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BARRISTERS



# Dealing with Caveats

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31 MARCH 2022

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# Introduction

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- How to challenge or remove a caveat:
  - Sections 89A and 90(3) of the *Transfer of Land Act 1958* (Vic) (**TLA**)
- The consequences for improperly lodging a caveat (for both caveators and solicitors):
  - Section 118 of the TLA;
  - Section 24 of the *Supreme Court Act 1986* (Vic); and
  - Rule 63.23 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic)

# Lodging a caveat

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- s 89(1) of the TLA:

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.

# Challenging or removing a hostile caveat

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Predominantly two methods:

- s 89A of the TLA
- s 90(3) of the TLA

# Section 89A

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- Administrative process
- A person with an interest in the land affected by a caveat can make an application to the Registrar for the removal of the caveat
- Upon receipt of that application, the Registrar will issue a notice to the caveator (colloquially known as a lapsing notice), informing them of the s 89A application and nominating a date (of no less than 30 days from the date of service of the notice) by which the caveator must issue proceedings substantiating their caveatable interest
- If the caveator fails to issue proceedings, the caveat will lapse

# Section 90(3)

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

Note: “Court” is defined in s 4 of the TLA and means a “court of competent jurisdiction”

# Section 90(3)

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- Court applies the two-stage test used for determining an application for an interlocutory injunction
- The two-stage test requires a caveator to establish that:
  - a) they have a *prima facie* case that they have the estate or interest which they claim in the land in question; and
  - b) the balance of convenience favours the maintenance of the caveat on the Register until the trial of the proceeding.

# Section 90(3)

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- Section 90(3) is drafted broadly, and enjoins the court to ‘make any such order’ it thinks fit
- The power is discretionary
- Therefore the two-stage test can only ‘... *inform the court in considering whether to exercise the discretion conferred on it in any particular case and, if it chooses to do so, what form that exercise should take. The two-stage test does not subsume or restrict the power conferred by the statute.*’ *Lee v Yap* [2021] VSCA 297 (Kyrou, McLeish and Walker JJA)

# Section 90(3)

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- The caveator bears the onus in satisfying the two-stage test
- A court is not constrained in the matters it may consider as going to the balance of convenience

# *Royal Melbourne Institute of Technology v Galloway* [2020] VSC 575 (Derham AsJ)

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- RMIT (the plaintiff and registered proprietor) owned land on Bourke Street Melbourne (**Land**)
- COVID = financial challenges for the university
- RMIT was taking steps to improve its financial position, including by selling the Land
- The defendant, Mr Galloway lodged a caveat over the land in August 2018
- The evidence filed in the proceeding revealed that Mr Galloway had never been a party to any agreement with RMIT and was never granted any form of interest in the Land
- Mr Galloway was a subcontractor to Schiavello Construction (Vic) Pty Ltd which carried out work on another property owned by RMIT, the Oxford Scholar Hotel

# *Royal Melbourne Institute of Technology v Galloway* [2020] VSC 575 (Derham AsJ)

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- Mr Galloway's dispute was with Schiavello Construction (Vic) Pty Ltd and not RMIT
- He said he was owed money arising out of his subcontract with that company
- Mr Galloway had been demanding that RMIT intervene in the dispute, or pay his debt
- Correspondence was sent by the solicitors acting for RMIT requesting that Mr Galloway remove the caveat, noting that he had no reasonable cause to lodge it and drawing his attention s 118 of the TLA
- The solicitors for RMIT notified Mr Galloway that if he failed to remove the caveat they would apply to the Court (s 90(3)) or to the Registrar (s 89A) seeking removal and seek costs on an indemnity basis

## *Royal Melbourne Institute of Technology v Galloway [2020] VSC 575 (Derham AsJ)*

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Mr Galloway replied via email as follows:

*Dear Kirsty,*

*Lovely to hear from you Monday afternoon.*

*Unfortunately, computer says no.*

*You're going to make a lot of money out of RMIT Kirsty but it's ok, you don't have to thank me...but hey, feel free to drop a slab around sometime, I drink Mercury Draught Cider.*

