that case is also authority that the relation back provisions will not defeat a transfer from partner to partner by reason of a property adjustment under the Act, where the transfer is supported by an underlying equitable interest that predates the relation back date.
- Procedurally there is authority that a State Supreme Court will not have jurisdiction where the subject matter of the caveat is within a matrimonial cause subject of an existing Family Law proceeding.

4. A statutory injunction

In *J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546, Barwick CJ said of a caveat (at 552):

“Its purpose is to act as an injunction to the Registrar General to prevent registration of 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 the persons who may consider dealing with the registered proprietor of the caveator’s estate or interest though if noted on certificate of title it may operate to give such notice.”

In the same case, Windeyer J said:

“After all, the primary purpose of a caveat against dealings is not to give notice to the world of an interest. It is to warn the Registrar General of a claim. The word ‘caveat’ has long been used in law to describe a notice given to an official not to take some step without giving the caveator an opportunity to oppose it.”

Section 91 of the Act provides:

No entry to be made in Register affecting land in respect of which caveat in force

(1) *So long as any such caveat remains in force the Registrar shall not except to register or give effect to-*

- (a) a transfer or dealing referred to in section 90(1)(a)(b)(c)(d) or (e);*
- (b) a transfer or dealing referred to in section 90(5); or*

(c) a transfer or dealing in respect of which the caveat has lapsed- record in the Register any change in the proprietorship of or any dealing purporting to affect the estate or interest in respect of which the caveat is lodged.

5. Why not Register instead of caveat?

If an interest is caveatable, why not simply register it on title? The answer is that the register records legal interest in land, but not all interests in land. There are three general situations where caveatable interests arise:

- Where registerable interest has arisen but the document creating it has not yet been registered.
 - Eg an executed but not registered mortgage, or an executed but not registered land transfer.
- Where a transaction has occurred that gives rise to a registrable interest, but a registerable document has not yet been executed or registered.
 - Eg a loan agreement that provides for the mortgage of a property, where the mortgage has not been prepared, or the interest of a purchaser under an incomplete contract of sale.
- The interest is not able to be registered at all
 - Eg an equitable charge.

6. Lodging a caveat

The approved form is attached to this paper and can be found online at

https://www.propertyandlandtitles.vic.gov.au/_data/assets/pdf_file/0023/64715/Caveat_V14_RE.pdf

A caveator must provide the following information in order to validly lodge a caveat:

- The title details, including whether all or only part of the land is affected
- The Caveator's name
- The claim category (of 9 selections, including "other")
- The grounds of claim: each selection produces multiple drop down options

- An example - Agreement/Contract - by agreement stating the date and parties, purchaser's contract, executed transfer, unpaid vendor under contract of sale, purchaser's lien to secure money paid, date of claim
- The estate claimed (e.g. freehold, leasehold, mortgage, charge, life estate, remainder, restrictive covenant, profit a prendre, easement, contingent interest)
- The extent to which dealings are prohibited by the caveat (e.g. absolutely, conditionally, subject to consent, subject to instrument expressed to be subject to my interest)
- Notice details of the lodging party:
 - Serves as the address for service of anyone wishing to give notice to the caveator.
- Signature of the Caveator or their agent.

Most caveatable interests require substantiation by reference to the writing that creates or gives rise to them – the “Parole evidence rule”.

Section s53 of the Property Law Act 1958 (Vic):

Instruments required to be in writing

- (1) *Subject to the provisions hereinafter contained with respect to the creation of interest in land by parol—*
- (a) *no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorized in writing, or by will, or by operation of law;*
 - (b) *a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;*
 - (c) *disposition of an equitable interest or trust subsisting at the time of the disposition must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorized in writing or by will.*
- (2) *This section shall not affect the creation or operation of resulting, implied or constructive trusts.*

In limited circumstances a caveat can be lodged where there is no documentary evidence, for example trust relationships that are not evidenced in writing.

Practitioners should always be careful of when taking instructions from a client to lodge a caveat. A person who lodges a caveat without reasonable cause will be liable for any loss or damage that follows. A solicitor who lodges a caveat knowing there is no legitimate basis for the caveat will be guilty of professional misconduct and may be liable for damages.

7. Time for Registration

Since a caveat is a form of statutory injunction protecting the interest of the caveator, a caveat should be lodged as soon as the caveatable interest is created in the land.

Any delay risks another transaction occurring that would adversely affect the caveatable interest.

8. Removal

A caveat can be removed either voluntarily or forcibly.

