Dealing with Caveats

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8.00 am to 9.00 am

A. Introduction

The term caveat is Latin for *let the person beware*.[1] A caveat is a 'document recorded on (or in the case of computerised registers, recorded in) the folio of the register for a parcel of Torrens title land, intended to protect a claimed interest that affects that title but that is either not registered or not registrable.'[2] A caveat may only be lodged to protect a proprietary interest in land.[3] A caveat '… suspends registration until a reasonable opportunity is given for the ascertainment by a competent court of the rights of the parties',[4] unless the consent of the caveator to deal with the land in question is sought and granted.

The primary function of a caveat is protective in that it is a claim by a caveator to receive notice before any dealing with land is carried out.[5] A secondary function is that it warns persons and practitioners searching the Register of Titles of the existence of the caveated interest.[6]

In this paper, the following topics are considered:

(a) how to challenge or remove a caveat; and

(b) the consequences for improperly lodging a caveat (for both caveators and solicitors).

B. Lodging a caveat

The ability to lodge a caveat with the Registrar is found in s 89(1) of the *Transfer of Land Act 1958* (Vic) (**TLA**). That subsection states as follows:

> (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

[1] Lexis Nexis, Encyclopaedic Australian Legal Dictionary.
[2] Ibid.
[3] Lexis Nexis, Halsbury's Laws of Australia, (I) Caveats – Torrens System, [355-8240] Nature and purpose of a caveat. Also see *McMahon v MacMahon* [1979] VR 239.
[4] Ibid.
[5] Lexis Nexis, Encyclopaedic Australian Legal Dictionary. Also see *J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546.
[6] Ibid.

> 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.

'Approved form' is defined under s 4 of the TLA and means '… a form approved by the Registrar for the purposes of the provision in which the expression appears.'

Ordinarily, caveats are lodged electronically by practitioners via PEXA. However, for those who do not have a PEXA subscription and wish to lodge a caveat on paper, there is an interactive caveat form available at www.delwp.vic.gov.au/property-forms.

Pursuant to this section, a caveat may be lodged absolutely or conditionally.

A recording of every caveat lodged under s 89 of the TLA must be made in the Register.[7]

The Registrar will then provide notice of the caveat and a copy of it (or any particulars) to the registered proprietor of the estate or interest concerned.[8]

The ability to withdraw a caveat administratively is similarly found in s 89(1) of the TLA, in that an approved form withdrawing a caveat can be lodged with the Registrar. Again, while caveats are typically withdrawn through PEXA, it is possible to withdraw a caveat using the interactive form available at www.delwp.vic.gov.au/property-forms.

Some examples of when a caveatable interest in land has arisen include the following:

(a) an interest as purchaser under an agreement for sale;[9]

(b) an interest as purchaser under a conditional agreement for sale, in circumstances where the court would grant an injunction to protect the interest;[10]

(c) an easement;[11]

(d) an equitable mortgage;[12]

(e) a beneficial interest under a resulting trust;[13] and

(f) the interest of a unit holder in a unit trust.[14]

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[7] s 89(2) of the TLA.
[8] s 89(3) of the TLA.
[9] *Fernandes v Houstein* (1963) 4 FLR 355.
[10] *Jessica Holdings Pty Ltd v Anglican Property Trust Diocese of Sydney* (1992) 27 NSWLR 140. *Whallin v Bailbart Investments Pty Ltd* (1987) 47 SASR 183.
[11] *Re Paul* (1902) 19 WN (NSW) 114.
[12] *Avco Financial Services Ltd v White* [1977] VR 561.
[13] *Official Trustee in Bankruptcy v P & R Alvaro Enterprises Pty Ltd* (1992) 111 FLR 47.
[14] *Costa and Duppe Properties Pty Ltd v Duppe* [1986] VR 90.

Ultimately the question whether or not a person has a caveatable interest is a question which needs to be assessed on a case by case basis having regard to all the facts and particulars of the individual case.

C. Challenging or removing a hostile caveat

It is relevant to note in the first instance that caveats are often withdrawn by consent.

Otherwise, there are predominantly two methods by which a hostile or contentious caveat may be withdrawn. Both methods are discussed below.

Section 89A of the TLA

The first method is that set out in s 89A of the TLA, which is effectively an administrative process. Pursuant to s 89A, 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 the application the Registrar will issue a notice to the caveator 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 (in a court or VCAT), substantiating their caveatable interest. Failure to issue proceedings by the caveator will result in the caveat lapsing and consequently, the land in question can be dealt with.

Section 89A of the TLA is as follows:

> **89A Removal of caveat on application to Registrar**
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> (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 subsection (3)
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> (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 the person's 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 the caveator.
>
> (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 or VCAT 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 30 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 subsection (3), but where notice has been given, only with the consent of the caveator or the caveator's agent.

(7) Where notice in writing of the kind referred to in paragraph (b) of subsection (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 a court or VCAT—the court or VCAT may make such order in relation to the caveat as the court or VCAT 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 or VCAT, disclosing that the proceedings in question have been discontinued, withdrawn or struck out or evidence to the satisfaction of the Registrar that those proceedings have been dismissed—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.

In summary, one of the ways in which a caveat can be removed is under the process prescribed under s 89A of the TLA. Under that section:

- Any person interested in land affected by a caveat can apply to the Registrar for the service of a notice (also colloquially known as a lapsing notice): s 89A(1).

- An application under s 89A(1) must:

- specify the land and the estate or interest in respect of which the application is made: s 89A(2)(a); and

- be supported by a certificate signed by a lawyer (engaged in practice in Victoria), referring to the caveat and stating that in their opinion, the caveator does have the estate or interest claimed by the caveator: s 89A(2)(b).

- When the Registrar has received the application and the certificate, the Registrar will provide notice to the caveator that the caveat will lapse on a day specified in the notice (not less that 30 days after the day on which the notice is served: s 89A(4)), unless:

  - the application is abandoned in writing: s 89A(3)(a); or

  - the caveator provides notice (in writing) to the Registrar that proceedings in a court or VCAT, which substantiate the caveator's caveatable interest in the land, have been issued: s 89A(3)(b).

- If the Registrar has not received any notice that the application has been abandoned or that proceedings are on foot, then the caveat will lapse on the day nominated by the Registrar and the Registrar will amend the Register: s 89A(5).

- Note, if a person wishes to abandon their application under s 89A(1), if notice has already been provided to the caveator, then the consent of the caveator (or their agent) is required: s 89A(6).

- Further, where the caveator provides notice to the Registrar that they have issued proceedings (under s 89A(3)(b)) and if the caveator is unable to substantiate their claim to the satisfaction of a court or VCAT, the Court or VCAT my make any order it thinks fit and the Registrar will give effect to that order: s 89A(7)(a).

- Additionally, where a proceeding is discontinued, withdrawn, struck out or there is evidence to the satisfaction of the Registrar that the proceedings have been dismissed, and a notice of this is subsequently served on the Registrar, the caveat will lapse and the Registrar will make the appropriate amendments to the Register: s 89A(7)(b).

Section 90(3) of the TLA

The other method by which a caveat may be removed is prescribed under s 90(3) of the TLA. That section is as follows:

> **90 Except in certain cases caveat to lapse after thirty days notice given to caveator**
>
> (3) 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.

Under this provision, a person (such as the registered proprietor) who is adversely affected by a caveat may bring an application in a court to remove the caveat.

Note, 'court' is defined in s 4 of the TLA and means a 'court of competent jurisdiction'.

Applications under s 90(3) of the TLA are typically commenced by originating motion and supported by affidavit. Further, the Registrar is typically named a party to the proceeding, but does not ordinarily participate in the proceeding (but abides by any order the Court makes).

In an application under s 90(3) of the TLA, a court applies the two-stage test used for determining an application for an interlocutory injunction.[15]

The two-stage test requires a caveator to establish that:

(a) they have a *prima face* 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.[16]

Whilst the authorities establish that courts have adopted this two-stage test, s 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.'[17]

Other relevant things to note in respect of s 90(3) of the TLA include the following:

(a) the caveator bears the onus in satisfying the two-stage test; and

(b) a court is not constrained in the matters it may consider as going to the balance of convenience.

In this section of the paper cases concerning s 90(3) of the TLA are considered.

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

In this case, Royal Melbourne Institute of Technology (**RMIT**) (the plaintiff and registered proprietor), owned land on Bourke Street in Melbourne (**Land**). RMIT had experienced financial challenges as a result of the COVID-19 pandemic, including a decline in revenue arising from a reduction in the number of student enrolments (particularly from international

[15] *Lee v Yap* [2021] VSCA 297 [78] (Kyrou, McLeish and Walker JJA).
[16] *Piroshenko v Grojman* (2010) 27 VR 489, 491 [7] (Warren CJ).
[17] *Lee v Yap* [2021] VSCA 297 [85] (Kyrou, McLeish and Walker JJA) (citations omitted).

students). As a consequence of this, RMIT was taking steps to improve its financial position, including by the proposed sale of the Land.

