

SOME CAVEATS ABOUT CAVEATS

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Barrister
Foley's List



Nature and purpose of caveats

- ▶ All about unregistered interests in land
- ▶ What is a caveat?
 - ▶ *Transfer of Land Act 1958* (Vic)
 - ▶ Statutory injunction
- ▶ Cost-efficient and effective
- ▶ Effect of valid caveat

Part V—Incidental provisions

Division 1—Caveats against dealings

89 Caveats temporarily forbidding dealings with lands

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

Who is entitled to lodge a caveat?

- ▶ Registrar
- ▶ Private caveats

Types of caveatable interests

Part V—Incidental provisions

Division 1—Caveats against dealings

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Types of caveatable interests

- ▶ Unregistered mortgage
- ▶ Uncompleted contract for sale (*Fernandes v Houstein* (1963) 4 FLR 355)
- ▶ Conditional contract of sale (*Kuper v Keywest Constructions Pty Ltd* (1990) 3 WAR 419)
- ▶ Charge (*Avco Financial Services v White* [1977] VR 561)
- ▶ Lease (*Antar v Fairchild Development Pty Ltd* [2008] NSWSC 638)
- ▶ Option to purchase (*Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57)

Types of caveatable interests (cont'd)

- ▶ Easement (*Deanshaw v Marshall* (1978) 20 SASR 146)
- ▶ Profit à prendre (*Permanent Trustee Australia Ltd v Shand* (1992) 27 NSWLR 426; *Ex parte Lord* [1985] 2 Qd R 198)
- ▶ Vendor's lien (*Ex parte Lord* [1985] 2 Qd R 198)
- ▶ Equitable interests in land (*Crampton v French* (1995) V Conv R 54-529)
 - ▶ Resulting trust (*Official Trustee in Bankruptcy v P&R Alvaro Enterprises Pty Ltd* (1992) 111 FLR 47)
 - ▶ Constructive trust
- ▶ Beneficiary of a trust (*Costa & Duppe Properties Pty Ltd v Duppe* [1986] VR 90)

Caveatable interests in building and construction

- ▶ Desire for builders to ensure work paid
- ▶ Property developments
- ▶ Interest in the land?
- ▶ *HG & R Nominees Pty Ltd v Caulson Pty Ltd* [2000] VSC 126
- ▶ *Depas Pty Ltd v Dimitriou* [2006] VSC 281
- ▶ *Walter v Registrar of Titles & Handberg* [2003] VSCA 122
- ▶ *Yamine v Mazloum* [2017] VSC 601

Domestic building contracts

Domestic Building Contracts Act 1995
No. 91 of 1995
Part 2—Provisions that apply to all domestic building contracts

18 Contract does not entitle builder to put caveat on the title of building site land

A domestic building contract does not give a builder an estate or interest in any land for the purposes of section 89 of the **Transfer of Land Act 1958**.

Domestic building contracts

- ▶ *Knight v Marras (Building and Property) (Amended)* [2018] VCAT 1046
- ▶ *Elliott v Simonds Homes Pty Ltd (Domestic Building)* [2010] VCAT 1827

CHARGE

A. Building Owner(s): GEORGE MARRAS
Address: 11/24-26 Burton Ave Clayton

B. Builder: WAYME KNIGHT
Address: 18 Vantage Point Blvd Doreen

C. Land: Unit 2, 2 Webster St Malvern East
Lot No: 2 Proposed PS: PS649029L
Part Vol: 04713 Fol: 500

Registered Proprietor(s): George Marras

D. Date of Major Domestic Building Contract between Builder and Building Owner:

The Building Owner(s) by signing this charge grants to the Builder a charge over all that piece of land described in item C above (or any subsequent Certificate of Title) on which the building work is to be undertaken with the due payment of all moneys that may become due and payable to the Builder under the Major Domestic Building Contract referred to in item D above. When all monies, including any legal costs and interest, property due and payable to the Builder have been paid, this Charge shall cease to have effect.

The Builder and the Building Owner acknowledge that this Charge is a separate document entered into between the Builder and the Building Owner and does not form any part of the Major Domestic Building Contract described in item D above.