Where the caveator agrees to remove the caveat voluntarily (by far the most common), a Withdrawal of Caveat Form must be lodged and registered at the Land Titles Office.

Where a caveat must be forcibly removed, there are alternative methods of doing so under the Act.

Section 89A - Lapsing Notices

Under this provision, an application is made to the Registrar of Titles and supported by a solicitor's certificate which is to the effect that the caveator no longer has the interest claim in the caveat. The Registrar of Titles is required to send notice to the caveator notifying them of the application and giving them a specified period, no less than 30 days, to issue proceedings failing which the caveat will lapse.

It may not be possible to use a lapsing notice- for example, where removal is urgent, or where a solicitor is not in a position to provide a certificate.

Section 90 application

A person who is adversely affected by a caveat can apply to the Supreme Court under s.90 of the Act for the caveat to be removed.

Such an application is made to the expedited cases division of the Commercial Court (previously having been made to the Practice Court). Often the applications are dealt with at first instance summarily, if the caveator does not make any serious attempt to maintain their interest.

Since a caveat is a statutory injunction, the application to remove is in effect an injunction hearing where the onus is on the caveator to maintain it.

Piroshenko v Grojsman & Ors [2010] VSC 240 usefully sets out the principles applying to an application to remove a caveat. A decision of Warren CJ, it sets out a very clear statement of the

nature of a caveat, the principles relating to applications to remove it, a burden on the caveator to maintain the caveat at [7]:

“Caveats under the Torrens system are treated by the court as analogous to applications for interlocutory injunctive relief. Insofar as the registration is an administrative act, it is when an application is made for their removal that the onus falls on the caveator to satisfy the two stage test used by the Court when deciding whether to exercise its discretion to grant interlocutory injunctive relief. This approach has been established in laws since the decision of Law Diplock Eng Me Yong v Letchumanan was approved by the Full Court of Queensland Supreme Court of Appeal in Re Jorss’ Caveat. As this two stage approach requires the caveator to establish that there is a serious question to be tried that they have the estate or interest which they claim the land in question, and having done so, to establish the balance of convenience favours the maintenance of the caveat on the Registrar of Titles until trial. This is still the approach taken by the courts in Victoria when deciding applications under s.90(3) of the Act.”

Her Honour goes on to apply the usual criteria of governing the grant for interlocutory injunctions, namely a serious question to be tried and the balance of convenience, as established by the High Court in *Australian Broadcasting v O’Neill* (2006) 227 CLR 57.

Mark McKillop
Castan Chambers
6 December 2017

Caveat

Section 89 Transfer of Land Act 1958

The information in this form is collected under statutory authority and used for the purpose of maintaining publicly searchable registers and indexes.

Caveat

Section 89 Transfer of Land Act 1958

The information in this form is collected under statutory authority and used for the purpose of maintaining publicly searchable registers and indexes.

Read this before you start

- 1) Items 1-6 to be filled online
- 2) Print form single sided
- 3) Complete other items in blue or black pen

1. Land/s

Land Title

- Folio range group
- Volume Folio
- Part of the land

Add Land

2. Caveator/s

Caveator

- Individual Corporation Other Organisation
- Given Name/s
- Family Name
- Name differs to Folio

Add Caveator

Claim Category

Agreement/Contract

3. Grounds of Claim

Agreement with the following Parties and Date.

Agreement with the following Parties and Date.

Parties

- Registered Proprietor
- Other
- Both of the above

Date of Claim

Date: (DD/MM/YYYY)

4. Estate or Interest claimed

Freehold Estate

5. Prohibition

Absolutely

6. Address for Service of Notice

- Australian Address Overseas Address

Australian Legal Practitioner /Law Practice /Licensed Conveyancer /Conveyancing Practice /Caveator Name

Address

Property Name

Unit Type

Unit Number

Floor Type

Floor Number

Floor Suffix

Unit

Street No

Street Name

Street Type

Locality

State

Postcode

7. Signing

Please indicate who will be signing for each Caveator.

Caveator

LEAVE BLANK

The caveator claims the estate or interest specified in the land described on the grounds set out. This caveat forbids the registration of any instrument affecting the estate or interest to the extent specified.

Caveator

8. Lodging Party

- Lodging party has a customer code
- Lodging party does not have a customer code

Customer Code

Reference

You can save this document at any time in order to complete it at a later time.

Save

Once you have completed items 1 - 6 you can print out a copy, ready to complete any remaining items by pen.

Print Form