In August 2018, Mr Galloway lodged a caveat on the title to the Land claiming a 'freehold estate' pursuant to an alleged agreement with the registered proprietor dated 3 August 2020. 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 or on any other basis by RMIT and otherwise had no other connection with the Land, other than having lodged the caveat.

Rather, Mr Galloway was a subcontractor to Schiavello Construction (Vic) Pty Ltd (**Schiavello**), which carried out work on the redevelopment and refurbishment of another property owned by RMIT, namely the Oxford Scholar Hotel.

Mr Galloway's dispute was with Schiavello. He claimed to be owed money by Schiavello arising out of his subcontract with that company. His claim was disputed by Schiavello. Mr Galloway had been demanding, since about May 2019, that RMIT intervene in the dispute and resolve it and even more recently, Mr Galloway had made demands that RMIT pay his debt which he claimed was in the sum of $140,000 in the event that Schiavello did not pay it. Mr Galloway had no claim against RMIT other than it was the owner of the Oxford Scholar Hotel.

Correspondence was sent to Mr Galloway from the solicitors acting for RMIT, requesting that he remove the caveat, noting that Mr Galloway had no reasonable cause to lodge the caveat and drew his attention to s 118 of the TLA (discussed below). The solicitors for RMIT noted that the Land was on the market for sale and the caveat was adversely affecting the sale process. Further, the solicitors for RMIT put Mr Galloway on notice that should he fail to remove the caveat by a certain date, they would apply to the Court under s 90(3) or to the Registrar of Titles under s 89A of the TLA seeking removal; and, would also seek their client's costs on an indemnity basis.

Shortly after this correspondence was sent, Mr Galloway replied via email as follows:

> Dear Kirsty,
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> 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[18]

There were further emails between the solicitors for RMIT and Mr Galloway, including one in which RMIT recommended that Mr Galloway seek legal advice.[19] However, Mr Galloway refused to alter his position.

RMIT then applied pursuant to s 90(3) of the TLA to remove the caveat and sought an order restraining Mr Galloway from lodging any further caveat on any land owned by RMIT without leave of the Court.

Derham AsJ summarised the test to be applied under s 90(3) of the TLA, the substance of which is extrapolated here for convenience:

> The plaintiff's application is made pursuant to s 90(3) of the Act. Under that provision, any person adversely affected by a caveat lodged under s 89 of the Act is permitted to 'bring proceedings in a court against the caveator for the removal of the caveat'. Section 90(3) empowers a court to 'make such order as the court thinks fit', and thus gives the Court a discretion. The principles applicable have been dealt with in many cases, particularly in *Piroshenko v Grosjma* [(2010) 27 VR 489], and may be stated shortly as follows:
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> (a) The application is in the nature of a summary procedure analogous to the determination of interlocutory injunctions.
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> (b) The procedure is consequently interlocutory in substance, even though it may give rise to a final order.
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> (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.
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> (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.
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> (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.
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> (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.
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> (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.

[18] *Royal Melbourne Institute of Technology v Galloway* [2020] VSC 575 [9] (Derham AsJ).
[19] Ibid [10] (Derham AsJ).

> 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.[20]

In respect of the first step, his Honour considered that Mr Galloway had no caveatable interest whatsoever in the Land.[21] Mr Galloway's only basis was that he (or an entity controlled by him), had a contract with Schiavello to undertake work on another property owned by RMIT, the Oxford Scholar Hotel and he was in a dispute with Schiavello regarding payment allegedly due under that contract.[22] His Honour noted that Mr Galloway during the course of the hearing acknowledged that lodging the caveat was a desperate attempt by him to induce RMIT to intervene in his dispute with Schiavello.[23] The Court considered that the correspondence between the parties which was in evidence before it showed that Mr Galloway was on notice of the lack of any basis for his caveat and that he therefore maintained the caveat with a view to putting pressure on RMIT to assist him with his dealings with Schiavello.[24] The Court considered that this was an improper use of the caveat procedure and a clear example of how a caveat can be used inappropriately as a bargaining chip.[25]

In any event, the Court stated that the balance of convenience strongly favoured RMIT's application to remove the caveat, because of the loss being caused to RMIT.[26] The Court noted that the sale of the Land was an important step in RMIT's reorganisation of its financial affairs because of the impacts of COVID-19 on its business.[27] The Court formed the view that the caveat had the potential to affect the sale price of the Land and discourage potential purchasers from moving forward with a contract of sale.[28] In such circumstance, the balance of convenience favoured removal of the caveat.

The Court considered that the lodgement of the caveat by Mr Galloway was a serious misuse of the relevant statutory provisions.[29]

The Court granted RMIT's injunction to restrain Mr Galloway from lodging any further caveat on the Land or any other land owned by RMIT.[30] RMIT offered the usual undertaking as to damages in this respect. However, the Court considered that this was a case in which RMIT's legal right to an injunction was so clear and the balance of convenience weighed so heavily in favour of the grant of an injunction that the undertaking as to damages was neither necessary

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[20] *Royal Melbourne Institute of Technology v Galloway* [2020] VSC 575 [16]-[17] (Derham AsJ) (citations omitted).
[21] Ibid [20] and [21] (Derham AsJ).
[22] Ibid [20] (Derham AsJ).
[23] Ibid [20] (Derham AsJ).
[24] Ibid [21] (Derham AsJ).
[25] Ibid [21] (Derham AsJ).
[26] Ibid [21] (Derham AsJ).
[27] Ibid [21] (Derham AsJ).
[28] Ibid [21] (Derham AsJ).
[29] Ibid [23] (Derham AsJ).
[30] Ibid [24] (Derham AsJ).

or appropriate.[31] The Court was satisfied on the evidence before it that there was a: '… a real risk that he [Mr Galloway] will seek to hold RMIT to ransom again by lodging another caveat on the title to the Land or the title to other land registered by RMIT.'[32]

The Court concluded that the caveat had been lodged for an ulterior purpose and considered that it was proper to order indemnity costs against Mr Galloway.

Wright v Insert Pty Ltd [2022] VSC 1 (Osborne J)

In *Wright v Insert Pty Ltd,*[33] plaintiffs Nicholas, Magdalini, Karen and Mark Wright (**Wrights**) were the registered proprietors of property in Brighton (**Brighton Property**). On 27 October 2021, the Wrights entered into a contract of sale in respect of the Brighton Property with a third party for the price of $4,950,000. A deposit of 10% was paid on signing, with the balance due at settlement. Settlement was due to occur on 17 January 2022.

On 28 October 2021, Insert Pty Ltd (**Insert**), the first defendant, lodged a caveat over the Brighton Property, claiming an interest as purchaser pursuant to a contract with the Wrights made 25 October 2021. The sole director and shareholder of Insert was a person named Gregory Shaw.

The Wrights subsequently commenced proceedings on 21 December 2021 seeking removal of the caveat under s 90(3) of the TLA.

After setting out the relevant legal principles to be applied (which were in substance the same as those set out by Derham AsJ in *Royal Melbourne Institute of Technology v Galloway* [2020] VSC 575), the Court considered whether Insert had a *prima facie* case as to the existence of a legally enforceable agreement made between it and the Wrights. In this respect the Court considered that Insert had failed to demonstrate that it had a *prima facie* case with sufficient likelihood of success to justify the maintenance of the caveat and the preservation of the status quo pending trial.

On the evidence before it, the Court noted that the Wrights and Insert had had dealings in relation to the Brighton Property in November 2020. At that time the parties had entered into a contract of sale with Mr Shaw (in his personal capacity) (although later Insert was nominated by Mr Shaw as the designated transferee at settlement). The contract of sale was in writing and in the conventional form and it was signed by each of the Wrights.

Settlement was not effected on the requisite date (nor by a later date agreed to between the parties). The Wrights issued a notice to Mr Shaw and Insert that unless the default was remedied within a certain period of time, the contract of sale would be rescinded. The contract was later rescinded by the solicitors acting for the Wrights and the property was placed on the market for re sale.

[31] Ibid [24] (Derham AsJ).
[32] Ibid [24] (Derham AsJ).
[33] [2022] VSC 1 (Osborne J) ('***Wright v Insert***').

