

CAVEATS UNDER THE TRANSFER OF LAND ACT

1. This is the paper that accompanying my Foleys CPD podcast on 14 February 2020 on caveats under ss. 89 – 91 of the Transfer of Land Act 1958 (TLA). I however include reference to cases decided up to the date of this paper, ie 9 April 2020. Caveat cases from mid 2017 are also covered in my Caveatsvictoria.blog.
2. Power to lodge a caveat over land is given by s. 89(1) of the Transfer of Land Act (TLA) which materially provides –

“(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”

It is typical in a caveat to state the extent of the prohibition against registration as “absolutely”. *Lawrence & Hanson Group Pty Ltd v Young* [2017] VSCA 172 establishes that this does not mean that the caveat seeks to prohibit absolutely the registration of an instrument dealing with the land but rather means that no instrument affecting the interest claimed in the caveat can be registered.

3. A caveat is a “statutory injunction to keep the property in statu quo until the court has an opportunity of discovering what are the rights of the parties” (*Kerabee Park Pty Ltd v Daley* [1978] 2 NSWLR 222 at 228 quoted in *Nicholas Olandezos v Bhatha & Ors* [2017] VSC 234 at [23]). A caveat or failure to caveat may also affect priorities between unregistered equitable interests. The interest first in time would normally prevail but that may change where the prior equitable interest holder has so acted that it would be unconscionable if its interest were to prevail: *TL Rentals Pty Ltd v Youth on Call Pty Ltd and Ors* [2018] VSC 105 at [21].
4. This paper divided thus –

- A. The importance of this topic – *Legal Services Commissioner v Mercader* [2011] VCAT 2062; *Legal Services Commissioner v Kotsifas* [2014] VCAT 1615. Paras. 5 - 9
- B. Caveats – removal procedures. Paras. 10 - 14
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A. The importance of this topic – *Legal Services Commissioner v Mercader* [2011] VCAT 2062; *Legal Services Commissioner v Kotsifas* [2014] VCAT 1615.

- 5. *Mercader* concerned the solicitor's own caveat. On termination of her instructions for a wife in a matrimonial dispute, the solicitor lodged a caveat over the former husband's property (in which the wife claimed a share) claiming an equitable estate in fee simple "By virtue of constructive trust". Her client had not executed a charge to secure payment of costs.

6. The notion that the circumstances gave rise to the solicitor having a caveatable interest in the husband's land was described by Judge Lacava as "a legal nonsense" [27] as was the interest claimed in the caveat [43]. The solicitor was charged with unsatisfactory professional conduct by lodging and/or refusing to withdraw the caveat where she knew and/or ought to have known that she had no caveatable interest and by providing information to the Registrar of Titles that she ought to have known was false. She was convicted with the question of penalty adjourned.

7. If the client had executed a charge to secure payment of costs, *Cressy v Johnson (No 3)* [2009] VSC 52 at [213] confirms that the solicitor could have caveated over the husband's property: the client had an arguable constructive trust over that property and that would have supported the solicitor's caveat over that property protecting its interest under that charge.

8. In *Legal Services Commissioner v Kotsifas* [2014] VCAT 1615 the solicitor pleaded guilty to three charges of professional misconduct. The facts were –
 - The solicitor acted for a company and its directors which was in dispute with another company.
 - A director caveated over the other company's land claiming an "equitable interest as chargee" [22].
 - The solicitor had not drawn the caveat but appeared to defend it arguing that the interest arose pursuant to a proposed joint venture and oral agreement. At this hearing Ferguson J: stated that the affidavits did not establish a prima facie case; drew the solicitor's attention to the difference between a joint venture and an interest in land; stated that she was very doubtful that a resulting or constructive trust would here be a sufficiently arguable basis for a caveat; and awarded indemnity costs.
 - The solicitor then provided a partially drawn caveat to a director who lodged it over the same land (it is assumed claiming the same interest as that referred to in the next paragraph).
 - The solicitor then drew and lodged a caveat on behalf of the company claiming an "estate in fee simple" over that land pursuant to an implied, resulting or constructive trust.

Croft J removed these caveats, commenting that in spite of Ferguson J's warning they had no proper basis, no prospect of success and in wilful disregard to known facts and law, and referring the matter to the LSC.

9. Senior Member Smithers noted that:
 - (a) Because lodgement of a caveat has a similar effect to an ex parte injunction, a high level of candour and preparation (in terms of gathering evidence to support the existence of the interests claimed) is required by the lodging solicitor [9];
 - (b) A solicitor has an independent duty to assess whether a caveat should be lodged. This duty cannot be delegated to counsel or the client [12];
 - (c) The solicitor had an analogous duty, reflected in the Civil Procedure Act 2010, to make an independent assessment of whether proceedings should be instituted [13], ie a proper basis for lodging a caveat [14].

B. Caveats – removal procedures.

10. Once the Registrar gives the registered proprietor notice of the caveat (s. 89(3)) the registered proprietor has several options. The first option is in due course to lodge a transfer or dealing for registration, in which case, with the exception of certain specified transfers or dealings the gist of which is broadly that they are not inimical to the interest of the caveator, the caveat lapses 30 days or such further time as a court allows after notice by the Registrar to the caveator (ss. 90(1),(2)).
11. The second option is to apply to the Registrar for a notice to the caveator, supported by a certificate stating the opinion of a lawyer that the caveator does not have the estate or interest claimed (s. 89A(1),(2)). This triggers a notice by the Registrar to the caveator that the caveat will lapse 30 days hence unless notice in writing is given to the Registrar that proceedings in a court 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 (s. 89A(3)-(5)). Accordingly, the caveator must issue a proceeding and give notice, and the fate of the caveat awaits the fate of the proceeding (s. 89A(7)).
12. The third option is under s. 90(3), which provides that any person adversely affected by a caveat may bring proceedings in a court against the caveator for the removal of the caveat and the court may make such order as it thinks fit. "Court" means the Supreme

Court and County Court, which has unlimited jurisdiction (TLA s. 4), but not VCAT: *Eliana Construction v Ramani* [2020] VSC 115 at [5(e)], [55]. Sometimes, having taken the s. 89A option, registered proprietors will find it moving too slowly and then will also take the s. 90(3) option. This is permissible (eg *Nineteenth Jandina Pty Ltd v Hijim Pty Ltd* [2004] VSC 298). The s. 90(3) application is normally by Originating Motion but *Walters v Perton (No 2)* [2019] VSC 542 establishes that it can in limited circumstances be by summons in the proceeding.

