

Caveats under section 89 of the Transfer of Land Act (Vic) 1958

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Acknowledgement of traditional owners and country

This session is being held on the lands of the Wurundjeri people of the Kulin Nation and on behalf of LPLC I wish to acknowledge them as the traditional owners of the land.

I also acknowledge the traditional owners of the lands which all of those joining us online today are living, learning and working on.

I would also like to pay my respects to their Elders past and present, and any Elders of other communities who may be present today.

Table of contents

1. TLA Caveat – Power to lodge and effect

2. Caveat removal

3. Tests for removal under S. 90(3)

4. Interests in land

5. No interest in land

6. Balance of convenience

7. Caveats bad on their face

8. Amendment of caveats

9. Repeat caveats

10. Conclusion

TLA Caveat | Power to lodge and effect

TLA s. 89(1) – “Any person claiming any estate or interest in land ... may lodge ... a caveat ... forbidding the registration of any person as transferee or proprietor of and of any instrument affecting such estate or interest either absolutely or conditionally ... “

- Is not an injunction as such but operates like one because it restrains action contrary to the caveat: *Nicholas Olandezos v Bhatha* [2017] VSC 234 at [23]

What is a caveat?

- Notice of an interest in that real property

Note: The caveat is not the interest itself, but notice that the caveator is claiming an estate or interest in the land

- Relevant to equitable priorities – *UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd (in liq) (No 2)* [2021] VSC 711 at [33]

Caveat removal

- There are 3 ways to remove a caveat.
 1. (s. 90(1)(e)) caveat lapses upon the expiration of thirty days after notice given by the Registrar ... that a transfer or dealing has been lodged for registration ...”:

Note: Under s. 90(2) a court may direct the Registrar to delay registering any dealing if within that period the caveator appears and in essence defends the caveat, court applies same tests as under s. 90(3)

Caveat removal

2. Section 89A notice – “... any person interested in the land ... may make application ... to the Registrar for service of a notice pursuant to subsection (3)”: s. 89A(1)
 - The Registrar gives notice to the caveator that the caveat will lapse on a day not less than 30 days after service or posting unless in the meantime notice in writing is given to the Registrar that proceedings in a court or VCAT to substantiate the claim of the caveator are on foot: s. 89A(3)(b), (4).

Caveat removal

S. 90(3) – “Any person who is adversely affected by any such caveat may bring proceedings in a court against the caveator for ... removal and the court may make such order as the court thinks fit”

- Most common
- Originating Motion supported by affidavit. Typical orders are either that caveat removed with costs against caveator, or caveat survives on condition that caveator issue proceedings within 30 days to substantiate the interest claimed in the caveat

Note: can take Option 3 notwithstanding having started Option 2.

Caveat removal | Appropriate courts

A Caveat can be removed by:

- Supreme Court or County Court (TLA s. 4) or
- Family Court – if a caveat is lodged on property the subject of litigation in the Family Court, (an application for its removal is regarded as arising out of a common substratum of facts and forming part of a single justiciable controversy determinable by the Family Court).

Tests for removal under s. 90(3)

- **General Discretion:** But in practice courts always use the following two stage test
- **Stage 1:** Does the caveator have a prima facie case that the caveator has, or does the caveator raise a serious question to be tried of having, an estate or interest in land (Original requirement in TLA S .89(1))

Note: The caveator bears onus of establishing a prima facie case to be tried, or serious question to be tried, that it has the claimed “estate or interest in land”

Tests for removal under s. 90(3)

- Must show a prima facie case with sufficient likelihood of success to justify maintenance of the caveat and preservation of the status quo pending trial, not necessarily more probable than not that will succeed at trial: *SMAV Nominees Pty Ltd v Bakal Enterprises Pty Ltd* [2020] VSC 203 at [31], [32]-[33]; *Reindel & Ors v Confreight Pty Ltd & Ors* (No 1) [2022] VSC 163 at [21].
- Some judges say “serious question to be tried” instead of “prima facie case” but in practice it appears to make no difference.