Mr Nicholas Wright continued to communicate directly with Mr Shaw about the Brighton Property during which time Mr Shaw continued to assert his interest in purchasing the property. On 8 October 2021, subsequent to communications between Mr Wright and Mr Shaw, the solicitors for the Wrights contacted Mr Shaw's solicitor by email stating that the Wrights were prepared to enter into a new contract with Mr Shaw (and Insert) despite the fact that the previous contract of sale had been rescinded and set out some of the proposed terms of the contact of sale. One of the terms of the sale was that settlement was to occur on 25 October 2021.

The email stated that it was not an offer capable of acceptance and that if the terms were acceptable to Mr Shaw, the solicitors for the Wrights would attend to preparation of a new contract of sale for execution and exchange.

Following this email, there was various correspondence between the solicitors (and their respective clients privately) regarding the contract of sale. Mr Shaw had issues regarding funding the transaction and similarly raised issues in respect of the purchase price (which was higher than what it had been under the previous 2020 contract of sale), interest and the deposit paid under the previous 2020 contact of sale. Ultimately the Brighton Property did not settle on 25 October 2021.

On 27 October 2021, the solicitor for the Wrights confirmed that the Brighton Property had been sold to a third party. Insert subsequently lodged a caveat over the Brighton Property on 28 October 2021 and advised (through his lawyers), that the contract of sale between the parties comprised emails sent between the solicitors, commencing on 8 October 2021.

The solicitors for the Wrights requested that the solicitors for Mr Shaw and Insert clarify which email chain constituted the signing of the contract by the Wrights and requested an explanation as to how the requirements of s 53 of the *Property Law Act 1958* (Vic) and s 126 of the *Instruments Act 1958* (Vic) had been met.

The solicitors for the Wrights then lodged an application under s 89A of the TLA with the Registrar. Insert then commenced proceedings on 9 December 2021 in the County Court of Victoria, seeking declaratory relief to the effect that it had an equitable interest in the Brighton Property pursuant to a purported contract of sale and sought specific performance of that contract of sale.

The solicitors for the Wrights became aware of the existence of the County Court proceeding by way of receipt of a Land Data Title alert sent via email. They wrote to the solicitors for Insert and Mr Shaw on the same date requesting information about the proceeding. The solicitors for Insert and Mr Shaw responded, stating that they would seek instructions from their client to serve the writ. They then wrote subsequently stating that they had not received any instructions to serve the writ.

The Wrights then commenced urgent proceedings in the Supreme Court of Victoria to remove the caveat ahead of the date of settlement with the third party (being 17 January 2022). In

determining whether or not the caveat should be removed, the Court had regard to the underlying claims in the County Court against the Wrights and whether the claims were sufficient to establish a *prima facie* case that Insert and Mr Shaw had a caveatable interest in the Brighton Property. In the County Court proceeding Mr Shaw and Insert sought specific performance of a contract of sale (amongst other things) which was said to give rise to the alleged caveatable interest.

Prima face case

The Court noted that the first hurdle to 'jump' was to establish that an agreement was reached by Mr Wright on behalf of the Wrights and Mr Shaw on behalf of Insert.[34] An issue before the Court was whether the agreement between the Wrights and Insert (if one had been reached), was established on 7 October 2021 or 25 October 2021.[35] In such circumstances, the Court dealt with the *prima facie* case question by reference to both a contract made on 25 October 2021 and 7 October 2021.[36]

In respect of alleged contract made on 25 October 2021, the Court said that email chain (of 8 October 2021) could not be taken to be evidence of a contract.[37] The email of 8 October 2021 made it clear that no enforceable agreement would arise unless and until a formal contract of sale was executed and exchanged and a deposit paid.[38] The solicitor for Insert and Mr Shaw wrote back on 25 October 2021 stating that the terms of the 8 October 2021 were acceptable and requested that a contract of sale and s 32 statement be sent to them so that it could be executed.[39] On the same date, the solicitors for the Wrights wrote back stating that upon receipt of the signed contract and deposit of 5%, the same would be submitted to the Wrights and that a contract would not arise until exchange had taken place.[40]

The Court noted that Mr Shaw had given evidence of oral conversations with Mr Wright, occurring on 25 October 2021, in which Mr Shaw said that he agreed with Mr Wright that no deposit was required and that settlement could occur on 28 October 2021 subject to Mr Shaw's financier agreeing to finance the purchase on the basis set out in the 8 October 2021 email.

The Court considered that Mr Shaw's evidence of his oral communications with Mr Wright was inconsistent with the communications between the lawyers themselves and was directly challenged by Mr Wright. In such circumstances (whilst the Court was conscious that it ought to refrain from making definitive findings in an interlocutory hearing), it noted that Mr Shaw's evidence was:

- in dispute;

[34] Ibid [69] (Osborne J).
[35] Ibid [69] (Osborne J).
[36] Ibid [69] (Osborne J).
[37] Ibid [70] (Osborne J).
[38] Ibid [69] (Osborne J).
[39] Ibid [69] (Osborne J).
[40] Ibid [69] (Osborne J).

- was inconsistent with the emails between the parties' legal and conveyancing advisors which passed between them on the same day;
- was not corroborated in any significant way by contemporaneous documents;
- was not adverted to by his solicitors; and
- required the Court to accept that Mr Wright agreed to sell the Property to the Purchaser subject to a condition wholly for Mr Shaw's benefit (a type of finance condition) without requiring a deposit to be paid.[41]

The Court also considered that the position was no better in relation to an alleged contract of sale made on 25 October 2021.[42] In this respect, Mr Shaw relied on various text messages between him and Mr Wright regarding the Brighton Property. The Court was not satisfied that the text messages were sufficient to make out the existence of an agreement.[43] Rather, all that the text messages showed were that Mr Shaw was still interested in purchasing the Brighton Property and Mr Wright was still prepared to negotiate with him for that purpose.[44]

In addition, the Court said that any alleged agreement (whether one was formed on 7 or 25 October 2021) was not in writing and that s 126 of the *Instruments Act 1958* (Vic) prevented an action being brought for enforcement of a contract for the sale of land unless the agreement is signed by the person to be charged or by a person lawfully authorised in writing by the person to be charged.[45]

While Insert sought to cure non-compliance with s 126 of the *Instruments Act 1958* (Vic) by pointing to alleged acts of part performance and relied on three examples, the Court considered that the three examples were unilateral acts done by Insert (or Mr Shaw) and were not sufficient examples to establish part performance.[46] The Court also considered that the evidence relied on by Insert (and Mr Shaw) fell far short of the quality required to support an estoppel claim (which formed part of the claims in the County Court proceeding).[47] To this end, the Court said that there was no unequivocal representation that a legally binding contract of sale had come into effect, nor had there been any detrimental reliance by Insert or Mr Shaw on any alleged representation.[48]

In relation to an assessment of Insert's *prima facie* case, the Court considered that it was an oversimplification to characterise the question as whether Insert had a *prima facie* case that it had an enforceable contract of sale.[49] Rather, the Court said that the question was, whether

[41] Ibid [72] (Osborne J).
[42] Ibid [73] (Osborne J).
[43] Ibid [73] (Osborne J).
[44] Ibid [73] (Osborne J).
[45] Ibid [75] (Osborne J).
[46] Ibid [78]-[81] (Osborne J).
[47] Ibid [84] (Osborne J).
[48] Ibid [84] (Osborne J) applying *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.
[49] Ibid [87] (Osborne J).

there is a *prima facie* case that Insert had an enforceable contract of sale in respect of which the Court will order specific performance.[50]

This was the relief sought by Insert in the County Court proceeding and was foundational to the interest which founded the caveat.[51]

The Court considered that ordinarily, if a party can establish it has a *prima facie* case that it has an enforceable contract for the sale of land, that is usually enough to meet the threshold that there is a *prima facie* case for an order for specific performance because land is of a sufficiently unique character such as to make damages an inadequate remedy.[52]

However, the Court noted that this basic proposition was difficult in the present case because the Brighton Property had been purchased by a third party.[53] Effectively, the case concerned a priority dispute between Insert under an alleged contract of sale (either formed on 7 or 25 October 2021) and the third party's interest as a purchaser made under a contract of sale on 27 October 2021.[54] In this context, the Court noted that where there are two competing equitable interests, priority is to be given to the interest created first in time.[55] Failure to lodge a caveat may constitute postponing conduct on behalf of a caveator.[56]

That is, the alleged contract was entered into (either on 7 or 25 October 2021), however, the caveat was lodged on 28 October 2021, after the third party had executed the contract of sale on 27 October 2021. Further, at no time did Mr Shaw and Insert (or their lawyers) assert from 7 to 26 October 2021 that they considered that there was an enforceable agreement in place.[57] If they had done so, then there might have been reason to believe that the Wrights would not have entered into the contract for sale with the third party.[58]