13. Applications under s. 90(3) are normally heard in the Supreme Court Practice Court or in the County Court Commercial Division: General List. The application is interlocutory and accordingly under the Rules of Court may be given on information and belief and cross examination is very unusual: *Van Klaveren v Otelta Pty Ltd and Ors* [2018] VSC 10.
14. This paper will concentrate on cases under s. 90(3) as other cases tend to resolve into full trials in which the caveat issue moves into the background.

C. The tests for removal of a caveat under s. 90(3).

15. In *Nicholas Olandezos v Bhatha & Ors* [2017] VSC 234 at [16] Derham AsJ sets out the summary of principles by Elliott J in *Sylina v Solanki* [2014] VSC 2 at [43]. These with embellishment are:

(1) The court's power under s. 90(3) of the Act is discretionary.

(2) A caveator bears the onus of establishing a serious question to be tried that it has the "estate or interest in land" as claimed (Elliott J). Derham AsJ expanded this [17] by noting that the "serious question to be tried test" was often used interchangeably with the "prima facie case test" and that the latter was to be preferred: this did not mean that caveators must show that it was more probable than not that at trial they would succeed, but must show 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.

Accordingly ordinarily the final determination of disputed factual issues or of the claimed interest is inappropriate: *Nicholas Olandezos* at [19]. However, in *McRae v Mackrae-Bathory* [2019] VSC 298 at [25] Derham AsJ applied the principle that where

a caveator established a prima facie case but there was a conflict of testimony the court would not order outright removal of the caveat, but may order removal unless steps were taken to establish the caveator's title within a certain time, in that case issuing proceedings within a month.

In *Concrete Mining Structures Pty Ltd v Cellcrete Australia Pty Ltd* [2015] FCA 888 at [33] (not a caveat case) Edelman J stated that the difference between the two tests is one of language not of substance.

(3) The caveator must also establish that the balance of convenience favours the maintenance of the caveat until trial (Elliott J). The court (as in an interlocutory injunction case) takes whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong".

(4) The stronger the case in establishing a serious question/prima facie case, the more readily the balance of convenience might be satisfied.

To similar effect is *Chan & Anor v Liu & Anor* [2020] VSCA 28 at [42], [43], [75], [76].

D. Interests in land – general.

16. A caveator bears the onus of establishing a serious question to be tried or prima facie case that it has the "estate or interest in land" as claimed. The caveator may fail to establish this for one of two reasons:
- (a) insufficient evidence of a valid estate or interest;
 - (b) regardless of the state of evidence the caveat does not arguably raise an estate or interest in land, eg "part performed oral agreement" (*National Australia Bank v Sgarretta* [2015] VSC 537) or have proper grounds, eg a charge on the grounds of an implied resulting or constructive trust (described as "a nonsense" in *Wells v Rouse & Ors* [2015] VSC 537 at [14]). See also *Alliance Developments Pty Ltd v Arbab & Anor* [2019] VSC 832 at [16]-[19], [56].

E. Interests in land – legal interests.

17. The highest form of interest in land is a legal interest, which is achieved by registration, and accordingly there is normally no need for a caveat to protect it. Recently the High

Court noted in *Boensch v Pascoe* [2019] HCA 49 at [107] that a caveat was not required to specify whether the interest claimed was legal or equitable – although the High Court was interpreting NSW legislation s. 89(1) is materially the same.

F. Interests in land – express, resulting and unit trusts.

18. The uncomplicated trusts giving rise to a caveatable interest are –
- (a) *Express trust*, such as where A declares by deed that he holds Blackacre on trust for B, and so B has the equitable estate and thereby a caveatable interest. (Unit and discretionary trusts are forms of express trust but it is convenient to deal with them separately).
 - (b) *Resulting trust*, most commonly arising where the property is put into the name of one of two or more contributors to the purchase price, the property generally being presumed to be held by the registered proprietor on trust for all contributors in proportion to their contributions, the interest of the unregistered beneficiaries being accordingly caveatable, eg: *Piroshenko v Grojsman* [2010] VSC 240 (in which the claim failed on the facts).
19. *Unit trust*. Whether a unit-holder has a caveatable interest depends on the construction of the trust deed (Article in the July 2008 LIJ p. 62 by the author). The fact that the owner of units may well not hold a proprietary interest in properties owned by the trust was reiterated in *Re S & D International Pty Ltd (No 4)* [2010] VSC 388 at [139] – [145]. In *AIT Investment Group Pty Ltd v Markham Property Fund No 2 Pty Limited* [2015] NSWSC 216 at [49] the court stated -
- “A unit trust “does not have a constant, fixed normative meaning”: ... Although there has been debate as to whether unit holders in unit trusts have a proprietary interest in trust property that, for instance, entitles them to lodge a caveat, it is the “exact terms” of the trust deed to which reference must be made to decide the nature of the interests of the unit holders in the trust property: ...”.

G. Interests in land – constructive trusts.

20. A constructive trust is raised by operation of law often without reference to the intentions of the parties concerned and indeed largely contrary to the desires and intentions of the constructive trustee, and without the requirements as to writing which statute imposes in respect of express trusts: Jacobs’ *Law of Trusts in Australia*, 7th ed., 2006, [1301].

21. Although the circumstances in which a constructive trust can be imposed are wide (best summarised in the caveat context by Dodds-Streeton J in *Goldstraw v Goldstraw* [2002] VSC 491 at [26]) cases of caveats over land held on constructive trust fall into some common groups (see an Article by the author in the April 2009 LIJ p. 46). These include the following.

22. *Muschinski v Dodds* constructive trust aka *Baumgartner v Baumgartner* constructive trust. This trust originates from the 1980s High Court cases of these names. It arises 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 in circumstances in which it was not specifically intended or specially provided - 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.

23. The evidence supporting this trust may be non documentary. So in *Cressy v Johnson (No 3)* [2009] VSC 52 Kaye J. stated that although he was “left with a paucity of documentary evidence produced by the plaintiff as to her income, her financial sources, and as to any expenses which she alleges that she incurred in respect of the properties acquired by the defendant” the caveatrix successfully relied on being the homemaker, and the prime carer of the three children involved in the family unit, and bearing most household expenses ([189]).

24. In *McRae v Mackrae-Bathory* [2019] VSC 298 the caveatrix successfully relied on her direct contributions to the acquisition of a property and her contributions to the maintenance and mortgage payments of that and another property.