*See you in Court honey.*

*Please serve Notice to Appeal to this email.*

*Best,*

*Brad Galloway*

# Royal Melbourne Institute of Technology v Galloway [2020] VSC 575 (Derham AsJ)

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- a) *The application is in the nature of a summary procedure analogous to the determination of interlocutory injunctions.*
- b) *The procedure is consequently interlocutory in substance, even though it may give rise to a final order.*
- c) *A caveator bears the onus of establishing that there is a prima facie case that they have the estate or interest in the land that is claimed in the caveat.*
- d) *Establishing a prima facie case does not mean that the caveator must show that it is more probable than not that at trial the plaintiff will succeed. It is sufficient that the caveator show a sufficient likelihood of success that, in the circumstances, justifies the practical effect which the caveat will have on the ability of the registered proprietor to deal with the property in question in accordance with its normal proprietary rights.*
- e) *If the caveator establishes a prima facie case that they have the estate or interest claimed, the caveator must further establish that the balance of convenience favours the maintenance of the caveat until trial.*
- f) *There is a relationship between the strength of the prima facie case and the extent to which the caveator must establish the balance of convenience favours the caveator; the stronger the prima facie case the more readily the balance of convenience might be satisfied.*
- g) *Caveats are not to be used as bargaining chips. Lodging a caveat, without proper cause, to force another party to pay money in exchange for the withdrawal of the caveat, or to incur legal expense in commencing a Supreme Court proceeding, is an ulterior or collateral purpose, characterised by many judges of this court as a serious misuse of the relevant statutory provisions.*

*An application to remove a caveat involves two steps. First, the caveator must establish that there is a prima facie case – that there is a probability on the evidence before the Court that the caveator will be found to have the asserted legal or equitable interest in the land. Second, having done so, the caveator must establish that the balance of convenience favours the maintenance of the Caveats on the title until trial. [at 10]*

# *Lee v Yap* [2021] VSCA 297 (Kyrou, McLeish and Walker JJA)

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- Ms Lee (the applicant) sought leave from a decision of the primary judge in which the Court refused to remove three caveats lodged by the first to third respondents over property in Glen Iris, of which Ms Lee was the registered proprietor
- Issue: whether the primary judge had erred in refusing to remove the caveats

# *Lee v Yap* [2021] VSCA 297 (Kyrou, McLeish and Walker JJA)

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- Ms Lee and the caveators were parties to a dispute in a proceeding in the SCV
- In this proceeding, the caveators alleged that the property in Glen Iris had been transferred to Ms Lee for no consideration, by a company trustee of which Ms Lee was the director
- It was said this transfer was a breach of her duties to the trust

# *Lee v Yap* [2021] VSCA 297 (Kyrrou, McLeish and Walker JJA)

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- Receivership application brought by caveators
- Undertaking proffered (but not given): not to deal with the Glen Iris property prior to the resolution of the substantive proceeding
- Receivership application was abandoned as Ms Lee gave an undertaking to lodge title deeds to properties owned by the trust in Carlton and Balwyn with the Prothonotary
- In April 2021, Ms Lee entered into a contract to sell the property in Glen Iris
- Sought removal of the caveats under s 90(3) of the TLA so that settlement could proceed
- Application opposed by caveators

# *Lee v Yap* [2021] VSCA 297 (Kyrou, McLeish and Walker JJA)

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Common ground that on an application to remove a caveat:

- a) the caveator is to satisfy the Court that the caveat should be maintained; and
- b) that the relevant test for maintaining a caveat is akin to the test for granting an interlocutory injunction to the caveator (prima facie case, balance of convenience).

Parties accepted that there was a prima facie case. Issue was where the balance of convenience lay.