In this context, the Court said that there may well be some force to the proposition that any interest of Insert and Mr Shaw is postponed in favour of the third party, and therefore specific performance would not be ordered.[59]

Finally, the Court observed that specific performance is an equitable remedy and when exercising equitable jurisdiction, the doctrine of laches requires those who seek to invoke equitable remedies to do so with due diligence, especially when they are on notice that prejudice could arise to a third party if a claim is not pursued promptly.[60] The Court said that Insert and Mr Shaw had not pursued their claim for specific performance with alacrity.[61] Whilst

[50] Ibid [87] (Osborne J).
[51] Ibid [88] (Osborne J).
[52] Ibid [89] (Osborne J).
[53] Ibid [90] (Osborne J).
[54] Ibid [90] (Osborne J).
[55] Ibid [91] (Osborne J).
[56] Ibid [91] (Osborne J).
[57] Ibid [91] (Osborne J).
[58] Ibid [92]-[93] (Osborne J).
[59] Ibid [93] (Osborne J).
[60] Ibid [94] (Osborne J).
[61] Ibid [95] (Osborne J).

the Court considered that the delay in the initiation of legal proceedings and the prosecution of the claim (and failure to serve the Wrights), was not a matter of itself to deny equitable relief, delay did go to the balance of convenience.[62]

The Court concluded that the claim by Insert faced a number of difficulties. The Court was not satisfied that Insert had established a *prima facie* case that it had the interest claimed and that a court would grant it specific performance of the alleged contract giving rise to the alleged interest.[63]

Balance of convenience

Whilst it was not required to do so, the Court went on to consider the balance of convenience in respect of the caveat.[64] The Court said that if it did not grant the relief sought and remove the injunction, then it would impact an innocent party, being the third party purchaser, who entered into the contract of sale in good faith, who had already paid a significant deposit, and who had expended time and incurred expenses in anticipation of the upcoming settlement.[65]

Additionally, the Court noted that there was evidence before it which suggested that Mr Shaw was open to a monetary solution in respect of the County Court proceeding and that he was not necessarily interested *per se* in the Brighton Property other than as a development site and that any loss could be measured in damages.[66] Further, he had failed to pursue his claim with urgency. These factors collectively all suggested that the balance of convenience weighed against the maintenance of the caveat.

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

In *Lee v Yap* the applicant, Ms Lee, 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 (**Caveators**) over property in Iris Road, Glen Iris (**Glen Iris Property**), of which Ms Lee was the registered proprietor.

The issue before the Court of Appeal was whether the primary judge had erred in refusing to remove the caveats.

Ms Lee and the Caveators were parties to a dispute in a proceeding in the Supreme Court of Victoria (**Substantive Proceeding**). In the Substantive Proceeding, the Caveators alleged that the Glen Iris Property had been transferred to Ms Lee for no consideration, by a company trustee of which Ms Lee was the director and that this transfer was a breach of her duties to the trust.

[62] Ibid [96] (Osborne J).
[63] Ibid [97] (Osborne J).
[64] Ibid [98] (Osborne J).
[65] Ibid [99] (Osborne J).
[66] Ibid [100]-[104] (Osborne J).

In the Substantive Proceeding, one of the Caveators and another party applied to have a receiver appointed to the trust to secure the trust property (**Receivership Application**). Prior to that application being heard, Ms Lee proffered two undertakings, the first of which is relevant: an undertaking not to deal with the Glen Iris Property prior to the resolution of the Substantive proceeding (**Proposed Undertaking**). When the application was heard before the primary judge, the Proposed Undertaking was not sought or given. Instead Ms Lee undertook to lodge with the Prothonotary title deeds to properties owned by the trust in Carlton and Balwyn. Further, Ms Lee acknowledged that any income paid to her by the trust would be subject to an accounting at the end of the Substantive Proceeding if required. On this basis, the Receivership Application was abandoned.

In April 2021 Ms Lee entered into a contract to sell the Glen Iris Property. Settlement was due to take place on 15 June 2021. Ms Lee sought removal of the caveats pursuant to s 90(3) of the TLA to enable the settlement to proceed. Her application was opposed by the Caveators.

It was 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.

That is, in respect of (b) it was common ground that a caveator must show that there is a *prima facie* case that it has the estate or interest claimed in the caveat and secondly, that the balance of convenience favours the maintenance of the caveat until trial (the two-stage test).

The parties accepted that there was a serious issue to be tried as to whether the Caveators had a caveatable interest in the Glen Iris Property. This meant that the only issue before the primary judge was where the balance of convenience lay.

Ms Lee submitted that she was prepared to pay into Court surplus funds from the sale of the Glen Iris Property (after discharge of the mortgage, payment of legal fees and the agent's commission). She submitted that the Caveators would not be prejudiced in the Substantive Proceeding because it is likely that the property would be sold in any event if the Caveators were successful.

In respect of these submissions the primary judge noted that they had some force, however, considered that it was necessary to take into account the manner in which the Receivership Application had been resolved, including by reference to the Proposed Undertaking.

The primary judge considered that it was unlikely that the Receivership Application would have been resolved in the way that it had if there was any prospect that Ms Lee would have subsequently been free to sell the Glen Iris Property. The primary judge observed that 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**).

In the light of this, the primary judge refused to order the removal of the caveats. Ms Lee subsequently appealed.

Extension of time

Ms Lee's application for leave to appeal was filed out of time by 2 business days. Consequently, Ms Lee sought leave to file her application out of time pursuant to r 64.08 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) (**Rules**). Her solicitor provided a brief explanation for the delay in an affidavit in support of the extension of time application.

Three reasons were provided: the snap lockdowns in Victoria in the latter half of 2021; that Ms Lee was over 60 and considered high risk should she catch COVID-19 and therefore it was impractical to have face to face conferences to obtain instructions; and it was difficult to obtain timely instructions in circumstances where Ms Lee did not speak English well and required assistance from her son to act as an interpreter. Ms Lee did not file an affidavit on her own behalf.

The Caveators opposed Ms Lee's application for an extension of time. They filed their own affidavit material, directly challenging Ms Lee's solicitor's affidavit. They gave evidence that Ms Lee's English was not poor and said that she was able to give instructors without an interpreter.

In determining whether or not to grant leave to file out of time, the Court of Appeal noted that the purpose of r 64.08 of the Rules is to provide the Court with a discretion to extend time so as to avoid an injustice.[67] The Court will consider several factors, including, the length of the delay, the reasons for the delay and the extent of any prejudice suffered by the respondent if the extension is granted: *Kambouris v Kiatos* [2016] VSCA 266.[68]

The Court noted that the length of the delay was short (only 2 business days).[69] However, the Court was dissatisfied with the explanation for the delay given by the applicant's lawyers.[70] The Court noted that the Caveators had filed affidavit evidence casting doubt on whether or not Ms Lee could sufficiently give instructions without an interpreter and that Ms Lee had failed to answer this evidence.[71] The Court was also not satisfied that the snap lockdowns in Victoria were a satisfactory excuse.[72] The Court stated that a legal practitioner who swears an affidavit in support of an application for an extension of time must provide a frank and thorough explanation for the delay.[73] The Court was of the view that the explanation provided was not

[67] *Lee v Yap* [2021] VSCA 297 [44] (Kyrou, McLeish and Walker JJA).
[68] Ibid [44] (Kyrou, McLeish and Walker JJA).
[69] Ibid [46] (Kyrou, McLeish and Walker JJA).
[70] Ibid [47] (Kyrou, McLeish and Walker JJA).
[71] Ibid [47] (Kyrou, McLeish and Walker JJA).
[72] Ibid [47] (Kyrou, McLeish and Walker JJA).
[73] Ibid [48] (Kyrou, McLeish and Walker JJA).

sufficient to explain the reason for the delay and even when a delay is short, parties should not assume that an extension will automatically be granted.[74]

Finally, the Court considered that the merits of the appeal weighed in favour of the grant of the extension of time and were sufficiently strong to overcome the deficiencies in the explanation for the delay.[75] Accordingly, leave to file out of time was granted to Ms Lee.

The appeal

Ms Lee raised three grounds of appeal. They were as follows:

1. The primary judge erred in assessing the balance of convenience by treating as decisive, alternatively giving substantial weight to, a factor which did not on proper analysis bear upon the balance of convenience, being the Proposed Undertaking (which was never given, or accepted and was therefore never operative).

2. The primary judge erred by speculating as to the significance or role of the Proposed Undertaking in resolution of the Receivership Application, despite there being no evidence of it having had any such significance or role.

3. Alternatively, that the result below was so unreasonable or plainly unjust that it is to be inferred that in some way there has been a failure to properly exercise the discretion.

