WHETHER A CAVEAT CAN BE LODGED TO PROTECT THE INTEREST OF A BENEFICIARY IN A UNIT TRUST HAS ATTRACTED DIFFERING JUDICIAL CONCLUSIONS. THERE IS NO FIXED ANSWER: THE TERMS OF THE TRUST DEED ARE CRUCIAL. BY PHILIP BARTON

LAND PROTECTION

Under s89 of the *Transfer of Land Act* 1958 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.

A caveatable interest may arise under a trust. Of commonly occurring trusts, a beneficiary under a simple declaration of trust in writing by the registered proprietor of land, or under a constructive trust,[1] has a caveatable interest, but not a beneficiary under a discretionary trust.[2]

This article considers another common type of trust, the unit trust. Whether the interest of a beneficiary in a unit trust is caveatable has recently been analysed by Warren CJ in *Schmidt v 28 Myola Street Pty Ltd* (*Schmidt*).[3] That decision built on Victorian authority over two decades, but that authority is unexpectedly tangled. This article considers Victorian cases over those decades and suggests what the current Victorian law is.

The foundation case

The most influential Victorian case is *Costa & Duppe Properties Pty Ltd v Duppe & Ors* (*Duppe*).[4] But what precisely it decided is controversial.

The plaintiff owned three properties legally or beneficially as trustee of a unit trust. One of two equal unit-holders lodged caveats over each property, claiming "an equitable estate or interest in fee simple" on grounds in substance based on the trust deed. The deed:

- defined "unit" as an undivided part or share in the trust fund having the characteristics provided in the deed: cl 1;
- said that the "beneficial interest in the Trust Fund . . . shall be vested in the Unit Holders . . . ": cl 7(a);
- said that "Each Unit shall entitle the registered holder thereof together with the registered holders of all other Units to the beneficial interest in the Trust Fund as an entirety but subject thereto shall not entitle a Unit Holder to any particular . . . investment comprised in the Trust Fund or any part thereof and no Unit Holder shall be entitled to the transfer to him of any property comprised in the Trust Fund other than in accordance with the provisions hereinafter contained": cl 8(a).

The trustee applied to remove the caveats on the ground that the caveator had no estate or interest in land within the meaning of s89(1). Brooking J said (at [92]), in words later divergently interpreted:

"No argument has been addressed to the nature of the estate or interest claimed in the caveats or the precise grounds of claim set out in them, and the issue presented for my determination is, not whether the three caveats claim an estate or interest in land on a ground that may be supported, but whether, regardless of the nature of the estate or interest claimed and the precise ground set out in the caveats, the caveator has an estate or interest in the three pieces of land. The answer to this question, and so the outcome of the application in so far as it is contested, has been treated by the parties as depending on whether a unit-holder has, by virtue of the deed constituting this unit trust, a proprietary interest in land forming part of the trust fund. Accordingly it is with that question, and that question alone, that I am concerned".

His Honour found (at [96]) the conclusion inescapable that the unit-holders had a proprietary interest in all the property subject to the trust deed, this interest being recognised by cl 7(a); that accordingly there must be a proprietary interest in each of the assets of which the entirety was composed; cls 7(a) and 8(a) only recognised what the effect of the trust deed would be in the absence of express provision; and this proprietary interest existed notwithstanding the possible duration of the trust, the extremely wide powers of management given to the trustee and the possibility that

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the trust might lose its capital through unprofitable trading or speculation. He concluded (at [96]):

"Duppe Holdings . . . had, by virtue of being a unit-holder, a proprietary estate or interest in each piece of land . . . It follows from the way in which the parties have chosen to fight this case that the application must be dismissed . . . ". Accordingly, the caveats stood.

Duppe applied to support caveats

In 1998, in *McCarthy v Wheeler & Wongan Hotels Pty Ltd* (*McCarthy*),[5] a unit-holder, desirous of setting aside transfers of his units executed by him, caveated over trust land to protect his position. The transfers were declared null and void and, relying on *Duppe*, Hedigan J said (at [37]), without quoting the trust deed, that the unit-holder had an interest capable of being protected by a caveat. In 2006, in *S & D International Pty Ltd (in liq) v Malhotra* (*Malhotra*),[6] an amended caveat by a unit-holder claimed a half interest in trust property. Gillard J said (at [22]) a "holder of a unit in a unit trust has an equitable interest in all the property of the trust, subject, of course, to the terms of the trust deed. See *Read v Commonwealth* [(1988) 167 CLR 57 at 61-2] and *Costa* and *Duppe*".