Note: On an Application for caveat removal the court does not normally finally fully determine disputed factual issues or of the caveator’s claims: *SMAV* at [34]

Tests for removal under s. 90(3)

- **Stage 2:** Caveator must also establish that balance of convenience favours caveat maintenance until trial.
- Court takes whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong”.
- The stronger the caveator’s case on stage 1 the easier for it on stage 2.

Can you defend your caveat?

If challenged, you need to be able to defend the caveat or face the risk of:

1. Disciplinary action against you at VCAT.
2. A costs order against your client and/or personal costs order against you.
3. A disgruntled client.

The key consideration is the strength of your client's claim to having an estate or interest in the land. If your client has a prima facie interest, though the caveat may be removed on the balance of convenience, you are unlikely to be criticized.

Interests in land | Non-equitable interests

- Interests in land are may be legal or equitable. Most caveats concern claimed equitable interests.
- Legal interests - Normally no need for caveat because legal interests under the TLA are registered.
- Occasionally the claimant may have an interest simply as a result of statute. Eg Adverse possessor interest caveatable - *Nicholas Olandezos v Bhatha & Ors* [2017] VSC 234 at [35], [37].

Caveatable interests commonly encountered

A **non-exhaustive** list of caveatable interests commonly encountered in practice:

- Express, Resulting or in Unit Trusts
- Constructive trusts
- The equitable interest of a purchaser of land under an enforceable contract of sale
- Equitable interests in land created by Other contracts – eg options to purchase, leases, mortgages, charges

Non-caveatable interests commonly encountered

Commonly encountered invalid caveats, because claiming no possible interest in land, include caveats based on or involving:

- Mere domestic relationships
- Mere rights to set aside a sale of transfer
- Companies
- Various probate situations
- Mere building works (absent a charge)
- Discretionary trusts
- Judgment debts
- Money lent and similar
- Agreements to share profits of development.

Interests in land | Express Trust, Resulting trust

- Express Trust - Normally required to be in writing in compliance with s. 53(1)(b) of the Property Law Act – Eg: *Groom v Leafbusters Pty Ltd (in liq)* [2021] VSC 765.

Interests in land | Resulting Trust

- Eg: *Piroshenko v Grojsman* [2010] VSC 240 at [33] – where more than one person provides the purchase money for a property jointly, but the property is registered in the name of one or some of them only, the property is, absent a relationship giving rise to a presumption of advancement, presumed to be held on resulting trust in favour of the unregistered party(s) in proportion to their contributions - failed on the facts in that case.
- Successful in *Dolan v Dolan* [2022] VSC 543 at [12], [19], [20], [69], [72] (appeal failed: [2023] VSCA 136).

Interests in land | Unit Trusts

- An Owner of units in a Unit Trust is unlikely to hold a proprietary interest in the properties owned by the Trust and so unlikely to have a caveatable interest – it depends on construction of the trust deed
- *LPY Investments Pty Ltd v JY Property Pty Ltd* [2024] VSC 94.

Interests in land | *Muschinski v Dodds* Constructive Trust

***Muschinski v Dodds (Baumgartner v Baumgartner)* constructive trust:**

“where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it. The content of the principle is that, in such a case, equity will not permit that other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do ...”

Interests in land | *Muschinski v Dodds* Constructive Trust

Example: *Cressy v Johnson* (No 3) [2009] VSC 52

- Man and woman Cohabiting
- A number of properties registered in the man's name
- No direct contribution by woman to the acquisition or mortgage repayments
- But they pooled their assets and thereby she indirectly contributed to the acquisition and maintenance of the properties, she maintained the home and cared for the children
- “Paucity of documentary evidence”
- Caveats by her upheld-on basis of prima facie claims to *Muschinski v Dodds* constructive trusts.