Before considering the grounds in detail, the Court relevantly noted that under s 90(3) of the TLA, any person adversely affected by a caveat may 'bring proceedings in a court against the caveator for the removal of the caveat' and that the section empowers a court to 'make such order as the court sees fit.' The Court noted that a court's power under s 90(3) of the TLA is discretionary.[76] When a court is considering an application under s 90(3), the court applies the two-stage test used for determining an application for an interlocutory injunction.[77]

In relation to ground 1, the Court held that it was open to the primary judge to have regard to the manner in which the Receivership Application was resolved and the assumptions that underpinned its resolution. The Court considered that the primary judge was aware that the Proposed Undertaking was never given, accepted or in operation. That is why the primary judge called it the "Proposed Undertaking".[78] However, the primary judge did know that the Proposed Undertaking had been offered and that it was relevant to the resolution of the Receivership Application.[79] It was not therefore legally irrelevant to the resolution of the application to remove the caveats.[80]

[74] Ibid [48] (Kyrou, McLeish and Walker JJA).
[75] Ibid [49] (Kyrou, McLeish and Walker JJA).
[76] Ibid [78] (Kyrou, McLeish and Walker JJA).
[77] Ibid [79] (Kyrou, McLeish and Walker JJA).
[78] Ibid [83] (Kyrou, McLeish and Walker JJA).
[79] Ibid [83] (Kyrou, McLeish and Walker JJA).
[80] Ibid [83] (Kyrou, McLeish and Walker JJA).

The Court held that the primary judge did not treat the Proposed Undertaking as 'decisive'.[81] Rather, the primary judge considered the way in which the Receivership Application had been resolved and the Proposed Undertaking was one of a number of factors considered in this respect.[82]

The Court opined further that whilst courts have adopted a two stage test in caveat removal applications, s 90(3) is broad and the court can make any orders it thinks fit under this provision.[83] The two stage test only informs a court in considering whether to exercise the discretion conferred on it to remove a caveat. The two stage test does not subsume or restrict the court's power under the statute.[84] Further, the court is not confined as to the matters it may consider as going to the balance of convenience.[85]

In relation to ground 2, Ms Lee focused on the Gravamen Finding, asserting that this finding was not supported by the evidence and was mere speculation.[86] The Court accepted this submission, noting that the Gravamen Finding could be understood in two ways:

1. 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

2. 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.[87]

The Court concluded that there was no evidence whatsoever to support the Gravamen Finding and the primary judge erred in making it. The Court considered that the Gravamen Finding played a significant role in the primary judge's assessment of the balance of convenience and therefore the primary judge erred in resolving the balance of convenience in the way in which he did.

The Court observed that it was not necessary to consider ground 3 where ground 2 was made out.

Balance of convenience

[81] Ibid [84] (Kyrou, McLeish and Walker JJA).
[82] Ibid [84] (Kyrou, McLeish and Walker JJA).
[83] Ibid [85] (Kyrou, McLeish and Walker JJA).
[84] Ibid [85] (Kyrou, McLeish and Walker JJA).
[85] Ibid [85] (Kyrou, McLeish and Walker JJA).
[86] Ibid [90] (Kyrou, McLeish and Walker JJA).
[87] Ibid [91] (Kyrou, McLeish and Walker JJA).

Having found error in the primary judge's decision, the Court determined that it was appropriate for it to exercise afresh the s 90(3) TLA discretion and determine whether the caveats ought to be removed, noting that the issue was where the balance of convenience lay.[88]

The Court considered that Ms Lee would suffer considerable financial prejudice if the caveats were not removed.[89] She would be required to pay legal fees and other fees associated with the sale; she may be required to pay the agent's commission and damages to the purchaser.[90] There was no evidence that the Caveators would suffer any prejudice if the caveats were removed.[91] While they would lose their beneficial interest in the Glen Iris Property, they would gain a beneficial interest in the net proceeds of sale.[92]

Consequently, the Court considered that the balance of convenience favoured the removal of the caveats, as long as the proceeds of sale were preserved pending the resolution of the Substantive Proceeding. Ms Lee offered an undertaking to this effect.

D. Advantages and disadvantages of each process

Section 89A of the TLA is a cost effective option in which an affected person can apply for the removal of a caveat pursuant to an administrative process. It provides for a non litigious regime.

However, the process is somewhat slow, in that there are time requirements in the legislation that need to be satisfied before a caveat can be removed. In the circumstances where there is an imminent sale, for example, this process may not be suitable.

Further, under this process a caveator in response to a lapsing notice, can issue proceedings (if it wishes to maintain its caveat over the land). However, there is nothing in the section which requires the caveator to serve those proceedings on the person affected by the caveat. Note that a writ or an originating process are valid for service for one year after the day it is filed.[93]

What this means practically, is that a caveator could issue proceedings and then wait to serve the originating documents for effectively one year. If this occurs, then the person affected by the caveat (if they wish for the issue to be determined), would need to apply to the court under s 90(3) of the TLA. Consequently, if the administrative process under s 89A of the TLA is used as an alternative to s 90(3) of the TLA, it does not mean that a person will not have to later use s 90(3) of the TLA. This was an issue in *Wright v Insert Pty Ltd* [2022] VSC 1 (discussed above).

Conversely, s 90(3) of the TLA is a quicker method as applications under this provision can be brought on an urgent basis. Having said this, the process is likely to be more costly.

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[88] Ibid [106] (Kyrou, McLeish and Walker JJA).
[89] Ibid [106] (Kyrou, McLeish and Walker JJA).
[90] Ibid [106] (Kyrou, McLeish and Walker JJA).
[91] Ibid [107] (Kyrou, McLeish and Walker JJA).
[92] Ibid [107] (Kyrou, McLeish and Walker JJA).
[93] See for example, rule 5.12(1) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic).

E. Consequences for improperly lodging a caveat

In this section of the paper, the consequences for improperly lodging a caveat, for both solicitors and caveators, are considered.

For caveators

The starting point is s 118 of the TLA. This section of the TLA prescribes as follows:

> **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.

For example:

> 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.[94]

This provision has been the subject of much judicial discourse. *Commonwealth Bank of Australia v Baranyay*[95] is considered to be the seminal case on compensation claims under s 118 of the TLA in which Hayne J summarised the key principles to be applied.[96] However, the relevant principles have been restated in later judgments, including in *Edmonds v Donovan*,[97] *New Galaxy Investments Pty Ltd v Thomson*,[98] *KB Corporate Pty Ltd v Sayfe*[99] and in *Long Forest Estate Pty Ltd v Singh*.[100]

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.

There were two issues before the Court, being the question of costs (that is the plaintiff's costs of the proceeding sought on an indemnity basis and fixed in the sum of $15,642) and also the plaintiff's compensation claim under s 118 of the TLA in which the plaintiff sought orders

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[94] Example taken from Robert Hay QC and Brett Harding, 'The use and abuse of caveats' (2018) *Australian Property Law Journal* 1, 10.
[95] [1993] 1 VR 589, 600-1 (Hayne J (as his Honour was then)).
[96] Robert Hay QC and Brett Harding, 'The use and abuse of caveats' (2018) *Australian Property Law Journal* 1, 10.
[97] (2005) 12 VR 513 (Winneke P and Charles JA).
[98] (2017) 18 BPR 36,811; [2017] NSWCA 153 ('***New Galaxy***'). Note in this judgment the Court of Appeal of New South was considering s 74P of the *Real Property Act 1900* (NSW), which is equivalent to s 118 of the TLA.
[99] [2017] VSC 623 [19] (Mukhtar AsJ) ('***KB Corporate v Sayfe***').
[100] [2020] VSC 604 [339]-[341] (John Dixon J) applying *KB Corporate v Sayfe*.

directing the first defendant (Mr Sayfe) to pay loss and damage incurred as a result of the caveats, fixed in the sum of $33,174.06.[101]

At a previous hearing (on 29 November 2017), the Court ordered that the first defendant pay the plaintiff's costs on an indemnity basis because the objective evidence revealed that the plaintiff was able to show that there were no apparent grounds for lodging the caveats. Relevantly, at the hearing, the application for indemnity costs was not opposed. At the same hearing, the Court proceeded to hear the compensation claim.

The compensation claim concerned 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.

The plaintiff's submitted that the caveats delayed or impaired these two dealings as a result of which it had incurred expense and financial liability, for which it said the first defendant ought to pay compensation.

Neither the application for indemnity costs or compensation orders were opposed by the first defendant. However, the Court proceeded to consider in detail the evidence filed in support of the orders and the applicable principles in respect of s 118 of the TLA.