25. In *Karan v Nicholas* [2019] VSC 35, a son established a serious question to be tried that a *Baumgartner v Baumgartner* trust existed, on evidence that:
- (a) he and their parents were involved in a joint endeavour whereby he made contributions to the property of which his late mother was registered proprietor, which enabled him and his family to live rent free there, and conversely enabled his parents to live rent free at a property owned by him;
 - (b) they pooled their resources to facilitate the joint endeavour;
 - (c) the joint endeavour ended without blame upon the death of the parents; and
 - (d) it would be unconscionable for the estate to retain the benefit of his contributions.
26. *Common intention constructive trust*. This form of constructive trust is frequently found on the same facts as those establishing a *Muschinski v Dodds* trust. It arises where there was a common intention that A would acquire an interest in a particular property to which B holds legal title, and A acts on that belief to his or her detriment, such that it would constitute a fraud to deny the interest intended to be acquired.
27. Possibly the earliest reported case in Victoria of a common intention constructive trust is *Hohol v Hohol* [1981] VR 221 where it appears that there was no written agreement or understanding but chiefly a conversation in which the registered proprietor said before the property was purchased “It’s for all of us, it’s for you and for me” (at 227). In *Commonwealth Bank of Australia v Love & Anor* [2014] VCC 887 at [30] Judge Anderson held arguable, as to a caveat lodged by a wife over her husband’s property, that the evidence might establish a common intention that the couple were each to have an equal interest in property of which the husband was registered proprietor, on the basis of the contributions made by her, both monetarily and by her long labour (the caveat was however removed on the balance of convenience).
28. *Constructive trust arising from proprietary estoppel*. An assumption as to the future acquisition of ownership of property induced by representations on which there has been detrimental reliance may give rise to a constructive trust based on a proprietary estoppel. Thus in *McNab v Graham* [2017] VSCA 352 such a constructive trust was established: it was unconscionable for a man now deceased to have departed from a representation he had made to a couple that he would devise his residence to them, on the basis of which the couple resided with and cared for him and his wife.

29. *Constructive trust imposed following breach of fiduciary duty or trust.* Examples are

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- In *AE Brighton Holdings Pty Ltd v UDP Holdings Pty Ltd* [2019] VSC 688 Ginnane J. reiterated the principle that where a trustee wrongfully used trust money to provide part of the cost of acquiring an asset, the beneficiary was entitled at his option either to claim a proportionate share of the asset or to enforce a lien upon it to secure his personal claim against the trustee for the amount of the misapplied money. Applying this principle his Honour found a prima facie case that a caveator had an interest in certain properties as a beneficiary under a constructive trust. This arose from money obtained by a company as a result of misleading or deceptive conduct, from which the caveator suffered loss, held on trust by the company for the caveator, being paid in breach of trust by the company to the registered proprietor which used it to purchase the properties.
- In *Sylina Pty Ltd v Solanki* [2014] VSC 2 Ms Solanki and her father invested in a joint venture between unit holders to develop a property. They never received proper accounting or payments of promised proceeds, and on resales their investment was rolled into other property developments over one of which she caveated. Elliott J held that there was a serious question whether the use of their moneys to develop subsequent property gave rise to a beneficial interest in the property.
- In *Dharmalingham v Registrar of Titles* [2005] VSC 417 a wife maintained a caveat over land given by her husband to his sister, on the grounds of “matrimonial property of caveator and husband fraudulently transferred to husband’s sister”.
- The breach of fiduciary duty may overlap with an arguable crime. Thus in *Dennis Hanger Pty Ltd v Brown* [2007] VSC 495 a company maintained a caveat over a former employee’s land, he having used forged company cheques to make mortgage repayments. And in *Aust Café Pty Ltd v Thushara de Soysa & Ors* [2019] VCC 237 Judge A. Ryan applied a similar principle to that applied by Ginnane J. in *AE Brighton Holdings*: an employee was alleged to have misappropriated an employer’s funds, part of which were ultimately applied by the second defendant to pay off a mortgage over her property, over which the employer validly caveated.

H. Interests in land – sale, mortgage and lease of land.

The interest of a purchaser under an agreement to purchase land.

30. Where a purchaser has a right in equity to specifically enforce a contract of sale the purchaser thereby has an interest in the land, akin to an equitable interest, which may be protected by a caveat: *Chan & Anor v Liu & Anor* [2020] VSCA 28 at [53]. But if no contract ever existed (eg *Matthews v Knight & Anor* [2017] VCC 1537) or the contract has been rescinded (eg *Nineteenth Jandina Pty Ltd v Hijim Pty Ltd* [2004] VSC 298) such caveat will be removed.
31. In *Chan & Anor v Liu & Anor* [2020] VSCA 28 the purchaser originally had a caveatable interest under an uncompleted contract. However the Court of Appeal held that when he lodged the caveat in question there was no longer a serious question to be tried that he had the right to specifically enforce the contract, there being strong grounds that he had lost this right by his actions constituting an election not to retain this right but, rather, to treat the contract as at an end and pursue a claim for damages. For the same reasons there was a strong basis for concluding that he was estopped from contending that he continued to have a right to seek specific performance.
32. *Land to be subdivided.* In *Bisognin & Anor v Hera Project Pty Ltd & Anor* [2017] VSC 783 Daly AsJ held that a purchaser of a future lot in land to be subdivided could caveat over the whole of the land before subdivision, and over the purchased land after subdivision, but on transfer of the purchased lot the purchaser retained no caveatable interest in the unsold lot.
33. *Lien for deposit.* Where a contract is rescinded the erstwhile purchaser may caveat based on a claimed equitable lien over the land to secure return of the deposit. An example of such a caveat, where however the caveat was removed on the balance of convenience, is *Six Bruce Pty Ltd v Milatos and Ors* [2017] VSC 784: Keogh J held that there was a prima facie case that the erstwhile purchaser had an equitable lien to secure his deposit under a contract he was entitled to rescind for breach of s. 32 of the Sale of Land Act.

Option to purchase, lease, mortgage, adverse possession.

34. Examples of caveats are –

The interest created by an option to purchase: Saafin Constructions Pty Ltd v Widak & Anor [2015] VSC 441 at [27].

The interest of a lessee under an unregistered lease: Oakland Investments (Aus) Pty Ltd v Senior Living Pty Ltd [2008] VSC 422, but the caveat will be removed if the lease has been terminated (*Glensborough Estate Pty Ltd v Frajman* [2009] VSC 591).

The interest created by an agreement to create a mortgage, which may be an equitable mortgage: Layrill Pty Ltd v Furlap Constructions Pty Ltd [2002] VSC 51; *Rolltherm Shutters Pty Ltd v Georgiou* [2004] VSC 273; *Montaigne Pty Ltd v Nerana at Nicholson Pty Ltd* [2004] VSC 116.

The interest of an adverse possessor: Nicholas Olandezos v Bhatha & Ors [2017] VSC 234 at [35], [37].

