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The Caveat Conundrum: Invoking protection without incurring risk

Introduction

Family law practitioners regularly deploy caveats as a protective tool. A caveat operates as a statutory injunction, preventing the registration on title of dealings contrary to the asserted interest and affording the caveator an opportunity to invoke judicial intervention to preserve their interest.

In so maintaining the status quo, caveats are an affordable, effective means by which parties can prevent the registered title holder from engaging in unauthorised dealings inconsistent with the caveator's right or interest in the land.[1] This is especially important in family law because land may be registered in the name of one party only, or to a corporate entity. Caveats are therefore powerful instruments in the family lawyer's toolkit.

However, practitioners are increasingly mindful of potential pitfalls, both to clients and the practitioner themselves. For clients, being on the receiving end of a court application to lift an inopportune caveat may occasion cost in defending the suit as well as costs orders if unsuccessful. There is also the risk that compensation for loss and damage will be awarded to a successful applicant.[2] For practitioners, personal costs orders and disciplinary action looms if caveats are found to lack proper basis.[3]

Distilled, the take-home message of this paper is that practitioners ought give careful consideration to the grounds on which a caveat is asserted by their client, in light not just of the client's instructions but also in view of any supporting documentation the client may have at hand. Then, when drafting court documents for lodgment in the family law courts, the factual matrix that underpins the claimed right or interest ought be identifiable in the client's affidavit material.

[1] Mary-Anne Hughson, Marcia Neave and Pamela O'Connor, "Reflections on the Mirror of Title: Resolving the Conflict between Purchasers and Prior Interest Holders" (1997) 21 *Melbourne University Law Review* 460, 465.
[2] *Transfer of Land Act 1958* (Vic) s 118.
[3] *Pearl Lingerie Australia Pty Ltd v TGY Pty Ltd* [2012] VSC 451.

Turning then to the body of the paper, I first describe general principles relating to the lodgment of caveats, including practical advice about how to frame the grounds of claim and prohibition. I then consider how practitioners might go about compelling the lifting of an adverse caveat by administrative means or litigation. The two aspects of the paper – lodgment and lifting – are summarized in the flow chart accompanying the paper.

Lodging Caveats Wisely – The who, what, why and how

Who should lodge?

Practitioners will commonly lodge caveats on behalf of their clients. This is orthodox and acceptable practice, provided the practitioner first satisfies themselves (and advises the client) that the caveat has a proper factual and legal basis.

Detailed instructions should be taken from the client and any supporting documentation reviewed, so as to enable the practitioner to exercise their independent forensic judgement in ascertaining if the client has an interest in the subject land. This should be done at the time the caveat is prepared and prior to lodgment.[4]

Be aware that encouraging or facilitating a client to lodge a "strategic" caveat can sheet home to the practitioner, even if the practitioner (or their firm) is not the lodging party. In *Pearl Lingerie Australia,* the applicant invited the court to infer, based on similarity of wording, that one of the impugned caveats had been prepared by the solicitor and supplied to the client for lodging. The court readily accepted the "*reasonable*" inference, in turn bolstering the rationale for the costs awarded against the solicitor and the disciplinary referral to the Victorian Legal Services Commissioner made by the trial judge.[5]

It was abundantly plain in that case that the caveats were intended as "*bargaining chips*", which was inappropriate.[6] Moreover, aggravating the

[4] Ibid at [17].
[5] ibid at [18].
[6] Ibid at [27].

impropriety of the practitioner's conduct was the fact that they had had prior notice that the caveats lacked a proper basis because of an earlier adverse judgment against the caveator. Reassuringly, this suggests that personal consequences of infelicitous caveating can be avoided if a practitioner makes a bona fide effort to identify a proper basis for their client's caveat, even if ultimately a court decides there is no such interest.

What interests are caveatable and which are not?

A caveat should be predicated on grounds known to law or equity. As the focus of this paper is the caveat lodged on behalf of a spouse who is not a registered proprietor, equitable trusts are the natural fit.

By way of indication only, other viable bases for a caveat include a vendor's lien, a purchaser's lien and an equitable mortgage.[7] Of potential relevance to family law practice is also the caveatable interest of a unit holder in a unit trust.[8]

If adopting the "implied, resulting or constructive trust" ground, it is not necessary to specify on the face of the caveat which of the equitable trusts, in particular, is claimed (and indeed, it may be that there are viable arguments for more than one such trust). What is necessary is the exercise of the practitioner's forensic skill to identify at least one such ground as arguable on the facts.