In relation to s 118 of the TLA, his Honour remarked as follows:

> For a compensation order to be obtained under s 118 it is not enough to show that the caveator Mr Sayfe did not have a caveatable interest. The power to lodge a caveat is not conditional upon the caveator actually having the estate or interest in question. Even though no caveatable interest is shown to exist, it may be that the caveator believed he did have such an interest especially if he had taken legal advice in the matter. The plaintiff has the onus of proving that the caveator did not have an honest belief based on reasonable grounds that he had a caveatable interest. That has both a subjective and objective element. The approach to be taken was considered by the Victorian Court of Appeal in 2005 in *Edmonds v Donovan and Others* and earlier this year by the New South Wales Court of Appeal in *New Galaxy Investments Pty Ltd v Thomson & Others.*[102]

His Honour went on to consider the relevant case law including both *Edmonds v Donovan* and *New Galaxy*. His Honour surmised as follows:

> 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:

[101] A second affidavit filed in the proceeding revealed that the sum sought was in fact $33,343.22: *KB Corporate v Sayfe* [7].
[102] *KB Corporate v Safye* [9] (Mukhtar AsJ) (citiations omitted).

(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 is 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.[103]

Mukhtar AsJ considered that he had already concluded that Mr Sayfe did not have a caveatable interest. In respect of the caveator's belief, the Court noted that there was no direct evidence from the caveator in the plaintiff's unopposed application under s 118 of the TLA. Therefore, his Honour was of the view that the question of belief had to be answered as a matter of inference from the established facts.[104]

The established facts included that the first defendant had solicitors acting for him at the relevant time, who lodged the caveats (presumably according to instructions).[105] The Court noted that there was no evidence from these solicitors.[106] Further, the Court noted that it did not have any evidence from the new solicitors who were retained for the caveator three days after the caveats were lodged.[107] These solicitors were asked by the solicitors for the plaintiff on what basis the caveats had been lodged.[108]

The first defendant's solicitors had only provided a limited statement in reply, providing a loan agreement and asserting a caveatable interest and a breach of the loan agreement.[109] However, the Court noted that the plaintiff and Mr Sayfe were not parties to that loan agreement and the loan could not be a source of any equitable interest.[110]

[103] Ibid [19] (Mukhtar AsJ).
[104] Ibid [20] (Mukhtar AsJ).
[105] Ibid [20] (Mukhtar AsJ).
[106] Ibid [20] (Mukhtar AsJ).
[107] Ibid [20] (Mukhtar AsJ).
[108] Ibid [20] (Mukhtar AsJ).
[109] Ibid [20] (Mukhtar AsJ).
[110] Ibid [20] (Mukhtar AsJ).

Further the court noted that after proceedings were commenced the caveats were shortly withdrawn, with an agreement to pay the plaintiff's costs, which was breached.[111]

In determining whether any compensation was payable by the first defendant, the Court considered the two matters advanced by the plaintiff in support of its application. The first matter concerned compensation for the costs incurred in a private lending agreement that the plaintiff made with Rigoni Private Lending Pty Ltd which, Mr Bell said, was made to assist his company High Country Holdings Pty Ltd to purchase the property in Kalkite in New South Wales for $5.5 million to be developed into 91 blocks of land. The contract of sale was dated 16 August 2017 and the deposit was $100,000.[112] The completion of the contract was due on 31 August 2017.[113] The contract of sale was not conditional on finance.[114]

The plaintiff said that the settlement costs, the solicitor's fees and associated costs required an additional amount of capital from a short term lender in order to settle the property purchase.[115] Rigoni Private Lending Pty Ltd offered to lend $172,000 to the plaintiff for a term of 2 months at a non-default interest rate of 36% per annum on a second mortgage security of the plaintiff's 12 strata title units (over which Mr Sayfe later lodged his caveats) and another property.[116] The plaintiff accepted this offer.[117] The loan was due to be settled on 24 October 2017, this being the date on which Mr Sayfe lodged the caveats over the same titles that were security for the loan from Rigoni Private Pty Ltd lending.[118]

The loan was partially settled in the sum of $72,000. However, the lender held back $100,000 balance of the loan, pending removal of the caveats.[119] Interest was running. The caveats were removed on 3 November 2017. The plaintiff (as borrower under the loan) claimed as compensation, the interest incurred on $100,000 from the date the caveats were lodged (being 24 November 2017) to 3 November 2017 (being the date the caveats were removed).[120] He also claimed additional fees from the evidence.[121] The amount claimed was in the sum of $3,781.78. This sum was particularised and the lender also gave evidence as to these amounts.[122]

The Court concluded that this part of the claim was legitimate in that the necessity to pay the lender was caused by the lodgement of the caveats.[123] The Court said that it was 'just' for the first defendant to pay compensation in the sum of $3,781.78 under this particular head of damage.[124]

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[111] Ibid [20] (Mukhtar AsJ).
[112] Ibid [22] (Mukhtar AsJ).
[113] Ibid [22] (Mukhtar AsJ).
[114] Ibid [22] (Mukhtar AsJ).
[115] Ibid [23] (Mukhtar AsJ).
[116] Ibid [23] (Mukhtar AsJ).
[117] Ibid [23] (Mukhtar AsJ).
[118] Ibid [23] (Mukhtar AsJ).
[119] Ibid [25] (Mukhtar AsJ).
[120] Ibid [25] (Mukhtar AsJ).
[121] Ibid [25] (Mukhtar AsJ).
[122] Ibid [26] (Mukhtar AsJ).
[123] Ibid [26] (Mukhtar AsJ).
[124] Ibid [26] (Mukhtar AsJ).

In relation to the second head of damage, which concerned the purchase of land in Kalkite, the Court was not satisfied that the evidence provided was sufficient to warrant compensation being granted. In fact the Court found the evidence confusing and expressed concern in respect of unexplained transactions and communications. The Court said that it had unease and apprehension about this aspect of the claim for compensation.[125] The Court said that it did not have confidence in the evidence and that it was inadequate in material respects.[126] His Honour held that:

> I am afraid to say the Court does not have confidence in the evidence. It is inadequate in material respects, in a dealing which has strange and unexplained features, and has aroused a sense of a lack of transparency. I am not willing, on the basis of a conclusion that there were no reasonable grounds for the caveat, to take a benevolent attitude and impose liability for compensation just because the purchaser is liable to compensate the vendor for a delayed settlement.[127]

In conclusion, the application for compensation was allowed in part to the extent of $3,781.78 (but otherwise refused).[128]

For solicitors

The current authorities suggest '… that a landowner cannot seek compensation from a caveator's solicitors or agent for lodging the caveat on their behalf.'[129]

This issue was considered by the Court in *Lanciana v Alderuccio*[130] and on appeal in *Lanciana v Alderuccio*.[131] In this paper, the decision on appeal is considered.

In *Lanciana v Alderuccio* the applicant, Ms Lanciana, was the beneficiary of two trusts and the trustees were registered proprietors of two properties, one in Maidstone and the other in Williamstown.

The respondents were legal practitioners practising together in a partnership. In March 2005, they lodged caveats on the titles of those properties on behalf of their client, Bloomingdale Holdings Pty Ltd (**Bloomingdale**).

Ms Lanciana brought a claim against the solicitors under s 118 of the TLA for loss sustained as a result of the caveats.

Orders were made that the Court determine, as a preliminary question (pursuant to r 47.04 o the *Supreme Court (General Civil Procedure) Rules 2015* (Vic)), whether the solicitors are 'a person' lodging a caveat with the Registrar for the purposes of s 118 of the TLA, or whether

[125] Ibid [35] (Mukhtar AsJ).
[126] Ibid [43] (Mukhtar AsJ).
[127] Ibid [44] (Mukhtar AsJ).
[128] Ibid [44] (Mukhtar AsJ).
[129] Robert Hay QC and Brett Harding, 'The 'serious business' of lawyers lodging and maintaining caveats over land' (2019) 28 *Australian Property Law Journal* 1.
[130] [2019] VSC 198 (Moore J).
[131] (2020) 63 VR 72 (Tate, Hargrave and Emerton JJA) ('***Lanciana v Alderuccio***').

Ms Lanciana is confined to seeking compensation from the party identified as the caveator in the relevant caveats.

In the Trial Division of the Supreme Court of Victoria, 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. Moore J did not answer the second part of the question (whether the applicant is confined to seeking compensation from the party identified as the caveator in the caveats) as he considered it unnecessary to do so.