The caveator succeeded, although under the deed the trustee had absolute powers and discretion to sell property and an indemnity, and notwithstanding its obligation to wind up the trust and realise property in part to satisfy that indemnity.

Caveats removed after *Duppe*

Not referred to in either *McCarthy* or *Malhotra* was the 1995 decision of O'Bryan J in *Evindon Pty Ltd v Ambassax Pty Ltd & Anor*[7] (*Evindon*), which in effect confined *Duppe* to its own facts.

A caveat claiming an equitable interest in fee simple as unit holder as to five equal undivided one-sixtieth parts or shares was lodged over trust land. Counsel relied on *Duppe*. However, O'Bryan J interpreted *Duppe* as only deciding that a unit-holder had by virtue of the trust deed a proprietary interest in land forming part of the trust fund, not whether the unit-holder had a sufficient interest in the land to support the caveat,[8] saying that Brooking J had not been asked to decide this.[9] And, although stating that the facts in *Duppe* were essentially the same as those before him,[10] his Honour removed the caveat on the ground that it was inconsistent with the trustee's very wide powers and discretions under the trust deed in dealing with trust property, such as to raise money on mortgage. He said:

"The legal relationship between the trustee, Evindon, and a unit-holder does not confer upon the unit-holder a right to frustrate or curtail the exercise of the very wide powers of management conferred on the trustee by the trust deed, in my opinion. A unit-holder's proprietary interest in each asset of the trust does not confer a caveatable estate or interest . . . To uphold the argument of the caveator may result in the trust losing the whole or part of its capital through a mortgagee's sale".[11]

O'Bryan J's treatment of *Duppe* has received some support. In the stay application to the Court of Appeal in *Evindon*, Phillips JA said there was "much force in the comments made by O'Bryan J about the decision in *Costa* and the very precise terms in which it appears that that judgment was couched".[12] Then in 2005 Hansen J noted that the decision in *Evindon* "has stood in this state since 1995",[13] but found it unnecessary to consider its correctness or to finally decide whether the unit-holder had a caveatable interest, removing the caveat on other grounds. Finally, in 2006 in *Schmidt*[14] (discussed below), Warren CJ followed *Evindon*'s confinement of *Duppe* but nonetheless upheld the caveat.

Even without the invocation of *Evindon* a caveator may fail. Thus in *Fenedisto Pty Ltd & Anor v Brott & Ors* (*Fenedisto*),[15] a solicitor's client charged her real estate in his favour. She held units in a trust. The solicitor caveated over the land in the trust. While noting that the caveator relied on *Duppe*, Hargrave J removed the caveat first because the client had ceased to be a unit-holder. However, he added that there was no evidence that the client had authority to exercise the trustee's power to charge its real estate; her only interest was as a holder of well under 1 per cent of the units and under the trust deed she did not have the authority, as a unit-holder, to charge the property of the trust.

Light cast by the High Court on *Duppe*

In 2005, in *CPT Custodian Pty Ltd v Commissioner of State Revenue* (*CPT Custodian*)[16] the High Court decided that a particular unit-holder was not liable to land tax in respect of land owned by the trustees because it was not entitled to any land for any estate of freehold in possession. The joint judgment is relevant to Victorian caveat law for two reasons. First, it stressed that, absent an applicable statutory definition, the expression "unit trust" did not have a fixed normative meaning, and that "[a]ll depends . . . upon the terms of the particular trust" (at [15]). Second, against this background it treated *Duppe* thus:

"To a significant degree the proposition advanced by the Commissioner . . . was treated as the hallmark of any unit trust. The alleged hallmark is that . . . unit holders do have beneficial interests in the assets of the trust . . .

A UNIT-HOLDER DOES NOT AUTOMATICALLY HAVE A CAVEATABLE INTEREST. IT DEPENDS ON THE CONSTRUCTION OF THE TRUST DEED.

"Similar reasoning is manifest in what was said in *Duppe* concerning the interest of each unit holder in the three parcels of land comprising the assets of the unit trust considered in that case. That trust deed (in cll 7, 8) contained provisions in similar form to cl 3.2 of the Deed considered above. The issue in *Duppe* was whether each unit holder had an estate or interest in land within the meaning of s89(1) of the *Transfer of Land Act* 1958 (Vic), which was necessary to support a caveat. Brooking J, in answering that question in the affirmative, said:

'If there is a proprietary interest in the entirety, *there must be* a proprietary interest in each of the assets of which the entirety is composed'. (*Emphasis added.*) . . .

"It is unnecessary for the instant appeals to determine whether *Duppe* correctly decided the requirements in Victoria for a caveatable interest. But what was said there provides . . . no authority of the general significance assumed for it by the submissions here by the Commissioner" (at [29]-[32]).