I. Interests in land – building works.

35. In *Walter v Registrar of Titles* [2003] VSCA 122 at [18] the court confirmed that mere work and labour done is not caveatable. Accordingly in *Yamine v Mazloun* [2017] VSC 601 John Dixon J. rejected an argument that the caveator's entitlement to be paid for his work on a quantum meruit was enforceable in equity by a constructive trust – the registered proprietor did not accept any intention to charge or secure the land with the obligation to repay the cost of the work or to create any beneficial interest in it. Similarly in *Depas Pty Ltd v Dimitriou* [2006] VSC 281 a builder was found to have at most a contractual right to, and perhaps even an equitable interest in, half a joint venture's net profit, but not a half interest in the land.
36. However, an equitable lien will give rise to a proprietary and so caveatable interest. Such liens are commonly invoked in building cases. The criteria for such a lien is stated by Deane J in *Hewett v Court* (1983) 149 CLR 639 at 668, that –
 - (a) there exists an actual or potential indebtedness by the owner of the property to the other party arising from a payment or promise of payment, either of consideration in relation to the acquisition of the property or of an expense incurred in relation to it; and

- (b) such property is specifically identified and appropriated to the performance of the contract; and
- (c) the relationship between the actual or potential indebtedness and the identified and appropriated property be such that the owner would be acting unconscientiously or unfairly if he or she were to dispose of the property without the consent of the other party or without the actual or potential liability having been discharged.

Caveat cases where no lien was established are: *Western Pacific Developments Pty Ltd (in liq) v Murray* [2000] VSC 436 and *HG & R Nominees Pty Ltd v Caulson Pty Ltd* [2000] VSC 126.

- 37. Similarly, in *Popescu v A & B Castle Pty Ltd* [2016] VSC 175 Ginnane J held that the only Romalpa clause conferring an equitable interest in land was one entitling the holder to enter upon the land to sever and remove the fixtures, and accordingly his Honour removed a caveat based on a clause simply providing that all materials used in a contract remained the supplier's property until paid in full.

J. Interests in land - equitable charges, agreements permitting caveats, solicitor's caveats.

Equitable charges.

- 38. "To constitute a charge in equity by deed or writing it is not necessary that any general words of charge should be used. It is sufficient if the Court can fairly gather from the instrument an intention by the parties that the property therein referred to should constitute a security".

(*Sim Development Pty Ltd v Greenvale Property Group Pty Ltd* [2017] VSC 335 at [119]). In this case Sifris J dismissed the caveat removal proceeding on the ground of a clause providing that, on termination of the agreement before completion of the project, Greenvale gave Sim "the right to register a charge over the property ... and any other property owned by [Greenvale] and such charge is to be applied to the payment in full of any money owed to [Sim Development]". The contractual right to register a charge supported the existence of a caveatable interest. On an interlocutory application in an application by *Sim* for leave to appeal against other orders the caveat

survived: *Sim Development Pty Ltd v Greenvale Property Group Pty Ltd* [2017] VSCA 345.

In *West Coast Developments Pty Ltd v Lehmann* [2013] VSC 617, also [2014] VSC 293, Robson J held that a non-pecuniary interest might, in certain circumstances, give rise to a charge capable of supporting a caveat.

An agreement permitting a caveat.

39. In *Sim Development* at [120] Sifris J quoted NSW authority that –

“Where the authority to lodge a caveat is given in connection with an obligation by A to pay money to B, and there is no sufficient indication to the contrary, the implication is that the estate or interest granted is an equitable charge to secure payment to B of that money”.

The most complete discussion of this topic is *Tannous and Anor v Abdo* [2017] VCC 304 (Judge Macnamara). The facts were –

- The plaintiffs alleged that they agreed with Mr Abdo to purchase an interest in a bakery and paid money towards this which went into the purchase of land by his wife.
- At one point in the litigation to recover this sum the parties entered a document which included an undertaking by the Abdos not to sell this land and to permit the plaintiffs to lodge a caveat over it.
- They caveated claiming “an equitable interest as chargee”.

His Honour held that –

whether an equitable interest in the nature of a charge was created by a contractual entitlement to lodge a caveat, in the absence of an express charging clause, depended on the interpretation of the particular contractual provision;

success for the plaintiffs, however, required the implication, not only of the existence of a charge, but also of a guarantee by Mrs Abdo. There was nothing in the language of the contract supporting this, and accordingly no charge was created.

Solicitors' caveats.

40. In *Lakic v Prior* [2016] VSC 293 a solicitor in 2008 required his client to sign an equitable charge in his favour over her family home enabling him to caveat to secure payment of his costs and disbursements. Macaulay J. held the charge and caveat to be unimpeachable inter alia because the client had been given proper advice before signing the charge [105]. An argument that by ceasing to act for the client the solicitor had given up all rights was rejected: although generally a solicitor was not entitled to terminate a retainer unilaterally unless there was ‘reasonable cause’ or ‘just cause’, involving a breach or repudiation of the retainer, such cause (non payment of the solicitor’s bill) existed here [107] – [108].
41. Any solicitors’ charge should be over specified land: *Brott v Shtrambrandt & Ors* [2009] VSC 467. In costs agreement entered into in 2000 there was inter alia provision: that the solicitor’s accounts not be payable until the earlier of completion of the proceedings or termination of the solicitor’s services (cl. 5), and; (without specifying any particular property) irrevocably charging all estates or interests in real estate which the client had or may acquire, including words covering companies. The solicitor subsequently lodged caveats over two properties claiming an “interest as chargee”. Beach J held that a charging clause purporting to charge unspecified interests of the client in real estate was void in contravention of the Consumer Credit (Victoria) Code s. 40, which provided –
- “(1) A mortgage that does not describe or identify the property which is subject to the mortgage is void.
- (2) Without limiting sub-section (1), a provision in a mortgage that charges all the property of the mortgagor is void.”
- (see now the National Credit Code, being Schedule 1 to the National Consumer Credit Protection Act 2009 (Cth), ss. 44 and 204).
- In the words of Croft J. in *Knowles v Victorian Mortgage Investments Limited & Anor* [2011] VSC 611 at [54], Beach J in effect determined –
- “that obtaining credit from one’s solicitor in order to conduct “Family Court proceedings against one’s spouse (or former spouse) falls within the rubric of ‘personal, domestic or household use’”. Thus the characterisation of the nature of the legal proceedings as domestic had the effect of characterising the nature of the expenditure in meeting the costs of those proceedings....”