Interests in land | Common Intention Constructive Trusts

- A common intention constructive trust will arise where there is an actual or inferred common intention of the parties as to their entitlements to the beneficial interest in the property, and there has been detrimental reliance on that common intention by the claimant such that it would be an equitable fraud on the claimant to deny his or her interest in the property.
- The onus of proving the parties had a common intention lies on the party asserting the property is held on trust for his or her benefit.
- Established in *Dolan v Dolan* [2022] VSC 543 at [71], [74] (appeal failed: [2023] VSCA 136).
- Not established in *Marinos v Mellissinos* [2024] VSC 642.

Interests in land | Proprietary Estoppel giving rise to Constructive Trust

- *Groom v Leafbusters Pty Ltd (in liq)* [2021] VSC 765 at [8]: The underlying principle of proprietary estoppel is that conduct of the promisor in engaging the complainant to change his or her position to their detriment on the footing that the promised property will be theirs, when acted upon by the complainant, creates an equity which binds the promisor to make good the expectation – not established on the facts. [8]
- *Olsen v Olsen* [2022] VSC 95: proprietary estoppel - farm.
- *Saad v Saad & Anor* [2025] VSC 15 – family dealings – no proprietary estoppel.

Interests in land | Breach of fiduciary duty or trust giving rise to constructive trust

Constructive trusts imposed following monies used on other property in breach of fiduciary duty or trust:

- *AE Brighton Holdings Pty Ltd v UDP Holdings Pty Ltd* [2020] VSCA 235 – AE Brighton owns land using money obtained from EH, which EH had obtained from the caveator by means of misleading or deceptive conduct - Caveat by UDP on ground of constructive trust upheld because AE Brighton liable to account as constructive trustee having received trust property with notice of breach of trust
- *Dennis Hanger Pty Ltd v Brown* [2007] VSC 495 and *Aust Café Pty Ltd v Thushara de Soysa & Ors* [2019] VCC 237 – Funds misappropriated by employees put into property over which caveat lodged.



Interests in land | Sale

- Purchaser with right in equity to specifically enforce a contract of sale has an interest in the land, akin to an equitable interest: *Chan & Anor v Liu & Anor* [2020] VSCA 28 at [53].
- This covers almost all contracts of sale.

Common points arising are:

- a) Is there a prima facie case of an enforceable contract of sale?
- b) The position of a nominee purchaser.
- c) Subdivision.
- d) Vendor validly rescinding.
- e) Purchaser validly rescinding.

Interests in land | Sale

a) Is there a prima facie case of an enforceable contract of sale?

- *Wright & Ors v Insert Pty Ltd* [2022] VSC 1 - Non-compliance with S. 126 of the Instruments Act - No part performance - No estoppel – even if prima facie case of a contract would not get specific performance because later innocent third party purchaser with priority would be prejudiced – caveat removed
- *Ritz Bitz Pty Ltd v Cumming* [2023] VSC 418 – alleged contract for sale of lot in plan of subdivision still unregistered 8 years after date of alleged contract – caveat removed

Interests in land | Sale

Is there a prima facie case of an enforceable contract of sale?

- *Hazelwood v Mercurio* [2021] VSC 362 – claim that agent orally accepted offer - Nothing signed by the vendor, only by agent, authorised to market the apartment but not to enter contract of sale – caveat removed.
- *Maverick Signs Pty Ltd v Cetinkaya & Anor* [2022] VSC 27 - Online auction using platform AuctionNow - No written evidence that vendor accepted alterations to the contract of sale – caveat removed.
- *Ek v Red Eagle International Pty Ltd (atf Chunan Bai Hybrid Unit Trust)* [2022] VSCA 254 - caveat relying on agreement to sell contained in “particulars of sale” upheld.

Interests in land | Sale

b) A nominee purchaser does not ordinarily have the right to caveat:

- *Six Bruce Pty Ltd v Milatos* [2017] VSC 784 at [35]

c) Subdivision.

- Purchaser of one lot in land to be subdivided: *Bisognin & Anor v Hera Project Pty Ltd & Anor* [2017] VSC 783 at [13]
 - Before subdivision purchaser could caveat over the whole of the land but after transfer of the purchased lot purchaser could not caveat over the rest of the land, even if vendor still having actual or contingent liabilities under the contract of sale.