Other resources offer more detailed guidance on the origination and operation of equitable (as opposed to express) trusts. However, by way of brief overview:

- Express trusts are typically established by deliberate act (such as the execution of a trust deed). However, they can also be created by statute (such as when a person dies intestate).[9]

[7] Family law practitioners will also be familiar with the caveat securing an equitable charge arising under contract, whereby the contracting parties are agreed that a caveat may be placed on title pending satisfaction of contractually-agreed payment for services or in repayment of a loan.
[8] See, eg, *Costa & Duppe Properties Pty Ltd v Duppe* [1986] VR 90.
[9] See, eg, trust for sale of intestate's estate at s 70H of the *Administration and Probate Act 1958* (Vic).

- Implied trusts arise by operation of law based on the circumstances of the case. Resulting and constructive trusts are both forms of implied trust.

    - A resulting trust arises where legal and beneficial ownership do not align because the settlor has conferred legal title on another whilst retaining for themselves a complete or partial beneficial entitlement. In this way, a resulting trust gives recognition to the parties' presumed intentions at the time of transfer, albeit they are not reflected in the legal title holding. Resulting trusts may occur where a person contributes to the purchase price of a property but is not registered on title, or where a property is transferred into the name of another for nil consideration. Such situations generate a presumption that a trust was established (unless the presumption of advancement applies, whereupon the dealing will be presumed a gift). These presumptions are rebuttable on the specific facts of a case. *Calverley v Green* (1984) 155 CLR 242 is the leading authority on resulting trusts. For an analysis of resulting trusts in a family law setting, see *Gray & Gray* (2005) FLC 93-228.

    - Constructive trusts arise independently of actual or presumed intention. Indeed, a constructive trust can occur even in the face of express contrary intention.[10] Such trusts operate to ameliorate unconscionable conduct by the title holder vis-à-vis the beneficiary of the trust: "*a constructive trust may be imposed … in circumstances where a person could not in good conscience retain for [him or herself] a benefit, or the proceeds of a benefit, which he has appropriated for to himself in breach of his contractual or other legal or equitable obligations to another*".[11] Unconscionable conduct may include actions contrary to a common intention.[12] *Baumgartner v Baumgartner* (1987) 164 CLR

[10] See, eg, *Koh v Chan* (1997) 139 FLR 410, 421.
[11] *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 125 per Deane J.
[12] *Olgivie v Ryan* [1976] 2 NSWLR 504 per Holland J: "*an appropriate constructive trust will be declared in equity to defeat a species of fraud, namely, that in which a defendant seeks to make an unconscionable use of his legal title by asserting it to defeat a beneficial interest in the property which he … has agreed*

> 137 is the canonical authority on constructive trusts arising between spouses. Although not given effect to until such time as a court determines the existence of the trust, a constructive trust is said to arise contemporaneously with the underpinning circumstances.

Equally important to be mindful of are rights and interests that are not capable of sustaining a caveat.

For example, it is a well-established proposition that a property application under s 79 or s 90SM of the *Family Law Act 1975* (Cth) (**Family Law Act**) does not give rise to an equitable or other interest capable of being caveated. The Family Law Act confers a bare statutory right to make a claim for property adjustment. It does not, in and of itself, generate an interest in property, unless and until the court adjusts the property holdings of the parties to create such interests.[13] As explained by the High Court in *Dougherty & Dougherty*, orders under s 79 (and the de facto equivalent) are made "*not in satisfaction of a cause of action but in the exercise of a discretion*".[14]

Likewise, the following cannot, without more, found a caveat:

- an agreement to share profits on resale of land;[15]
- judgment debts;
- an order for security for costs;
- being a director or shareholder of a corporation that is the legal titleholder to property; and
- being a beneficiary of a discretionary trust.

to or promised; or which it was the common intention of the parties that the plaintiff should have, in return for benefits to be provided by, and in fact obtained from, the plaintiff in connection with their joint use or occupation of the property. The common ingredient in both categories is an unconscientious use of the legal title."

[13] *Stevens & Stevens* (1991) FLC 92-250 at 78-682; *Praxoulis & Praxoulis* (1995) FLC 92-621 at [19] to [21]; *Goldstraw v Goldstraw* [2002] VSC 2002 at [27]; *Bell v Graham* [2000] VSC 142 at [17] – [20].

[14] *Dougherty & Dougherty* (1987) 163 CLR 278, 293 per Brennan J.

[15] *Simons v David Benge Motors Pty Ltd* [1974] VR 585.

Why caveat (and what are the alternatives)?