42. *Defteros v Foster* (Ruling) [2015] VCC 1025 in which Judge O'Neill refused a solicitor's application for summary judgment raises a possible further problem. The defendant was sole director of a company operated by her husband. The solicitor's firm acted for the company, and on its liquidation the husband by assignment, in Supreme Court proceedings against another company for damages. During the litigation the couple guaranteed to pay all legal costs and disbursements incurred by the firm and in support the defendant gave the solicitor a second mortgage over a property. It was argued that the mortgage was void and unenforceable for breach of the National Consumer Credit Protection Act 2009 (Cth) inter alia because the solicitor was not a licensed credit provider (s. 29). This turned (ss. 29(1) and 6) on whether credit activity was engaged in, which occurred if the person was a mortgagee under a mortgage to which the National Credit Code applied. Section 5(1) of the Code provided, relevantly to this case, that it applies to the provision of credit to (a) a natural person, (b) wholly or predominantly for personal, domestic or household purposes, (c) and a charge and -
- “(d) the credit provider provides the credit in the course of a business of providing credit ... or as part of or incidentally to any other business of the credit provider carried on”

After referring to *Brott v Shtrambrandt* and the fact that s. 6(1) of the legislation before Beach J was similar to s. 5(1) Judge O'Neill stated –

“32 The facts in this application are different from those in *Brott*. The mortgage to *Defteros* identified the property to be mortgaged, rather than a charge over all property owned by the clients (as in *Brott*). Secondly, the purpose for the provision of credit was, like *Brott*, for the purpose of litigation, but rather than Family Law proceedings, was related to litigation of a commercial nature involving Ms Foster's husband and his company. It is therefore not clear as to whether the National Credit Code would apply. However, it has been determined that whether credit is provided wholly or predominantly for personal, domestic or household purposes is a complex question. It will be necessary for there to be further evidence as to the precise nature of the provision of the credit In particular, as to whether that credit may be considered in the nature of “personal, domestic or household purposes”. In my view, this is a matter appropriate to be investigated at trial ...

33 A further issue in considering the Code is whether *Defteros* Lawyers provided credit (the mortgage) in the course of its business as a credit provider or as incidental to other business of a credit provider. In his affidavit, Mr *Defteros* swore he had not entered a similar mortgage arrangement before. Nonetheless the interpretation of the section requires careful assessment.”

43. Notwithstanding the possibility raised in paragraph [33] of *Defteros*, the message from these two cases is to describe or identify the property, then caveat, and then (insofar as not easily been able dealt with already) confront any other issues as they arise.

K. No interest in land – many domestic relationships.

44. So prevalent are caveats lodged after domestic relationship breakdown (often incanting “pursuant to an implied, resulting or constructive trust”), including as a “holding position” (*Goldstraw* [2002] VSC 491), that it should be reiterated that the mere existence of a matrimonial or de facto relationship does not create a caveatable interest in the spouse or partner’s land even when combined with express or implied undertakings to provide support and accommodation (*Cressy v Johnson (No 3)* [2009] VSC 52 at [193] quoting NSW authority).

However the position is subtle, because whether the facts have crossed the boundary into a constructive trust often turns on fine distinctions, particularly in a long relationship. This is illustrated by *Commonwealth Bank of Australia v Love & Anor* [2014] VCC 887 at [30] referred to in paragraph 27 above.

45. Further, a caveat is not supportable by a mere prospective or actual court proceeding (*Goldstraw; Westpac Banking Corporation v Dimopoulos* [2006] VSC 10), such as to seek an order conferring an interest in land under the Family Law Act or an injunction of the Family Court, or for that matter of any court, restraining disposal of property (*Elmant Pty Ltd v Dickson* [2001] VSC 155). So, in *Hermiz v Yousif* [2019] VSC 160 at [39] Derham AsJ reiterated that the Family Law Act did not, of itself, give a party to a marriage or a de facto relationship a caveatable interest, although an order under that Act could have that effect.

L. No interest in land – other examples.

46. *Discretionary trust.* A beneficiary under a discretionary trust has no proprietary interest in the trust and so no caveatable interest: *Southage Pty Ltd v Beijing Garden Resort Pty Ltd* [2013] VSC 272.
47. *Judgment debt.* A judgment debt, even if followed by a warrant of seizure and sale, does not create a proprietary interest and so is not caveatable: *Rubytime Nominees Pty Ltd v Bottiglieri* [2011] VSC 678.

48. *Money lent.* Money lent for the purpose of being applied towards the purchase price of land does not, on being so applied, entitle the lender to an estate or interest in the land, unless the parties intended that the lender should have security for the loan: *Simons v David Bengel Motors Pty Ltd* [1974] VR 585. Thus in *EZY Global Ltd v Miller Crescent P/L* [2019] VSC 815 there was simply a loan without a charging clause or other clause giving security and so no caveatable interest.

49. *Promise to pay.* A caveat is not supportable by a mere promise by a registered proprietor to pay any proceeds of sale, or a percentage of net profits as a fee, to the caveator: *Epple v Wilson* [1972] VR 440; *Maxwell v Moorabool Developments Pty Ltd* [2004] VSC 392. So, in *Yamine v Mazloum* [2017] VSC 601 the caveator alleged in substance that: the plaintiff registered proprietor asked him to work to finish his house and prepare it for auction; the caveator replied that much work was involved which he could not even put a figure on, asked how he would be paid, and said that he would not help unless assured he could be paid; the plaintiff replied that he would be paid for his work from the proceeds of sale. The caveat was removed: the plaintiff did not accept any intention to charge or secure the land with the obligation to repay the cost of the work or to create any beneficial interest in it.

50. *Right to set aside mortgagee's sale.* This paragraph and paragraphs 51 and 52 are illustrations of the proposition recently reaffirmed by the High Court that the interest asserted in the caveat must be in existence at the time of its lodgment – the assertion by a caveator, who at the time of the lodgment did not have an estate or interest in the land, that he had commenced proceedings which may result in such an interest being vested in him did not suffice: *Boensch v Pascoe* [2019] HCA 49 at [103] – [104].
 In *Swanston Mortgage Pty Ltd v Trepan Investments Pty Ltd* [1994] 1 VR 672 the Supreme Court Appeal Division held that the right of a mortgagor to set aside a mortgagee's sale was an equity, being a personal right of action, and not an equitable interest in land and so not caveatable. Until the equity was made good the mortgagor had no equitable interest in the land.

51. *Right to set aside a transfer.* *Swanston Mortgage* has been applied recently in *Super Jacobs Pty Ltd v Faalogo* [2019] VSC 778, the facts being –

- The defendants were registered proprietors of a residential property. They were migrants, of limited means, not highly educated or familiar with legal or financial matters.
- In 2016 they gave a general power of attorney to a mortgage broker who they believed was arranging finance for them. In 2017 the mortgage broker, the defendants claimed fraudulently, used the power to execute a contract of sale to the plaintiffs who became registered proprietors in June 2018. The sale was not by auction or private treaty or advertised and had other unusual features. The defendants received no funds from sale and subsequently discovered this transfer.