Interests in land | Sale

d) Vendor validly rescinding.

- Purchaser's right to caveat is lost.

e) Purchaser validly rescinding.

- Can caveat in respect of claimed equitable lien to secure return of monies paid: *Six Bruce Pty Ltd v Milatos*.
- This claim fails on the facts in *Long Forest Estate v Singh* because purchaser had no right to rescind: [2020] VSC 604.

Interests in land | Other contracts

- Option to purchase caveatable, eg: *Saafin Constructions Pty Ltd v Vidak & Anor* [2015] VSC 441 at [27].
- Interest of lessee under unregistered lease caveatable, eg: *Oakland Investments (Aus) Pty Ltd v Senior Living Pty Ltd* [2008] VSC 422 at [82].
- Interest of mortgagee under unregistered (equitable) mortgage caveatable: *BD78 Pty Ltd v FGK3GEN Pty Ltd* [2022] VSC 361 at [5], [17]; *Cui v Salas-Photiadis* [2024] NSWSC 1280.
 - But if you can register the mortgage, you should, because then it becomes a legal interest.

Interests in land | Equitable charges

- Sufficient to establish an equitable charge that the court can fairly gather the intention that the property referred to in the document should constitute a security: *Sim Development Pty Ltd v Greenvale Property Group Pty Ltd* [2017] VSC 335 at [119]; [2017] VSCA 345.
- Caveat upheld in *Reindel & Ors v Confreight Pty Ltd & Ors* (No 1) [2022] VSC 163 but not in *Rainford v SA & RT Tesoriero Pty Ltd* [2023] VSC 617.
- Caveats by solicitors based on charges for their costs upheld in *Lakic v Prior* [2016] VSC 293; *Cressy v Johnson* (No 3) [2009] VSC 52 at [4](3), [11], [211], [213].

Interests in land Agreements permitting a caveat to be lodged

- Agreement permitting a caveat - *Sim Development* at [120]: “Where the authority to lodge a caveat is given in connection with an obligation by A to pay money to B” - implication of equitable charge.
- However, *Tannous and Anor v Abdo* [2017] VCC 304 held no caveatable interest because on the facts of that case not just a charge would need to be implied but also a guarantee

No interest in land | Mere domestic relationships

- Marriage/de facto relationship insufficient – even when combined with undertakings to provide support and accommodation: *Cressy v Johnson (No 3)* [2009] VSC 52 at [193]. But ? whether facts cross boundary into constructive trust - *Commonwealth Bank of Australia v Love & Anor* [2014] VCC 887 at [30].
- Prospective or actual Family Court proceedings or an injunction, insufficient – *Goldstraw v Goldstraw* [2002] VSC 491; *Elmant Pty Ltd v Dickson* [2001] VSC 155; *SJM v PMD* [2023] VSC 349 (claim under the FLA s. 90SN(1)); *Burghley Pty Ltd v Soames* [2021] VSC 236 (FCC proceeding including seeking declaration of de facto relationship with director of company).

No interest in land | Right to set aside sale / transfer

- Interest asserted in the caveat must exist at the time of lodgment - Proceedings by caveator which may result in such an interest being vested in him insufficient: *Boensch v Pascoe* [2019] HCA 49 at [103] – [104].
- Right of mortgagor to set aside a mortgagee's sale insufficient: *Swanston Mortgage Pty Ltd v Trepan Investments Pty Ltd* [1994] 1 VR 672; similarly, *Archer Wealth v Casey* [2024] VSC 300.
- *Super Jacobs Pty Ltd v Faalogo* [2019] VSC 778 - Mortgage broker fraudulently used power of attorney to execute a contract of sale to plaintiffs who became registered proprietors - even if plaintiffs obtained the property by fraud or improper dealing caveators' claim to have the transfer set aside not an interest or estate in land.