Put simply, caveats are an accessible and cost-effective means of protecting interests, provided of course that the requisite interest subsists in the land. As explained above, proper practice calls for the identification of a specific equitable (or other appropriate) interest in the subject land before a practitioner lodges a caveat, or recommends lodgment of same.

If your client wishes to prevent dealings with land in which they do not have an apparent interest (aside from what they might receive as and by way of property adjustment under the Family Law Act), then an alternative approach should be pursued.

One scenario where a caveat may not be sustainable but it is nonetheless desirable to prevent dealings with land may be where children are born of a short relationship. If the parties lived in rental accommodation (or perhaps never even resided in the same premises) and also kept their finances separate (such that no *Baumgartner* constructive trust arises), the party with primary care of the child may yet obtain a property adjustment derived from (or associated with) the other spouse's real property on the basis of parenting and homemaker contributions as well as s 75(2) factors. In those circumstances, efforts to preserve property may well be fruitful for the ultimate efficacy of the claim.

Injunctions can be viable alternatives to caveats. They are typically more costly and time-consuming to obtain and therefore a caveat is to be preferred as the pragmatic course, where appropriate.[16] However, if a caveat is not accessible to your client, consider seeking a suitably-drafted injunction as and by way of interim order in the client's Initiating Application or Response (as the case may be).

The injunction would be worded so as to restrain the registered proprietor from transacting with the identified subject land pending further order or unless with the written consent of the other party.[17] It may also be appropriate to restrain

[16] Mary-Anne Hughson, Marcia Neave and Pamela O'Connor, "Reflections on the Mirror of Title: Resolving the Conflict between Purchasers and Prior Interest Holders" (1997) 21 *Melbourne University Law Review* 460, 465.
[17] If an injunction is obtained ex parte, security for costs may be required.

the Registrar of Titles from registering adverse dealings (and if so, the Registrar must be joined as a party to the proceedings).

Consider, too, that if a spouse proprietor divests themselves of real property while on notice of pending or active family law proceedings, this may constitute a transaction to defeat a claim under s 106B of the Family Law Act.[18]

How to properly formulate a caveat

When caveats are lodged with Land Use Victoria, either via PEXA or on paper, three key pieces of information must be identified. The first is the statement of claim, which comprises both the overarching claim category as well as the particular grounds of claim within the designated claim category. Second is the asserted estate or interest; third, the nature of the prohibition sought. Land Use Victoria publishes a useful guide for practitioners entitled Grounds of Claim for Caveats.[19]

As explained above, for family law purposes, the most common ground will be the "Trust/Settlement" category, and specifically "implied, resulting or constructive trust" as the statement of claim. The asserted estate will likely be a freehold estate.

In framing the prohibition, an absolute prohibition will be common, but perhaps may not be necessary. A lesser prohibition (such "transfer of land" or "unless I/we consent in writing") may be sufficient for the client's purposes, and if so, should be adopted. If an excessive prohibition is applied, this may render the caveat unsupportable overall and expose the client (and practitioner) to adverse cost consequences if litigation ensues.

It remains an open question as to whether a defective caveat can be amended, or whether it must be withdrawn and re-lodged in the appropriate form.[20]

Lifting a Contested Caveat

[18] Consider also the applicability of s 85A.
[19] Accessible at https://www.propertyandlandtitles.vic.gov.au/forms-guides-and-fees/transfer-of-land/caveat-forms-2.
[20] See, eg, *Midwarren Estates Pty Ltd v Retek and Stivic* [1975] VR 575.

Putting to one side a negotiated resolution, how does one go about compelling the lifting of a caveat where the caveator does not consent to this course? There are two primary options: making administrative application to the Registrar of Titles under s 89A of the *Transfer of Land Act 1958* (Vic) (**Transfer of Land Act**) and issuing proceedings under s 90(3) of said Act.[21]

Section 89A application to the Registrar

An application to the Registrar to remove a caveat must be made in accordance with the requirements of s 89A. Whilst "*any person*" may make the application (including the client in their own right), the application must be supported by a certificate of a legal practitioner stating that, in the practitioner's opinion, the caveator does not have the estate or interest claimed by them.

Upon receiving the application, the Registrar will give notice to the caveator that their asserted estate or interest is contested. The caveator then has a minimum of 30 days (which timeframe is to be specified in the Registrar's notice) to either withdraw their caveat or reinforce it by issuing proceedings (or otherwise demonstrating that such proceedings are already on foot) to substantiate their claim in relation to the land. Absent either response, the caveat will lapse at the expiration of the notice period.