The defendants caveated on what appeared in any event to be an invalid ground, but Daly AsJ dealt with the matter at a more basic level. Her Honour held that, even if (which they denied) the plaintiffs obtained the property by fraud or improper dealing, the caveators' claim to have the transfer set aside on the grounds of a fraud by, or which could be sheeted home to, the registered proprietors was not an interest or estate in land. They did not hold an equitable interest in the property until the claim was made good in a court. Until then their equitable right to assail the transfer for fraud was a mere equity.

52. *Super Jacobs* concerned an arguable fraud. The situation is a fortiori where there is no fraud. Thus in *Gold Road No. 3 Pty Ltd v Platt* [2019] VSC 714 the erstwhile registered proprietors and transferors caveated over the title of the current registered proprietor and transferee, contending that the transfer had been illusory and that there had been misleading or deceptive conduct in breach of the Australian Consumer Law. Ginnane J held that the caveators did not have an estate in the property but at most an action for damages: notwithstanding the width of possible relief under the Australian Consumer Law this possible remedy did not create an interest in land.
53. *Companies*. A mere shareholder has no caveatable interest in land belonging to a company: *Alliance Developments Pty Ltd v Arbab & Anor* [2019] VSC 832 at [56]. Accordingly where there is at most a constructive trust with respect to a company's shares this does not support a caveat over the company's land: *GW & R Mould Pty Ltd v Mould & Anor*; *Wakefield v Mould & Anor* [2016] VSC 330 at [50].

54. *Estate beneficiary.* A beneficiary under an unadministered estate has no proprietary interest in specific assets in the estate (*Commissioner of Stamp Duties (Qld) v Livingston* (1964) 112 CLR 12), and so cannot, if claiming solely as a beneficiary of the estate, caveat over land in the estate. So, in *The matter of the Will of Dorothea Agnes Baird* [2019] VSC 59 the caveator residuary beneficiary had only a chose in action, or personal right, to compel proper administration of the estate (and a proposed testator's family maintenance also gave him no interest in the property). Accordingly the caveat was removed.
55. *Claim by estate beneficiary concerning inter vivos transfer.* A caveat lodged by beneficiaries of a deceased estate over land transferred by the deceased in his lifetime, which transfer is allegedly impeachable, is unsupportable: *Van Wyk v Albon* [2011] VSC 120 at [14]. At best such a caveat could be lodged by the deceased's personal representative.

M. Balance of convenience.

56. Balance of convenience issues are infinitely variable. However the following recur, but are on the assumption that there is a serious question to be tried – if there is not the balance of convenience becomes irrelevant.
57. *Sale goes through.* If there is already a contract of sale on foot to a third party, but the caveator shows a prima facie interest in the land, the court may let the transfer go through on condition that the net proceeds of sale are held in trust, their ultimate disposal to be fought over between the erstwhile registered proprietor and caveator. In other words the satisfaction of whatever interest the caveator has in the land is relocated to a claim against the net proceeds, eg *McRae v Mackrae-Bathory* [2019] VSC 298, often by agreement between the parties eg *Karan v Nicholas* [2019] VSC 35; *Colakoglu v Ozelik* [2020] VSC 139.
58. *Avoiding financial disaster.* The court will take into account financial consequences to the registered proprietor or a mortgagee if the caveat is not removed, including potential liquidation (eg *Saafin Constructions Pty Ltd v Vidak & Anor* [2015] VSC 441 at [20], [28]). So in *Six Bruce Pty Ltd v Milatos and Ors* [2017] VSC 784 the balance of convenience favoured removal of the caveat inter alia because without refinancing a

mortgagee's sale was likely and the vendor undertook not to deal with the property pending determination of the purchaser's proceeding and to charge the property to secure the amount of any judgment against it. Also *Shaw v Yarranova Pty Ltd* [2005] VSC 94 at [68]; *Rogers v Censori* at [48]; *Percy & Michele Pty Ltd v Gangemi* [2010] VSC 530 at [147]; *Kearsley v Robson* [2011] VSC 503 at [37].

59. *Money to be paid.* As the price of the caveat remaining in place the court may impose conditions as to issue of proceedings and/or requiring payment of monies: *Kearsley v Robson* at [38]; *Nicholas Olandezos v Bhatha & Ors* [2017] VSC 234. As to payment of monies, particularly in the case of a mortgage debt, see *National Australia Bank v Sgarretta* [2015] VSC 537 at [42].
60. *Caveator needing to live on the property.* The court may take into account whether the caveator needs to live in the property (*Wade v Davie* [2010] VSC 211 at [45]) or, if the property is sold, that the caveator will lose the benefit of expenditure on the property: *Kearsley v Robson* [2011] VSC 503 at [37].
61. *Undertaking as to damages.* This is unusual in the caveat setting, for the reason stated by the High Court in *Boensch v Pascoe* [2019] HCA 49 at [113], but may possibly be required: *Percy & Michele Pty Ltd v Gangemi* [2010] VSC 530 at [151]; *Official Trustee in Bankruptcy v Shaw* [2019] VSC 681 at [57].
62. *Section 118 proceeding.* The court may consider whether if the caveat remains in place until trial, but is then removed and an order for compensation under s. 118 is made, the caveator could satisfy that order: *Shaw v Yarranova Pty Ltd* [2005] VSC 94 at [68].
63. *Whether damages an adequate remedy.* Conversely, the court may consider whether, if the caveat is removed and the caveator is left with a remedy in damages, these will be an adequate remedy: *Shaw v Yarranova Pty Ltd* at [69].
64. *Caveat pointless.* The caveat may be removed if pointless because there is due to prior ranking securities no residual equity: *Glenis v Ikosedikas* [2018] VSC 278; *GNI Enterprises Pty Ltd v Registrar of Titles for Victoria & Ors* [2016] VSC 95 at [37].

N. Repeat caveats.

65. Section 91(4) provides that 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. *Layrill Pty Ltd v Furlap Constructions Pty Ltd* [2002] VSC 51 establishes that the fact that the sources of the two caveats was different did not mean that they were not in respect of the same interest.