No interest in land | Companies

- Shareholder has no caveatable interest in company's land: *Alliance Developments Pty Ltd v Arbab & Anor* [2019] VSC 832 at [56].
- Even if constructive trust over company's shares this does not support a caveat over its land: *GW & R Mould Pty Ltd v Mould & Anor*; *Wakefield v Mould & Anor* [2016] VSC 330 at [50].

No interest in land | Probate

- Estate beneficiary under unadministered estate has no proprietary interest in specific estate assets: *The matter of the Will of Dorothea Agnes Baird* [2019] VSC 59.
- Agreement between tenants in common whereby one could live on property rent-free for life, or until he permanently vacated it, on proviso that he execute a will devising his share in the property to the other tenant in common – Not caveatable, no prima facie case of an interest in land: *Goldberg v Campbell and Shaw & Anor* [2021] VSC 647 at [34]-[40], [43].
- *Van Wyk v Albon* [2011] VSC 120 at [14] – Inter vivos transfer by person now deceased to executor and virtually sole beneficiary – arguable dementia – person seeking to set sale aside had no standing to caveat.

No interest in land (generally) | Building works

- Claim with respect to work or materials on land not caveatable absent a charge - *Yamine v Mazloum* [2017] VSC 601
- *Popescu v A & B Castle Pty Ltd* [2016] VSC 175 - caveat removed - based on clause simply providing that all materials used in a contract remained the supplier's property until paid in full.

No interest in land (generally) | Building works

- *Hewett v Court* (1983) 149 CLR 639 at 668 - equitable lien can give rise to a constructive trust in certain circumstances. Not established in *Western Pacific Developments Pty Ltd (in liq) v Murray* [2000] VSC 436.
- *H G & R Nominees Pty Ltd v Caulson Pty Ltd* [2000] VSC 126 – caveat by supplier and installer of materials to a building removed because once materials were affixed, lien was lost and also dispute was not with owner but with registered mortgagee

No interest in land – Other examples

- Discretionary trust - *Southage Pty Ltd v Beijing Garden Resort Pty Ltd* [2013] VSC 272.
- Judgment debt, even if followed by a warrant of seizure and sale - *Rubytime Nominees Pty Ltd v Bottiglieri* [2011] VSC 678.
- Money lent, including for the purpose of being applied towards purchase of land, unless the parties intended that the lender should have security for the loan: *EZY Global Ltd v Miller Crescent P/L* [2019] VSC 815.
- Agreement to split profits of land development - *Depas Pty Ltd v Dimitriou* [2006] VSC 281; *Yamine v Mazloum* [2017] VSC 601.

Balance of convenience

- Balance of convenience infinitely variable, but some common situations are as follows.
- Most common: Contract of sale on foot but caveator's claim sufficiently strong to justify protection. Caveat removed to permit sale to proceed but on vendor giving Undertaking to hold net settlement proceeds in trust/joint account pending further order: eg: *McRae v Mackrae-Bathory* [2019] VSC 298.
- Caveat retained: on condition that proceedings issued, or (if caveator a debtor) money paid, especially to mortgagee; Caveator needing to live on property or would lose benefit of expenditure – caveat retained – eg: *Dolan v Dolan* [2022] VSC 543 at [77]

Balance of convenience

- Caveats removed:
- to give opportunity to refinance to avoid financial disaster (*Six Bruce Pty Ltd v Milatos and Ors* [2017] VSC 784);
- need to repay loan (*Gold Road No. 3 Pty Ltd v Platt* [2019] VSC 714); provided registered proprietor (debtor) repays amount owing under equitable mortgage and pays into court the disputed interest: *BD78 Pty Ltd v FGK3GEN Pty Ltd* [2022] VSC 361 at [31];
- because pointless as no equity remaining in the land after payment of secured creditors: *Glenis v Ikosedikas* [2018] VSC 278.

Caveats bad on their face

Misdescription of interest in land

If prima facie case not established it is usually because, although caveat OK on its face, evidence insufficient for prima facie case.

However, some caveats are bad on their face: eg: Caveat claiming an interest as mortgagee on grounds of mortgage with registered proprietors, but one registered proprietor was not a party to the mortgage: *Rainford v SA & RT Tesoriero Pty Ltd* [2023] VSC 617.