The Court of Appeal considered Moore J's reasoning to be 'entirely correct'.[132]

The Court of Appeal said that the central issue between the parties was whether the words 'any person lodging' in s 118 of the TLA bear their literal meaning and give rise to a purely factual question as to who in fact lodged the caveat (as advanced by the applicant, Ms Lanciana); or whether the words 'any person lodging' should be construed in the context of the Act as a whole and having regard to s 89 in particular, so that 'any person lodging' a caveat is to be interpreted in light of the phrase '[a]ny person claiming any estate or interest in land' in s 89(1).[133]

The Court of Appeal summarised the primary judge's findings in the following paragraph:

> 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.[134]

Further, the Court of Appeal noted that the primary judge also correctly considered that this interpretation was consistent with s 115 of the TLA which contemplates that the person who lodges a caveat can be identified with certainty.[135]

The Court of Appeal made the following observations:

Content of the caveats:

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[132] Ibid [10] (Tate, Hargrave and Emerton JJA).
[133] Ibid [11] (Tate, Hargrave and Emerton JJA).
[134] Ibid [12]-[13] (Tate, Hargrave and Emerton JJA) (citations omitted).
[135] Ibid [14] (Tate, Hargrave and Emerton JJA).

The caveats recorded that they were lodged by 'Alderuccio' and identified 'Alderuccio Solicitors', at a Melbourne address, as the address for the service of notices. They were signed by John Alderuccio, as 'agent being a Current Practitioner under the Legal Practice Act 1996'. The caveator was named as Bloomingdale and the interest in the land that was described on each of the caveats was Bloomingdale's asserted interest.[136] This accorded with the requirements of s 89(1) of the TLA, which conferred a right on a person who claims to have an interest in land to lodge a caveat to protect the asserted interest and to do so either directly or by his or her agent.[137] The Court considered that:

> The right is conferred on the person claiming the interest, whether or not the interest is ultimately established. Insofar as the caveat is lodged by an agent of the person claiming the interest, the agent, according to the well-established principles of the law of agency, stands in the shoes of the person claiming the interest. The act of lodging the caveat is the act of the principal, that is, the person claiming the interest in the land.[138]

Content of the pleadings:

The Court of Appeal also considered the pleadings filed by the parties. In Ms Lanciana's further amended statement of claim, she alleged that the respondents lodged the caveats on the properties '… on behalf of their client Bloomingdale. In their defence, in response to this allegation, the solicitors admitted that they lodged the caveats but said that they were 'signed on behalf of, as disclosed agent for, and on the instruction of Bloomingdale''.[139]

In such circumstances, the Court of Appeal said that the respondents lodged the caveats as agents for Bloomingdale and consequently: '… the acts of the respondents in lodging the caveats were the acts of Bloomingdale and the judge correctly so found in answering the first limb of the preliminary question. Bloomingdale lodged the caveats within the meaning of s 118.'[140]

TLA

The Court of Appeal also considered how the primary judge had interpreted s 118 of the TLA. The Court considered that it was appropriate for the trial judge to read s 118 in tandem with s 89(1) of the TLA, which confers an entitlement on any person lodging a caveat (insofar as that person claims an interest in land), to lodge a caveat to protect that their interest.[141] The Court concluded that:

> 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

[136] Ibid [31] (Tate, Hargrave and Emerton JJA).
[137] Ibid [31] (Tate, Hargrave and Emerton JJA).
[138] Ibid [31] (Tate, Hargrave and Emerton JJA).
[139] Ibid [32] (Tate, Hargrave and Emerton JJA).
[140] Ibid [32] (Tate, Hargrave and Emerton JJA).
[141] Ibid [33] (Tate, Hargrave and Emerton JJA).

> 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 ...'.
>
> We also agree with the judge that the proposition, that s 118 involves a factual enquiry about the person who lodged the caveat, proceeds from the false premise that s 89(1) does not provide an answer to the question and fails to appreciate that lodgement involves a statutory concept that can only be understood by reference to the requirements governing eligibility for lodging under the Act.[142]

The Court considered that: '… the primary task of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of the statute as a whole.'[143]

The Court also remarked that if the literal approach advanced by the applicant were to be accepted, the practical consequence would be that both a narrow and broad approach would need to be adopted in answering the question: 'who lodged the caveat?'[144] The Court considered that neither approach was satisfactory.[145]

In the Court's view, the narrow approach open on the applicant's case involved looking at the caveat, which in the top left hand corner, beside the words 'Lodged by', provides for a name to be inserted.[146]

The broad approach conversely involved embracing the analysis set out in the New Zealand decision of *Gordon*[147] in which any number of persons, including the caveator, the caveator's solicitor, the solicitor's clerk and the registration agent, may be identified as a person who lodged the caveat.[148]

In respect of both approaches, the Court considered that:

> If the narrow approach were applied in this case, it might be necessary to establish whose writing appears in the top left hand corner of the caveats and how it came to appear there. The word 'Alderuccio' does not identify either the first or the second respondent specifically; nor does it correctly use the name of the respondents' firm. Most importantly however, identifying the person who lodged the caveats in this way leads to the absurd result that one person who did not lodge the caveats was the caveator, Bloomingdale. If, as the applicant submits, the purpose of s 118 is to expand liability beyond the caveator, then the narrow approach to the factual question does precisely the opposite.

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[142] Ibid [33]-[34] (Tate, Hargrave and Emerton JJA).
[143] Ibid [35] (Tate, Hargrave and Emerton JJA).
[144] Ibid [37] (Tate, Hargrave and Emerton JJA).
[145] Ibid [37] (Tate, Hargrave and Emerton JJA).
[146] Ibid [37] (Tate, Hargrave and Emerton JJA).
[147] *Gordon v Treadwell Stacey Smith* [1996] 3 NZLR 281; [1996] NSCA (Blanchard J) ('***Gordon***') discussed in *Lanciana v Alderuccio* [44]-[46] (Tate, Hargrave and Emerton JJA).
[148] *Lanciana v Alderuccio* [37] (Tate, Hargrave and Emerton JJA).

> On the other hand, adoption of the broad approach, endorsed in *Gordon*, may require a wide-ranging factual inquiry as to who, in any way, was responsible for lodging the caveats. Rather than giving the word 'lodging' its literal meaning, the broad approach places a gloss on that word, because the question becomes 'who was involved in lodging' or 'who had responsibility for lodging', which entails a departure from the text of the Act. The breadth of the enquiry that is required may be extremely large. If the caveator is a corporation, for example, quite apart from the persons considered to be potential 'lodgers' by Blanchard J in *Gordon*, it may be necessary to consider which officers within the corporation had an involvement in lodging the caveat. For example, is it each and every member of the board or is it only those directors who were consulted or who gave instructions?
>
> That ss 89(1) and 118 of the Act use the words 'any person' rather than 'the caveator' is a function of the fact that both the 'claiming' and the 'lodging' precede the 'recording' of the caveat in s 89(2). The opening phrase '[a]ny person lodging' in s 118 is in the present tense because that is the point in time at which the question of 'reasonable cause' is to be assessed, that is, when the person is about to lodge or is in the course of lodging the caveat and the caveat has not yet been recorded on the Register. That is the critical point in time for assessment regardless of when the claim for compensation is made by any person who sustains damage. Section 89(1) operates at the same point in time, that is, prior to the recording of the caveat on the Register. The references in the Act to the 'caveator' all focus on a point in time after the caveat has been lodged.[149]

Ultimately, the Court concluded that if the narrow approach to the question 'who lodged the caveat?' is adopted, then the caveator may be excluded. On the flip side, if the broad approach were adopted, then what may be required is a labyrinthine series of enquiries to ascertain who lodged the caveat, in circumstances where the Act contemplates certainty in the identification of the person lodging the caveat.[150] The Court of Appeal therefore rejected the literal construction advanced by the applicant.

In so doing, the Court of Appeal declined to follow the New Zealand decision of *Gordon* and in this respect the Court said:

> It follows from this analysis that we respectfully decline to adopt the reasoning in Gordon. Having regard to the text of the statute with which we are concerned, we cannot agree that 'any person' in s 118 includes solicitors, their employees and registration agents and the like, some of whom even on the applicant's analysis would only be handling or delivering the document or documents to the Registrar.[151]

The Court concluded that the text of TLA provides the answer to the proper construction of s 118 and observed that:

> If the construction that we favour creates 'gaps' in liability (and we make no determination as to whether it does or does not), that is a function of the words in the Act and the way in which the relevant provisions operate together. The Act evinces the legislative intent to confine liability to pay compensation to the person who lodged the caveat, that being an entitlement conferred on the person claiming the interest in the land.[152]

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[149] Ibid [37]-[39] (Tate, Hargrave and Emerton JJA).
[150] Ibid [41] (Tate, Hargrave and Emerton JJA).
[151] Ibid [43] (Tate, Hargrave and Emerton JJA).
[152] Ibid [46]-[47] (Tate, Hargrave and Emerton JJA).