# *Lee v Yap* [2021] VSCA 297 (Kyrou, McLeish and Walker JJA)

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- Ms Lee:
  - prepared to pay surplus funds from the sale into Court (after discharge of the mortgage, payment of legal fees and agent's commission)
  - no prejudice to caveators - seeking to sell property in the substantive proceeding
- Primary judge considered the way in which the Receivership Application had been resolved (including by reference to the proposed undertaking, which was not sought and not given)
- Primary judge considered that the Receivership Application would not have been resolved if Ms Lee would have subsequently been free to sell the property in Glen Iris
- The gravamen of the resolution of the Receivership Application was that the properties the subject of that application – the Carlton property, Balwyn property and Glen Iris Property – would not be dealt with until the determination of the Substantive Proceeding (**Gravamen Finding**)
- Primary judge refused to order removal of the caveats.

# *Lee v Yap* [2021] VSCA 297 (Kyrou, McLeish and Walker JJA)

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- Extension of time
- Gravamen Finding – not supported by evidence and was mere speculation
- Court of Appeal accepted this, saying that the finding could be understood in two ways:
  - a) a finding that the parties had agreed to resolve the Receivership Application on the basis that the Glen Iris Property would not be dealt with prior to the determination of the Substantive Proceeding; or
  - b) a finding that Ms Lee's conduct of the Receivership Application had induced the receivership applicants to believe that the Glen Iris Property would not be dealt with prior to the determination of the Substantive Proceeding and that this was the basis on which the receivership applicants had agreed not to pursue the Receivership Application.
- Agreed that there was no evidence

# *Lee v Yap* [2021] VSCA 297 (Kyrou, McLeish and Walker JJA)

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- Balance of convenience
  - Ms Lee would suffer considerable financial prejudice if the caveats were not removed
  - Legal fees and other fees associated with the sale
  - Agent's commission
  - Damages to the purchaser
  - No evidence of prejudice to the caveators

# Advantages and disadvantages of each process

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- Time
- Costs

# Consequences for improperly lodging a caveat

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## **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 a court deems just and orders.

# Example

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A sells their property to B for \$1.5 million. Settlement is due in 3 months. Two and a half months later, C lodges a caveat over the property. The caveat is based on a judgment debt. C refuses to remove the caveat, and consequently the sale with B falls over. A later resells but only for \$1.2 million. Section 118 allows A to sue C for the shortfall of \$300,000 – C's improper caveat lodged 'without reasonable cause' directly caused A's loss.

Robert Hay QC and Brett Harding, 'The use and abuse of caveats' (2018) *Australian Property Law Journal* 1, 10.

# *KB Corporate Pty Ltd v Sayfe* [2017] VSC 623 [19] (Mukhtar AsJ)

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- In *KB Corporate v Sayfe* the Supreme Court of Victoria had made orders (by consent), requiring the second defendant (the Registrar) to remove ten caveats lodged over the plaintiff's properties
- The plaintiff was controlled by a Mr Bell
- The properties were strata title storage units in Collins Street Melbourne

# *KB Corporate Pty Ltd v Sayfe* [2017] VSC 623 [19] (Mukhtar AsJ)

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- Two issues before the Court
  - Question of costs – plaintiff’s costs on an indemnity basis
  - Compensation claim under s 118 of the TLA

# *KB Corporate Pty Ltd v Sayfe* [2017] VSC 623 [19] (Mukhtar AsJ)

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Compensation claim –

- Consequential losses said to have been suffered by the plaintiff in two other dealings because of the caveats:
  - One dealing was a two month loan agreement between the plaintiff and private financier, Rigoni Private Finance Pty Ltd, for a loan of \$172,000. This included prepaid interest of \$10,320 for two months.
  - Another dealing concerned the purchase of land in Kalkite NSW for \$5.5 million between High Country Holdings Pty Ltd as purchaser (a company of which Mr Bell was sole director and shareholder) and Patricia Gaines as vendor

# *KB Corporate Pty Ltd v Sayfe* [2017] VSC 623 [19] (Mukhtar AsJ)

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*These two cases permit the following propositions to be stated concerning an application for compensation under s 118 for lodging a caveat without reasonable cause:*