Schmidt

The most recent case is *Schmidt*.[17] The caveator claimed to be a unit-holder in two trusts governed by deeds said by Warren CJ to be "in some respects, similar to that in *Duppe*".[18] Her Honour's reasoning was that the words in s89(1) were plain and cast so as to encompass a range of circumstances that may arise in the context of commercial transactions concerned with land. Thus the categories were not closed by the imposition of a narrow concept of traditional "caveatability" – in essence, a caveat is a quasi-injunction to preserve the status quo.[19]

Her Honour accepted the *Evindon* interpretation that *Duppe* did not stand for the proposition that a unit-holder held a caveatable interest, but said that nonetheless this proposition might ultimately be reached.[20]

Although reaching a different ultimate conclusion to that in *Evindon*, her Honour did not disagree with it. She rather said that it was unclear whether the decision in *Evindon* was founded on the exercise of judicial discretion under s90(3), which provides that on an application for removal of a caveat the court may make such order as it thinks fit, or on the precise wording of the trust deed.[21]

Having noted that depending on the terms of the trust deed, a unit-holder may possess an interest sufficient to support a caveat,[22] her Honour found it to be arguable that the caveator, should they prove to be party to either deed, had a beneficial interest in the trust property.[23] She relied particularly on two clauses, one of which was similar to cl 7(a) in *Duppe*, and the other of which provided:

" . . . the Trustee shall stand possessed of the Trust Fund . . . for the benefit of the . . . Unit Holders in proportion to the number of units respectively held by them . . . the Unit Holders are and shall be beneficially entitled to all assets of whatever nature of the Trust Fund in accordance with the respective rights of each class of unit in proportion to the number of units respectively held by them of each unit".

The caveat was upheld.

Conclusion

The following conclusions are proposed from this tangle:

1. The better interpretation appears to be that, contrary to *Evindon* and *Schmidt*, Brooking J not only determined in *Duppe* that the caveator had a proprietary interest in land, but also that the unit-holder had a sufficient interest in the land to support the caveat. This is because a proprietary interest supports a caveat. This wider interpretation appears supported by *McCarthy* and *Malhotra*, but most importantly by the statement in *CPT Custodian* that:

   "The issue in *Duppe* was whether each unit holder had an estate or interest in land within the meaning of s89(1) . . . which was necessary to support a caveat. Brooking J, in answering that question in the affirmative, said . . . ".
2. A unit-holder does not automatically have a caveatable interest. It depends on the construction of the trust deed.
3. The following deed provisions support, or at least do not prevent, a caveatable interest arising:
   (a) the clauses quoted above from *Duppe* and *Schmidt*;
   (b) extremely wide powers of management: *Duppe*, *Malhotra*; and
   (c) the trustee's indemnity and obligation to wind up the trust: *Malhotra*.

Evindon is expressly contrary to (a), at least as to the proposition that the clauses quoted from *Duppe* support a caveatable interest, to (b) and impliedly to (c). Also possibly contrary to some of the foregoing is *Fenedisto*; however, this is uncertain because Hargrave J did not disclose the terms of the deed. ●

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The numbers in square brackets in the text refer to the paragraph numbers in the judgment.

1. For example, *Riverview Projects Pty Ltd v Elleray* [2007] VSC 150.
2. *Walter v Registrar of Titles & Anor* [2003] VSCA 122.
3. (2006) 14 VR 447. See also DKL Raphael, "Caveats and unit trusts" (2007) 81 *ALJ* 881.
4. [1986] VR 90.
5. [1998] VSC 67.
6. [2006] VSC 280.
7. (1995) V Conv R 54-534.
8. At 66,357.
9. At 66,358, accordingly stating that the Victorian Reports headnote was "somewhat misleading".
10. At 66,357.
11. At 66,358.
12. *Ambasax Pty Ltd v Evindon Pty Ltd* (unreported, 10 November 1995), quoted in *Binningup Nominees Pty Ltd v Brogue Tableau Pty Ltd* [2004] WASC 14 at [27].
13. *Floriston Nominees Pty Ltd v Kingsley Brown Finance Pty Ltd* [2005] VSC 467 at [22].
14. Note 3 above.
15. [2005] VSC 459.
16. (2005) 224 CLR 98.
17. Note 3 above.
18. Note 3 above, at 458.
19. Note 3 above, at 453.
20. Note 3 above, at 455-456.
21. Note 3 above, at 456.
22. Note 3 above, at 457.
23. Note 3 above, at 458.