However, if stick to PEXA dropdown menu at least the caveat will not be bad on its face.

Caveat does not need to specify whether interest legal or equitable: *Boensch v Pascoe* [2019] HCA 49 at [107]



Caveats bad on their face

- Caveats wrongly claiming a freehold estate – must be claim to a fee simple, a fee tail and a life estate: *Alliance Developments Pty Ltd v Arbab & Anor* [2019] VSC 832 Footnote [15]. Does not cover a charge or something similar to a charge: *Marchmont v Keeshan* [2023] VCC 2138.
- Freehold interest covers the equitable right to obtain the freehold on a sale or a conditional right to purchase under a contract: *187 Settlement Road v Kennards Storage Management* [2022] VSC 771 at [49].

Caveats bad on their face

Extent of prohibition

- Extent of prohibition – meaning of “absolutely” - *Lawrence & Hansen Group Pty Ltd v Young* [2017] VSCA 172, where only one of two registered proprietors gave a charge, a claim for absolute prohibition was sufficiently clear and should be construed as limited to the interest of the charging joint proprietor. [16]-[20], [56], Footnote 15.
- Caveat removed if extent of prohibition excessive. Eg: a claim by an unregistered mortgagee to an absolute prohibition on dealings which stultified the exercise of a power of sale by a registered mortgagee: *Alliance Developments Pty Ltd v Arbab & Anor* [2019] VSC 832 at [19]

Amendment of caveats

- Amendment of interest claimed or only of grounds or scope of protection?
 - Court generally less inclined to amend the interest or estate claimed than to amend the grounds or scope of the protection asserted: *Percy & Michele Pty Ltd v Gangemi* [2010] VSC 530 at [101] – [102]
 - Court could only amend estate or interest claimed in special or exceptional circumstances, and not to substitute entirely different one: *Schwartz v Hadid* [2013] VSC 130

Amendment of caveats

Goldberg v Campbell & Shaw and Anor [2022] VSC 24. Court would consider:

- whether the application was to amend interest claimed and not just grounds of claim or scope of the protection;
- whether error innocent or careless (court may be more favourable if words in caveat forced by the shoehorn of the PEXA dropdown menu: *A. P. Welco Holdings Pty Ltd & Anor v Canterbury Hills Pty Ltd & Anor* [2022] VSC 490 at [106] *Ritz Bitz Pty Ltd v Cumming* [2023] VSC 418)
- not encouraging belief that caveats could be imprecisely formulated and then “fixed up later”;
- the overall merits of the claim for the amended caveatable interest.

Repeat caveats

S. 91 (4) a caveat that has lapsed or been removed by an order of a court shall not be renewed by or on behalf of the same person in respect of the same interest.

- *Fazal v Fazal* [2022] VSC 165 – caveat removed by court order – new identical caveat removed as abuse of process.
- Outside s. 91 (4) are: if existing caveat withdrawn (not removed) *BD78 Pty Ltd v FGK3GEN Pty Ltd* [2022] VSC 361 at [33]; caveat removed for claiming the wrong interest (new caveat not the same interest), *Marchmont v Keeshan* [2023] VSC 2138.
- If caveator has more or different rights in land than those claimed in first caveat can lodge second caveat claiming the additional interests - *Alliance Developments Pty Ltd v Arbab & Anor* [2019] VSC 832 at [23].

Conclusion

- Don't lodge if no possible interest - You risk disciplinary proceedings, costs orders, client disgruntlement.
- Independently assess evidence, gather it, seek documentary corroboration if you are instructed that the caveat is based on a document, or you reasonably suspect this - eg *Pearl Lingerie Australia Pty Ltd v TGY Pty Ltd; v Giarratana* [2012] VSC 451
- But little documentary corroboration may be available Eg: *Cressy v Johnson (No 3)* [2009] VSC 52 – caveats based on constructive trust may be OK – but still take care that you have the prima facie evidence.