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

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

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

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

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

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

*(g) legal advice that the caveator was entitled to lodge the caveat may be of considerable significance in determining whether the claimant has established that the caveat was lodged without reasonable cause, but the content and accuracy of the legal advice must be evaluated with all other relevant circumstances. [at 19]*

# *KB Corporate Pty Ltd v Sayfe* [2017] VSC 623 [19] (Mukhtar AsJ)

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- Had already concluded that Mr Sayfe did not have a caveatable interest
- Belief – no direct evidence available – question of belief answerable as a matter of inference from the established facts
- Est facts:
  - Had solicitors acting at the time of lodging
  - No evidence from the solicitors
  - Provision of some documentation – including a loan agreement – but plaintiff and Mr Sayfe were not parties to it and therefore it could not be a source of equitable interest
  - Withdrawn after proceedings commenced

# *KB Corporate Pty Ltd v Sayfe* [2017] VSC 623 [19] (Mukhtar AsJ)

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Outcome:

- Compensation ordered in respect of the first head of damage
- No compensation order in respect of the second head of damage

# *Lanciana v Alderuccio* (2020) 63 VR 72 (Tate, Hargrave and Emerton JJA)

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- Issue:

- Whether the solicitors are ‘a person’ lodging a caveat with the Registrar for the purposes of s 118 of the TLA or whether Ms Lanciana is confined to seeking compensation from the party identified as the caveator in the relevant caveats

Heard as a preliminary question: r 47.04

Moore J determined that the respondents were not ‘a person’ lodging a caveat with the Registrar for the purposes of s 118 of the TLA

# *Lanciana v Alderuccio* (2020) 63 VR 72 (Tate, Hargrave and Emerton JJA)

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*The judge rejected the literal construction of s 118 contended for by the applicant. He held that the critical words in s 118 — '[a]ny person lodging' — naturally invited the question, 'who lodges the caveat?'. The judge found a clear and unambiguous answer to that question in s 89(1) of the Act: 'Any person claiming any estate or interest in the land ...'. The judge did not accept the applicant's submission that the Act should be construed on the premise that ss 89(1) and 118 play independent roles, as this ignored the fact that '[a]ny person lodging' a caveat is a statutory concept which has been a feature of the statutory framework since the Real Property Act 1862 (Vic). Moreover, the fact that s 89(1) expressly authorises a person to lodge a caveat by 'his agent' strengthens the conclusion that an agent who lodges a caveat is not 'any person' lodging a caveat in his or her own right; the act of lodging is the act of the principal.*

*Based on the established relationship of agency between Bloomingdale and the respondents, the judge determined that the respondents were not a person lodging a caveat with the Registrar for the purposes of s 118 but declined to answer the second part of the preliminary question. [at 12-13]*

# *Lanciana v Alderuccio* (2020) 63 VR 72 (Tate, Hargrave and Emerton JJA)

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- Content of the caveats
- Content of the pleadings
- TLA

*We consider that the judge was entirely correct to read s 118 in tandem with s 89(1) of the Act. Section 89(1) confers an entitlement on any person, insofar as that person claims an interest in land, to lodge a caveat to protect that interest. The entitlement to ‘lodge’ a caveat is conferred on ‘any person claiming’ a relevant interest. Accordingly, ‘any person lodging’ a caveat is a statutory concept, not simply a question of fact. The identity of a person ‘lodging’ a caveat is ascertained by reference to the exercise of the entitlement conferred by s 89(1). As the judge held, the answer to the question, ‘who lodged the caveat?’ is provided clearly and unambiguously by s 89(1): ‘Any person claiming any estate or interest in the land ...’. [at 33-34]*

# Costs consequences for solicitors

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- s 24 of the *Supreme Court Act* (Vic); and
- r 63.23 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic)
- *Pearl Lingerie Australia Pty Ltd v TGY Pty Ltd* [2012] VSC 451 (Croft J)