O. Amendment of caveats/Interlocutory injunction.

66. In *Schwartz v Hadid* [2013] VSC 130 McMillan J held that the Court could only amend the estate or interest claimed in a caveat in special or exceptional circumstances, and not to substitute an entirely different estate or interest.
- In *Percy & Michele Pty Ltd v Gangemi* [2010] VSC 530 at [101] – [102] Macaulay J. stated without resolving the issue that ultimately the better view may be that the court should generally be less inclined to amend the interest or estate claimed than to amend the grounds of the claim or the scope of the protection asserted. In *S & D International Pty Ltd (in liq) v Malhotra* [2006] VSC 280 at [16] the grounds were amended.
67. In *Yamine v Mazloum* [2017] VSC 601 at [35] – [37] the court stated that it would have refused any application to amend because: an amendment of the interest claimed, not just the grounds, would not usually be permitted; the mistake had been made not by an unrepresented person but by a solicitor; and because the court wanted to discourage the belief that caveats could be imprecisely formulated and then fixed up later.
68. However in *TL Rentals Pty Ltd v Youth on Call Pty Ltd* [2018] VSC 105 Derham AsJ allowed the caveator to get round a defectively worded caveat. His Honour noted that the estate claimed in a caveat could probably be amended but only in special or exceptional circumstances, which he would not allow, but allowed the caveator to amend its summons to apply for an interlocutory injunction which would in substance give the same relief as maintenance of the caveat .

P. Costs of proceedings under s. 90(3).

69. In s. 90(3) proceedings costs normally follow the event. However, dating at least from the since oft-quoted statement of Dodds-Streeton J in 2002 in *Goldstraw* [2002] VSC

491 at [42] that caveats lodged as “bargaining chips” undermine the operation of an essential feature of the Torrens system, the Supreme Court has showed an increased tendency to visit seriously unsuccessful caveators with (formerly) orders for solicitor/client and (now) orders for indemnity costs garnished at times with reproofs such as that: there was “an abject failure to support the caveats” (*Maher v Commonwealth Bank of Australia* [2008] VSCA 122 at [41], quoting the decision at first instance); the conduct in lodging the caveat was “a high-handed presumption” (*Marchesi v Vasiliou* [2009] VSC 213 at [106]).

70. I distill the following following factors from Supreme Court and County Court cases from 2017 where indemnity costs were awarded –
- (a) The caveator’s case was very weak and she had been legally advised that she had no caveatable interest: *Sekhon & Anor v Chandyoke and Ors* [2018] VSC 327;
 - (b) The caveat was being used as a bargaining chip: *Alliance Developments Pty Ltd v Arbab & Anor* [2019] VSC 832 at [73];
 - (c) The caveat was lodged for a collateral purpose such as to recover extraneous funds, eg for wrongful diversion of monies and work from a partnership: *Sekhon & Anor v Chandyoke and Ors* [2018] VSC 327; *Hooi & Anor v Lim & Anor* [2017] VCC 949;
 - (d) The fact that the other party had asked the caveator in writing to identify an arguable caveatable interest, without proper response, and warned that indemnity costs would be sought: *Tawafi v Weil* [2017] VSC 643; *Kuipers v Harrington (No. 2)* [2019] VSC 190. See further paragraph 71;
 - (e) Unjustified allegations of fraud: *Hooi & Anor v Lim & Anor* [2017] VCC 949;
 - (f) Where the caveator was also a shareholder in the registered proprietor, it would be unfair to the other shareholders if the registered proprietor was left to bear the difference between an indemnity costs order and a standard costs order: *Alliance Developments Pty Ltd v Arbab & Anor* [2019] VSC 832 at [73];
 - (g) And, as in any other case, an effective Calderbank Offer.
71. An instructive example on how a solicitor can prepare the ground for obtaining indemnity costs is *GW & R Mould Pty Ltd v Mould & Anor; Wakefield v Mould & Anor* [2016] VSC 330. The facts were –

- Caveats claiming in substance constructive trusts had been lodged over three properties owned either by a company or an estate, the settlements of sales of which were imminent, the proceeds of sale being needed to pay considerable debts.
- The solicitor for the company (who also happened to be the second plaintiff) wrote: stating that urgent application would be made to remove the caveats over its properties; stating that the circumstances were substantially similar to those in a previous proceeding in which a costs order had been made against the caveator; as to the need to pay debts; and requesting that the caveats be withdrawn by a particular date, and if so the company would undertake to hold the net proceeds of sale in trust pending the determination of a separate proceeding by the caveator, other than to pay proper expenses, failing which an application for removal would be made and the letter would be produced on the issue of costs.

Indemnity costs were awarded on the ground that given the outcome of the previous proceeding the caveator was aware of the likely outcome of these proceedings and acted unreasonably in refusing to remove the caveats. By implication the letter assisted.

Q. Costs orders against lawyers related to caveats.

72. Increasingly costs have been awarded against solicitors, eg *Gatto Corporate Solutions Pty Ltd v Mountney* [2016] VSC 752 and *Sekhon v Chandoyke* [2018] VSC 327. The most recent cases are *Alliance Developments Pty Ltd v Arbab & Anor* [2019] VSC 832 and *Alliance Developments Pty Ltd v Arbab & Ors (No 2)* [2020] VSC 37 in which groundless caveats were removed from two titles. Garde J held that the plaintiff's costs were payable on an indemnity basis jointly and severally by the caveator and the solicitor. Assuming the standard laid down by Dixon J. in *Briginshaw v Briginshaw* (1938) 60 CLR 336 applied, his Honour was satisfied to a comfortable level of satisfaction on the balance of probabilities that the solicitor had failed to act with reasonable competence, and that she was negligent and acted in breach of her duties to the Court, on the following grounds stated in the first proceeding (stated more briefly in the second proceeding):
- (a) the drafting of the caveats;
 - (b) her response to a s. 89A application;
 - (c) misrepresentations to the Registrar of Titles in the s. 89A application;
 - (d) the refusal to withdraw the caveats to avoid the proceeding;

- (e) the failure to acknowledge that the caveats were unsustainable; and
- (f) the failure to brief counsel with the relevant facts, or if in doubt, obtain counsel's opinion on whether the caveats were maintainable. [88]-[90]

R. Claim for compensation for lodging caveat without reasonable cause.

73. Section 118 provides that -

“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”.

The foundational modern Victorian case is the judgment of Hayne J in *Commonwealth Bank of Australia v Baranyay* [1993] 1 VR 589 which established: that the plaintiff carried the onus of showing that the caveator acted without reasonable cause and that this caused damage; that it was insufficient for the plaintiff to show that there had been no caveatable interest but that often determinative was whether the caveator held an honest belief based on reasonable grounds that the caveator had such an interest.