From a practical perspective, where family law proceedings are already on foot or are contemplated, a s 89A application may not be the most effective course for a party seeking that the caveat be lifted. The mere existence of Family Law Act proceedings will suffice to preclude a s 89A application, even if there is no particularized equitable claim (and there usually will not be, for reasons articulated below). The Registrar will not look behind the veil of proceedings to ascertain if the caveat is properly lodged given the circumstances of the case.

A s 90(3) application may be particularly appropriate if time is of the essence, such as where the caveated property has been sold on commercial terms to a third party and the caveat needs to be urgently removed so that the sale can conclude in a timely manner. A s 89A application is not guaranteed to achieve

[21] Also, under s 90(1), should a party proceed to lodge for registration a contrary title dealing, the Registrar will give notice to the caveator of the intended dealing. The caveator must then take steps to assert their priority lest the caveat lapse within 30 days of the notice being given.

the desired outcome if the caveator intervenes with litigation in relation to the land.

Section 90(3) application to a court

A. Legal principles

Section 90(3) of the Transfer of Land Act provides:

> *Any person who is adversely affected by any such caveat may bring proceedings in the Court against the caveator for the removal of the caveat and the Court may make such order as the Court thinks fit.*

In *Piroshenko v Grojsman* (2010) 27 VR 489 at 491, Warren CJ sets out a two-stage test for the exercise of the s 90(3) discretion:

> *This two-stage approach requires the caveator to establish that there is a serious question to be tried that they have the estate or interest which they claim in the land in question, and having done so, to establish that the balance of convenience favours the maintenance of the caveat on the Register of Titles until trial.*

Her Honour concluded at 493:

> *Therefore, consistently, in order for a caveator to satisfy the first limb of the test applied by the courts when deciding applications under s 90(3) of the Act, he or she must satisfy the court that:*
>
> 1. *There is a probability on the evidence before the court that he or she will be found to have the asserted equitable rights or interest; and*
> 2. *That probability is sufficient to justify the practical effect which the caveat has on the ability of the registered proprietor to deal with the property in question in accordance with their normal proprietary rights.*

What will be apparent is that a defendant caveator will best be placed to successfully establish that there is a serious question to be tried if their affidavit material in the family law proceedings addresses the equitable basis of the caveat. Absent the necessary evidentiary support, a caveat will not survive judicial scrutiny. This is what transpired in *Piroshenko*.

The husband in *Piroshenko* was unable to establish either the existence of a constructive or resulting trust over the wife's property in his favour. Nothing on the evidence was sufficient to support such a trust, be it the rent he paid to the wife while they were in mutual occupation of the property, his purchase of

chattels for their shared occupation of the property, his contributions towards living costs, or monetary gifts given by him to the wife. The only possible factual basis was the husband's assertion that the $10,000 purchase deposit was sourced from joint funds, which Chief Justice Warren found was not made out on the evidence.

Assessing the balance of convenience entails consideration of factors such as whether the property is intended to be marketed for sale or is already subject to a third-party, arms-length sale contract. If the caveator's interest can be adequately preserved by having sale proceeds placed in trust, this weighs in favour of lifting the caveat.

B. Is it necessary to seek a declaration?

Pirokshenko begs the question of whether a caveator, in their family law proceedings, should also seek a declaration of their asserted equitable interest pursuant to s 78 or 90SL of the Family Law Act. The simple answer is no, this ought not be necessary, provided that the evidence led establishes, prima facie, the existence of an equitable trust.

It has long been recognised in the jurisprudence that it is not necessary to simultaneously seek a declaration and property adjustive orders. This is because the alteration of property interests between former spouses is not predicated on the principles of equity, though it may be informed by similar considerations. Sections 79 and 90SM set out the statutory pathway to be followed by the court in ascertaining what adjustment, if any, is just and equitable between the parties. The phrase "*just and equitable*" (per s 79(2) and s 90SM(3)) is a statutory concept rather than a referent to the law of equity.

In *Stages & Wenty* [2009] FamCAFC 31, Justice O'Ryan of the Family Court of Australia opined at [38] that:

> *it is clear that proceedings may be brought under s 79 alone and that proceedings under s 78 are in no way a necessary accompaniment or preliminary to s 79 proceedings. It follows that in view of the wide powers under s 79 to alter property interests the situations in which s 78 proceedings will be used are limited.*

A central reason for the sidelining of s 78 in the day-to-day practice of family law

was described by Evatt CJ, Asche SJ and Murray J in *Good & Good* (1982) FLC 91-249 at 77,375 as follows:

> *It was unnecessary [and] inappropriate for his Honour to make the [s 78] declaration [because] such a declaration was not the final determination of the parties' rights. His Honour's determination was no more than a preliminary decision, a first step towards a determination of what, if any, order were appropriate to make in respect of the alteration of property interests under sec. 79. … In* Stathopoulos & Stathopoulos *(1977) FLC 90-289, it was held unnecessary to declare interests under sec. 78 before altering them under sec. 79.*

Their Honours went on to state at 77,377 that:

> *Indeed, sec. 79 issues flow naturally and almost inevitably from the determination of rights and interests under sec. 78. That is one reason why the Court encourages resort to sec. 79 rather than, or at least in conjunction with sec 78. Very few cases can be finally and satisfactorily determined under sec 78.*

As the statutory pathway replicates equitable reasoning in the form of assessing contributions to the acquisition, conservation or improvement of property, s 78 and s 90SL are in most instances rendered otiose.

A property claim of course does not preclude an equitable claim. In *Re Sabri; ex parte Brien* (1997) FLC 92-732, it was held that equitable interests can co-exist with the right to make a claim under the Family Law Act. Likewise, in *Goldstraw* at [27], it was acknowledged that "*circumstances which would give rise to a constructive trust over land may arise in the context of … de facto relationships*".[22] It is just that it is not necessary to bring a parallel claim in equity exclusively for the purpose of obtaining property adjustment.

The leading of evidence on affidavit is therefore not of itself directed at an equitable analysis for the purposes of property adjustment, but rather to resist any anticipated application under s 90(3) of the Transfer of Land Act. An equitable analysis will be undertaken at that juncture.

For completeness, I note that *Trevi & Trevi* [2015] FamCA 123 sits uneasily with this line of case law. In *Trevi,* the Family Court acceded to an application to remove a caveat. Cited grounds for the lifting of the caveat included, inter alia, there being "*no application for relief pursuant to a declaration of interests in*

[22] *Goldstraw v Goldstraw* [2002] VSC 2002 at [27].

property by the wife and she has not sought to invoke … s 78".[23]

Even so, it is my respectful view that *Trevi* is an orphan in the jurisprudence and that there are compelling reasons, both of public policy in terms of streamlining property applications and also given the weight of authority, to refrain from seeking a declaration alongside property adjustment simply for the purpose of sustaining a caveat if later contested.

C. To which court should application be made?

If acting for a party seeking to have a caveat lifted, application can be made to the Supreme Court or either of the family law courts exercising their accrued jurisdiction.[24]

When choosing a forum, it may be that the Supreme Court will be able to more quickly hear and determine the matter.[25] Costs consequences also more readily follow the result, as compared to proceedings in the family law courts.

However, if there are already active family law proceedings, it may be strategic and cost-effective to consolidate the caveat cause of action with the extant proceedings (even if this requires third-party joinder). This is because, pursuant to cross-vesting legislation, a defendant can apply for the transfer of proceedings issued in the Supreme Court to the family law court seized of the substantive dispute.[26] If the defendant is successful in obtaining a transfer, the plaintiff to the Supreme Court proceedings may have to pay costs.

For example, Supreme Court proceedings were transferred to the Family Court of Western Australia in *Armstrong & Armstrong*, as the court held that the contested property was tightly and clearly connected to the central family law dispute.[27]

[23] At [9].
[24] *W & D* (2003) FLC 93-166.
[25] See eg *Geron v Geron* [2018] VSC 582 at [36] where it was held that the "*early stage of the family law proceeding and the confined nature of [the instant] proceeding being of a type commonly dealt with by this Court [mean] it is likely that this proceeding would be heard sooner than the proceeding in the Family Court*".
[26] In Victoria, s 5(1) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Vic).
[27] *Armstrong & Armstrong* (2004) FLC 93-190. Cf *Geron v Geron* [2018] VSC 582, where transfer was sought but not granted, such that the Supreme Court retained jurisdiction of the caveat dispute.

Conclusion

To avoid the spectre of personal costs orders and disciplinary action, a la *Pearl Lingerie Australia*, practitioners ought carefully identify the legal or equitable basis for any caveat lodged by them or their firm on behalf of a client. A family law claim is not sufficient basis for a caveat and a discrete equitable or other interest should be identified as part of the preparation of the case, albeit it will not be actively agitated pursuant to s 79 or s 90SM of the Family Law Act. Moreover, I have here argued that a party need not seek a declaration under s 78 or s 90SL in addition to property adjustive orders, even in circumstances where the party's caveat is said to be rooted in an equitable interest in land. Addressing the issue on affidavit (ie in evidence) ought be sufficient in the event a s 90(3) application is made under the Transfer of Land Act.