The Court of Appeal refused leave to appeal.

Whilst *Lanciana v Alderuccio* establishes that a landowner cannot seek compensation from a caveator's solicitors or agent in Victoria for lodging the caveat on their behalf, practitioners should still be conscious of the operation of s 24 of the *Supreme Court Act 1986* (Vic) and r 63.23 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic), pursuant to which the Supreme Court has power to make costs orders against practitioners.[153]

In *Pearl Lingerie Australia Pty Ltd v TGY Pty*[154] the plaintiff sought orders pursuant to s 90(3) of the TLA for removal of caveats lodged by the defendants Mr Giarratana (personally) and TGY Pty Ltd (**TGY**) over property owned by the plaintiff in Chelsea Heights (**Property**). The Property had been sold to a third party pursuant to a contract of sale dated 3 August 2012, with settlement due to take place on 31 August 2012.

On 25 July 2012, Mr Giarratana lodged a caveat on the title to the Property. On 30 July 2012, TGY lodged a caveat on the title to the Property. The directors of TGY were Mr Giarratana, Tina Giarratana, Guek Long Yin and Kim Hor Thea. TGY's solicitors lodged the caveat.

The application for removal of the caveats was heard on 30 August 2012 by Croft J. Counsel for the plaintiff submitted that the defendants had no caveatable interest in the Property.

The defendants contended that the basis of their claims was founded in a "joint venture agreement", entered into between Mr Giarratana, Kim Thea and Guek Long Yin dated 18 December 2010, through oral discussions between Mr Giarratana and Kim Thea and other conduct of the defendants in implementing that agreement and based on certain written documents.

His Honour considered that the "joint venture agreement" was unenforceable in that it appeared to be subject to contract, falling into the third category of *Masters v Cameron*[155] and even if it was enforceable, the agreement contained no provision conferring any interest in the Property, by way of charger or otherwise.[156] This was ultimately conceded by the solicitor appearing for the defendants. In circumstances where the defendants had failed to establish any basis for a caveatable interest in the Property and where the balance of convenience favoured removal of the caveats, the Court ordered that the defendants execute withdrawal of caveat forms or alternatively that that the caveats be removed pursuant to s 90(3) of the TLA.

The remaining issue was whether or not the defendants and their solicitors (jointly and severally) ought to pay the plaintiff's costs on an indemnity basis.

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[153] For further discussion see Robert Hay QC and Brett Harding, 'The 'serious business' of lawyers lodging and maintaining caveats over land' (2019) 28 *Australian Property Law Journal* 13.
[154] [2012] VSC 451 (Croft J) ('***Pearl Lingerie v TGY***').
[155] (1954) 91 CLR 353, 361 (Dixon CJ, McTiernan and Kitto JJ) referred to in *Pearl Lingerie v TGY* [7] (Croft J).
[156] *Pearl Lingerie v TGY* [9] (Croft J).

In relation to the defendants, the plaintiff submitted that the caveats lodged were unsupported by any documentary or oral agreement that could substantiate the interest claimed in the caveats, or any other interest in the Property. Further, the plaintiff submitted that:

(a) the caveat had been maintained in circumstances where the defendants, properly advised, should have known that they had no chance of success; and

(b) the defective and improperly lodged caveat was being used as a 'bargaining chip'.[157]

The solicitor for the defendants ultimately agreed that costs should be ordered against the defendants on an indemnity basis.

In relation to the defendants' solicitors, the Court considered that pursuant to the Court's inherent jurisdiction, s 24 of the *Supreme Court Act 1986* (Vic) and under rule 63.23 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic), it had the power to make an order that the solicitor pay the plaintiff's costs of the proceeding.

In relation to the TGY caveat, the plaintiff contended that the solicitors for the defendants had failed to properly investigate whether TGY had adequate grounds to lodge and maintain the caveat. The Court said that the solicitors should have reviewed any documents and considered instructions at the time of preparing and lodging the caveat.[158] In the Court's view if the documents had been reviewed a competent solicitor would have formed the view that the documents did not disclose any basis for TGY to claim and interest in the land.[159]

In relation to Mr Giarratana's caveat, the plaintiff submitted that even though the caveat had not been lodged by a solicitor, it was identical to the one submitted by TGY. The plaintiff said that on balance it was likely that the firm acting for TGY prepared the wording of the caveat for Mr Giarratana. The plaintiff also noted that the firm had then subsequently acted for Mr Giarratana and defended the lodging of the caveat. The Court accepted that it was reasonable to infer that the firm had prepared the wording of the caveat.[160]

The plaintiff also referred to a separate proceeding (which it had commenced four weeks earlier), in which it had applied to the Court to remove a caveat lodged by Tina Giarratana over the Property (one of the directors of TGY).[161] Ms Giarratana was represented by the same solicitors for TGY.[162]

In that proceeding, Justice Ferguson (as her Honour was then), ordered the removal of the caveat and indemnity costs against Ms Giarratana on the basis that the evidence relied on by her did not support the interest claimed.[163] Relevantly, in the separate proceeding, the plaintiff

[157] Ibid [11] (Croft J) referring to *Ren v Shi* [2012] VSC 271.
[158] Ibid [17] (Croft J).
[159] Ibid [17] (Croft J).
[160] Ibid [18] (Croft J).
[161] Ibid [19]-[20] (Croft J).
[162] Ibid [19]-[20] (Croft J).
[163] Ibid [19]-[20] (Croft J).

had requested that an injunction restraining Ms Giarratana from lodging further caveats over the Property be granted.[164] This was refused by Justice Ferguson. However, her Honour warned Ms Giarratana that if a further caveat was to be lodged it would need to be grounded on a proper basis that could be sustained on the principles in *Piroschenko v Grojsman*.[165]

The plaintiff also relied on letters sent by its solicitors to the defendants' solicitors in which they had asserted that the defendants did not have an interest in the property and in which the plaintiff had informed the defendants' solicitors that they intended to seek their costs on an indemnity basis against them.

During the course of the hearing, the Court became aware that the defendants' solicitors did not have possession of the documents alleged to support the basis of either caveat until the day before the hearing for the removal of the caveats.[166] Consequently, the solicitors had lodged the caveat (on behalf of TGY) and prepared another caveat for Mr Giarratan, without having received any documentation.[167] The only information they had prior to lodging the caveat for TGY were oral instructions.

The Court concluded that:

> In the absence of evidence to the contrary, these statements support the contention that the [s]olicitors prepared and lodged the TGY caveat in circumstances where they could not have formed a professional view at the time of preparing and lodging the caveat that TGY had a caveatable interest in the Property. Even if it were arguable that there was a caveatable interest at the time of preparing and lodging the TGY caveat, it should have become apparent to the [s]olicitors in the process of preparing the affidavit material sworn in these proceedings on 29 August 2012 (in preparation of the defence to the lodgement of the caveats lodged by Mr Giarratana and TGY) that the [d]efendants had no basis of maintaining the caveats.[168]

His Honour went on as follows:

> In my opinion, the conduct of the [s]olicitors in preparing and lodging the TGY caveat, and their subsequent conduct of defending the caveats lodged by Mr Giarratana and TGY respectively without any consideration of the underlying documents said to support the caveatable interests, instead relying on instructions provided by the [d]efendants that they had a caveatable interest in the Property, demonstrates very clearly that those [s]olicitors acted in wilful disregard of known facts and law which, in my view, amounts to serious misconduct and a serious dereliction of duty on their part. This is particularly so having regard to the clear and express warning given by Justice Ferguson in the July proceedings, on 26 July 2012, that any further caveats lodged over the Property must have a proper basis. Although this warning by her Honour in the July proceedings was in relation to a caveat lodged by Tina Giarratana, who is not a party to these proceedings, the [s]olicitors ought to have been put on notice and have been acutely aware of the position that any

[164] Ibid [19]-[20] (Croft J).
[165] Ibid [20] referring to the transcript of the hearing before Ferguson J (as Her Honour was then) in the separate proceeding.
[166] Ibid [24] (Croft J).
[167] Ibid [24] (Croft J).
[168] Ibid [25] (Croft J).

> caveat lodged over the Property by any person or entity associated with Tina Giarratana arising out of the same or substantially similar facts and circumstances required a proper basis.[169]

The Court ordered that the defendants and the defendants' solicitors, jointly and severally pay the plaintiff's costs associated with the removal of the caveats.

His Honour also considered that the conduct warranted review by the Victorian Legal Services Commissioner (**VLSC**).[170] Consequently, his Honour stated in his ruling that he would forward a copy of his reasons to the VLSC.[171]

[169] Ibid [26] (Croft J).
[170] Ibid [30] (Croft J).
[171] Ibid [30] (Croft J).