Dated: 18/7/2012

Signed by the Builder:

Wayme Knight

Signed by the Building Owner(s):

George Marras

Caveatable interests in building and construction

- ▶ Charge is acceptable caveatable interest (*Official Trustee in Bankruptcy v P & R Alvaro Enterprises Pty Ltd* (1992) 111 FLR 47)
- ▶ Example charging clauses
 - ▶ *Rising Developments Pty Ltd v Hoskins* (1996) 39 NSWLR 157
 - ▶ “If there is an amount outstanding including any legal fees and costs associated with recovering an amount under this agreement the owner agrees that the land on which the building works are being undertaken is hereby charged in favour of the contractor for such outstanding amount. This clause shall not merge on completion.”
 - ▶ *Griffith v Hodge* (1979) 2 BPR 9474 (NSWSC)
 - ▶ “The owner hereby charges the parcel of land on which or on part of which the works are to be erected with the due payment to the builder of all moneys that may become payable to the builder by virtue of this contract or otherwise arising from the carrying out of the works.”

Caveatable interests in building and construction

- ▶ *Forder v Cemcorp Pty Ltd* (2001) 51 NSWLR 486
- ▶ *Multi-Span v Portland* [2001] NSWSC 696

Interests which are not caveatable interests

- ▶ Builder under a construction contract
- ▶ Possession of a building site
- ▶ Contractual or person right (*Simons v David Bengel Motors Pty Ltd* [1974] VR 585)
- ▶ Entitlements to bring a *Family Law Act* application (*Bell v Graham & Ors* [2000] VSC 142 at [19])
- ▶ Mere equities (*Swanston Mortgage Pty Ltd v Trepan Investments Pty Ltd* [1994] 1 VR 672; *Re Pile's Caveats* [1981] Qd R 81)

Removing a caveat

- ▶ Withdrawal
 - ▶ s.89
- ▶ Lapsing
 - ▶ s.90 - Lapsing by dealings
 - ▶ s.89A - Administrative challenge
- ▶ Court avenue

Removing a caveat - s90(3) court application

- ▶ s.90(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.*
- ▶ Two step test (*Piroschenko v Grojsman* (2010) 27 VR 489)
- ▶ Consider indemnity costs
 - ▶ *New Galaxy Investment Pty Ltd v Thomson* [2017] NSWCA 153
 - ▶ *Love v Kempton* [2010] VSC 254

Compensation claims and costs

- ▶ Costs order against solicitor
 - ▶ *Pearl Lingerie Australia Pty Ltd v TGY Pty Ltd; Pearl Lingerie Australia Pty Ltd v John Giarratana* [2012] VSC 451
- ▶ s.118 Transfer of Land Act:
 - ▶ “Any person lodging with the Registrar without reasonable cause any caveat under this Act shall be liable to make to any person who sustains damage thereby such compensation as the Court deems just and orders”.
- ▶ Compensation
 - ▶ *Deutsch v Rodkin* [2012] VSC 450

Risk areas for practitioners

- ▶ Compensation order sought against solicitor
 - ▶ *Lanciana v Alderuccio* [2019] VSC 198
 - ▶ Not possible
- ▶ Adverse costs order
 - ▶ *Pearl Lingerie Australia Pty Ltd v TGY Pty Ltd; Pearl Lingerie Australia Pty Ltd v John Giarratana* [2012] VSC 451
 - ▶ *Yamine v Mazloum* [2017] VSC 601
- ▶ Disciplinary action
 - ▶ *Guirgis v JEA Developments Pty Limited* [2019] NSWSC 164
 - ▶ “Lodging a caveat is not a trivial act to be undertaken lightly. It has immediate legal effect and can have significant commercial and financial consequences. Legal practitioners and licensed conveyancers who advise on, prepare and certify caveats that are lodged electronically have an important role to ensure that obviously unmeritorious caveats are not lodged. This judgment arises from a failure by a licensed conveyancer to perform that role properly” per Kunc J
 - ▶ *Pearl Lingerie Australia Pty Ltd v TGY Pty Ltd; Pearl Lingerie Australia Pty Ltd v John Giarratana* [2012] VSC 451

Risk areas for practitioners

- ▶ Risk is limited or non existent where:
 - ▶ Taking instructions about claimed interest
 - ▶ Obtaining documentation (if available) to support interest
 - ▶ Not blindly accepting client's instructions
 - ▶ Bona fide effort to identify proper basis