

KELLEHERS AUSTRALIA

In-House Memorandum

Caveatable Interests

A caveat is an important tool used to protect a person's interest in land, but when used incorrectly it exposes the caveator to considerable risk. The *Transfer of Land Act 1958* (Vic) (TLA) provides that any person lodging a caveat without reasonable cause is liable for compensation to any person who sustains damage arising from that lodgement.

Caveatable Interest

Section 89(1) TLA allows any person with 'any estate or interest in land' to lodge a caveat with respect to that land. Chief Justice Marilyn Warren recently observed that:

*"The phrase 'any estate or interest in land' is not defined in the Act, and the authorities do not provide an exhaustive list of what interests meet the standard set out in s 89."*¹

Generally, a person must have a proprietary interest². However, in an earlier 2006 decision, Chief Justice Warren also noted:

*"... in appropriate circumstances, an equitable interest in land is capable of supporting a caveat even where that interest will not compel the registered proprietor to deliver a registrable instrument."*³

Caveatable interests can be wide and varying, including:

- A purchaser under an agreement for sale⁴ or certain conditional agreements for sale⁵;
- A registered or equitable mortgagor⁶;
- An easement⁷;
- Beneficiaries of an interest in a trust⁸;
- A tenant, in certain circumstances;
- A builder's contractual right to charge the land with all moneys owing⁹; and even
- A registered proprietor who fears a false transfer of ownership.

By contrast, interests determined as **non-caveatable** include:

- The interest of a person who has made improvements to another person's land, but has not obtained an order for relief¹⁰;
- Rights arising from agreement to share profits on resale of land¹¹;
- Possession of a building site by a builder¹².

¹ *CFHW Pty Ltd v Burness* [2014] VSC 451 per Warren CJ at [23].

² *McMahon v McMahon* [1979] VR 239; *CFHW Pty Ltd v Burness* [2014] VSC 451.

³ *Schmidt v 28 Myola Street Pty Ltd* (2006) 14 VR 447 per Warren CJ at [21].

⁴ *Fernandes v Houstein* (1963) 4 FLR 355.

⁵ *Jessica Holdings Pty Ltd v Anglican Property Trust Diocese of Sydney* (1992) 27 NSWLR 140.

⁶ *Avco Financial Services Ltd v White* [1977] VR 561; *Sinclair v Hope Investments Pty Ltd* [1982] 2 NSWLR 870.

⁷ *Re Paul* (1902) 19 WN (NSW) 114; *Deanshaw v Marshall* (1978) 20 SASR 146.

⁸ *Costa and Duppe Properties Pty Ltd v Duppe* [1986] VR 90; *Official Trustee in Bankruptcy v P & R Alvaro Enterprises Pty Ltd* (1992) 111 FLR 47.

⁹ *Wright v Bridge Wholesale Acceptance Corp (Aust) Ltd* [1993] 1 VR 502.

¹⁰ *Ex parte Goodlet & Smith Investments Pty Ltd* [1983] 2 Qd R 792.

¹¹ *Simons v David Bengel Motors Pty Ltd* [1974] VR 585.

¹² *HG & R Nominees Pty Ltd v Caulson Pty Ltd* [2000] VSC 126.

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Lodging with Reasonable Cause:

Any person who lodges a caveat without reasonable cause is liable for damage sustained by any other person 'as a court deems just and orders' (s118, TLA). It does not place the liability on the caveator per se, in contrast with other sections where 'caveator' is expressly mentioned.

The Supreme Court considered this 'without reasonable cause' test, noting that:

"...it is not necessary to establish as a precondition to an entitlement to compensation ... that lodgement of the caveat was occasioned by any hint of 'wrongfulness' or moral blameworthiness or turpitude of any kind. All that is necessary is that there be no 'reasonable cause' for lodging the caveat." (Croft J)¹³

"Reasonable cause" is not determined by whether an actual caveatable interest existed at the time of lodging, but whether the lodging party had an 'honest belief based on reasonable grounds' that a caveatable interest existed¹⁴. It is not enough to show the interest did not exist. The party claiming loss must show that the lodging party knew this¹⁵.

Even so, an 'honest belief based on reasonable grounds' may be insufficient if the caveat is lodged

*"for an ulterior motive and without regard to its effect on transactions to which the caveator had agreed."*¹⁶

Maintaining a Caveat:

Where the caveator lacked reasonable cause to lodge a caveat, it is irrelevant whether they had a reasonable cause to maintain it¹⁷.

However, as highlighted in our October 2013 NewsFlash, if the caveat is reasonably lodged, the law is unsettled as to whether rights to compensation arise where it becomes unreasonable to maintain the caveat¹⁸. Uncertainty remains. Relevant statutes in Northern Territory, New South Wales, and Queensland expressly extend the 'without reasonable cause' test to maintaining a caveat, but not in Victoria.

Cameron Algie
12 November 2014

¹³ *RDN Developments Pty Ltd v Shtrambrandt & Ors* [2011] VSC 130 per Croft J at [18].

¹⁴ *Bedford Properties Pty Ltd v Surgo Pty Ltd* [1981] 1 NSWLR 106 per Wootten J at [108].

¹⁵ *Edmonds v Donovan* (2005) 12 VR 513.

¹⁶ *Arkbay Investments Pty Ltd v Tripod Funds Management Pty Ltd* [2014] NSWSC 1003 per Robb J at [17].

¹⁷ *Young v Rydalmere Credits Pty Ltd; Hooke v Holland* [1984] WAR 16

¹⁸ Halsbury's Laws of Australia at [355-8325]

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