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In-House Briefing Memorandum

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Compensation Arising From Caveat

S 118 of the *Transfer of Land Act 1958* ('the Act') creates an entitlement to compensation for losses arising from the lodgement of a caveat 'without reasonable cause'. The onus is on the party seeking compensation.

A caveat is lodged without reasonable cause where the caveator does not have an honest belief based on reasonable grounds that he or she has a caveatable interest: *Beca Developments Pty Ltd v Idameneo (No 92) Pty Ltd* [1990] 21 NSWLR 459. A caveat may be lodged without reasonable cause where there is a caveatable interest, but the caveat is lodged for some other purpose than protecting that interest: *Nelson v Kimberley Homes Pty Ltd* [1989] ANZ ConvR 123.

A key question arises where the caveat is reasonably lodged, but is maintained in circumstances that may not be regarded as reasonable. The courts have considered whether these provisions extend to the situation where it becomes unreasonable to maintain a caveat on the Register but have not come to a conclusive position: *Young v Rydalmere Credits Pty Ltd* [1964-1965] NSW 1001.

In *Edmonds v Donovan*,¹ Counsel, Mr Jim Delaney, argued that:

"damage flows always from the maintenance of a caveat rather than its lodging; for even if lodged without reasonable cause it is only the instance of the caveator in refusing to withdraw it that, in the final analysis, can cause damage to the registered proprietor" at [98].

Ultimately, however, in *Edmonds*, the question whether 'lodging' should be read as meaning 'lodging and maintaining' did not require judicial decision. Nevertheless His Honour recorded that caution is required lest maintaining the caveat be regarded as leverage or use of a caveat as a bargaining tool, particularly in the face of a written request to remove the caveat.

In the more recent case of *South Eastern Secured Investments Ltd (recs & mgrs apptd)* [2011] VSC 662, Justice Daly, of the Victorian Supreme Court, found that a claim for compensation for unreasonably maintaining a caveat would be:

"...inconsistent with the authorities which state that the question of whether the lodgement of the caveat was reasonable must be determined in the light of the facts and circumstances which existed at and before the time of the lodgement of the caveat, not in hindsight. If s 118 was to be construed to apply to unreasonably maintaining a caveat, that inquiry must of necessity extend to the facts and circumstances for the entire period leading up to the removal of the caveat." at [36]

These two Victorian Supreme Court cases confirm that the question of the reasonableness of a caveat is determined by whether, **at the time of its lodgement**, a caveatable interest existed and that its lodgement was reasonable and not done to achieve an ulterior motive. They support the proposition that s 118 arises from **lodgement** not **maintenance**, but the matter is not without some uncertainty. Whenever a caveat is lodged, attention is needed to how long it should be maintained and ensuring it is withdrawn promptly upon expiry of the interest protected.

¹ *Edmonds & Ors v Donovan & Ors; Disctrionics Ltd v Kingston Links Country Club Pty Ltd* [2005] VSCA 27 (22 February 2005)
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