74. High Court cases on caveats are rare. But in the December 2019 in *Boensch v Pascoe* [2019] HCA 49 the court considered the equivalent NSW section, not materially different from s. 118, which relevantly read that any person who, "without reasonable cause" lodges or after request refuses to withdraw a caveat is liable to pay compensation to any person who sustains pecuniary loss attributable to the lodging of the caveat, or the refusal or failure to withdraw it (Real Property Act 1900 s. 74P(1)). The court held (drawn from the judgment of the plurality - Bell, Nettle, Gordon and Edelman JJ.) –
- (a) The test for liability under s. 74P(1) was established in *Beca Developments Pty Ltd v Idameneo (No 92) Pty Ltd* (1990) 21 NSWLR 459 at which time the statutory words were “wrongfully without reasonable cause”. This test was that the claimant for compensation must establish that the caveator had neither a caveatable interest nor an honest belief based on reasonable grounds that the caveator had a caveatable interest (and thus "without reasonable cause"), and that the caveator acted deliberately, knowing that he or she had no interest in the land (and thus "wrongfully"). Notwithstanding the repeal of “wrongfully”

this remained the correct test. [110], [111] (Similarly Kiefel CJ, Gageler and Keane JJ at [12]).

- (b) The plurality noted that the *Beca Developments* test had been substantially followed by intermediate courts in other States including in *Edmonds v Donovan* [2005] VSCA 27; (2005) 12 VR 513 at 548 per Phillips JA (Winneke P and Charles JA agreeing at 516 [2], [3]). The Court however left open whether, if that test is not satisfied, a person may still be liable under s. 74P(1) by reason of acting with an ulterior motive or where the only interest supporting a caveat is *de minimis* in terms of legal content or economic value [114].
- (c) Even if, as the plurality had held, there was a mere technical deficiency in the statement of the interest claimed this did not of itself demonstrate the absence of a "reasonable cause" to lodge and not withdraw the caveat, at least where the caveat did not overstate the interest sought to be protected [108].

- 75. In *KB Corporate Pty Ltd v Sayfe* [2017] VSC 623 Mukhtar AsJ. stated that even an honest belief may not avail the caveator if the caveator was actuated not by the protection of the caveator's interest but by an ulterior motive (also raised by the High Court – (b) of the previous paragraph). Further, that the fact that the caveator obtained legal advice to lodge the caveat may be of considerable significance in determining lack of reasonable cause, but the content and accuracy of the legal advice must be evaluated with all other relevant circumstances. And further, that where a solicitor had no reasonable basis for advising the caveators to caveat, the caveators had no reasonable grounds for their belief that they were entitled to lodge a caveat.
- 76. Successful claims are rare. But two are *RDN Developments Pty Ltd v Shtrambrandt* [2011] VSC 130, in which compensation was awarded based on a fall in the property market, and *KB Corporate* in which the plaintiff claimed that the caveats delayed a purchase of another property. It succeeded in obtaining compensation for loss due to a lender temporarily withholding funds to it but did not prove any loss relating to completion of the contract of sale.
- 77. In *Lanciana v Alderuccio* [2019] VSC 198 a lodging solicitor or firm of solicitors was not held to be a "person" within the meaning of s. 118. The contrary result would have exposed solicitors to great liability.

S. Injunctions against caveating and similar.

78. Particularly where there the caveator has a history of making groundless claims the court may order the Registrar not register any caveat without its leave or further order (*Westpac Banking Corporation v Chilver* [2008] VSC 587), or any caveat by any person, other than a purchaser from the successful plaintiff, without the leave of the Court for a certain period (*Lettieri v Gajic* [2008] VSC 378) or may enjoin the lodging of further caveats (*Marchesi v Vasiliou* [2009] VSC 213; *Wells v Rouse & Ors* [2015] VSC 533).

79. A Mr Annesley features in several cases. So in *Andrews Family Holdings Pty Ltd v Yellow Tractor Pty Ltd* [2017] VSC 682 the court enjoined him from lodging further caveats in respect of the land without leave. This case merited an injunction because he had already lodged two caveats and did not foreswear lodging more.

80. However, undaunted, on the day after this decision he caveated in his own name claiming a purchaser's lien. This led to some criticism of the Titles Office by Ginnane J. and to Mr Annesley being permanently enjoined from lodging caveats in respect of the property, with indemnity costs, and to the Registrar being enjoined to forthwith reject and not record any caveat by Annesley over the property: [2017] VSC 695.

81. Mr Annesley did better in 2019 in *R.G. Murch Nominees Pty Ltd v Paul David Annesley & Ors* [2019] VSC 107. Sloss J. held that as the application did not arise from previous caveat lodgment over the land, or from a current threat to lodge, but from Mr Annesley's history, this did not suffice it enjoin him.

82. In *Lendlease Communities (Australia) Ltd v Juric & Another* [2018] VSC 107 T Forrest J. enjoined a caveator with a long-standing grudge against the plaintiff from lodging any further caveat over the land, over any titles derived from its titles, and over any other land of the plaintiff, for 5 years.

83. In *Kuipers v Harrington (No 2)* [2019] VSC 190 Derham AsJ enjoined the caveator from lodging further caveats because of his profound disregard of the absence of any underlying basis for a previous caveat and his displaying that he was ready, willing and able to continue to disrupt any sale.

T. Conclusion.

84. If acting for a prospective caveator:
- (a) Do not lodge a caveat claiming what could not be an interest in land.
 - (b) Independently assess whether the caveat should be lodged. Exhibit a high level of candour and preparation (in terms of gathering evidence to support the existence of the interests claimed). Seek documentary corroboration, eg if the client alleges that expenditure occurred or that a relevant agreement existed. However, sometimes, for example where a constructive trust has arguably arisen in domestic circumstances, and so there is as in *Cressy v Johnson (No. 3)* [2009] VSC 52 a dearth of documentary evidence, it can be difficult to determine which side of the line the case falls on. Given the value of a caveat it may be best to caveat but be prepared to assess any new evidence carefully and to seek instructions to withdraw the caveat or if possible amend it.
 - (c) If the other solicitor makes a sensible offer, advise your client to accept it. In particular if the caveat is blocking a sale, weigh carefully whether your client's claim is going to be reasonably satisfied by receiving part or all of the net proceeds of sale (the caveat having being removed and the net proceeds of sale being held in a joint bank account opened by the solicitors pending determination of the claim).
85. If acting for a registered proprietor:
- (a) Send a letter as done by the solicitor in *GW & R Mould Pty Ltd v Mould & Anor; Wakefield v Mould & Anor* [2016] VSC 330. Say that indemnity costs will be sought. The letter can be in Calderbank form.
 - (b) Apply under s. 90(3). Be open to applying to the County Court. Formerly the application would almost always have been to the Supreme Court but now the County Court has unlimited jurisdiction.

- (c) If the caveat looks like it is going to survive consider seeking an undertaking as to damages or conditions as to issue of proceedings and/or requiring payment of monies. Investigate the ability of the caveator to satisfy the undertaking as to damages or make payment.
- (d) Seek costs. In extreme cases consider applying for costs against the other solicitor.
- (e) If necessary apply for compensation under s. 118.
- (f) If necessary seek an injunction against future caveats.

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