

PART IX – CAVEATS

I Lodgement of Caveats

A Definition

A caveat is a statutory injunction to maintain a property *in statu quo* until the caveator's unregistered interest has been determined by a court, or the caveat is withdrawn or lapses (*J & H Just (Holdings) Pty Ltd v Bank of New South Wales*).

Caveats take the form of notices placed on the land titles register, warning interested parties that an unregistered interest exists in relation to the specified land. They are normally lodged by the party with the equitable interest to prevent inconsistent dealings with it. In the event that a transaction involving the land occurs, the land titles office will notify the holder of the caveat, whereupon they will have a chance to assert their competing interest.

B Context

The following scenario provides an example of a situation in which a caveat should be lodged:

H is the registered proprietor of a large block of land. G has an equitable fee simple in a portion of that land. H negotiates to sell the land to I, a property developer. H is concerned that the sale to I does not result in G's interest being destroyed. I promises to respect G's interest and to negotiate separately with G. Having received the promise, H transfers title to I. The purchase price is only for the portion of H's land which excludes G's land. I registers and commences an action to eject G, relying on his registration as proprietor.

What can G argue in order to protect his interest against I's registered title?

- First step: what is the nature of the interest held by each party?
 - G holds an equitable fee simple
 - I is the registered proprietor
 - H a vendor's lien over any unpaid purchase money
- Second step: what actions are available to protect G's interest?
 - If the promise was made dishonestly, it may amount to fraud such that title will become defeasible: *Loke Yew*
 - However, if the court found on the facts that when I promised to respect G's interest, I honestly intended to do so, and that it was only after registration that I decided to rely on his title to defeat G's interest, then this would not be fraud: *Bahr v Nicolay* (conduct must be pre-registration)

Caveats, used properly, can prevent a situation such as this from ever arising. Thus, if G had lodged a caveat prior to I becoming registered, I's registration would have been prevented, giving G a chance to either contest the sale or else obtain some personal assurance from I that his rights would remain protect (in consideration for removing the caveat).

C Nature and Function of Caveats

Equitable interests may be held in respect of Torrens system land (*Barry v Heider*). Such interests may simply be unregistered (as in the case of a transfer or mortgage) or may be unregistrable interests (a trust or short lease). These interests are *prima facie* vulnerable to extinguishment by any subsequent registered interest. Caveats provide a means of protecting unregistered and unregistrable proprietary interests in land.

As Giffith CJ noted in *Barry v Heider*:

The provisions of the [Transfer of Land] Act relating to caveats embody a scheme expressly devised for the protection of equitable rights...

The purpose of these caveat provisions is thus protective. A secondary purpose has been described, notifying others of an unregistered dealing, but *J & H Just (Holdings)* confirms that this is less important than the injunctive nature of a caveat.

J & H Just (Holdings) Pty Ltd v Bank of NSW (1971) HCA:

Reasoning (Barwick CJ)

- '[A caveat's] purpose is to act as an injunction to the Registrar-General to prevent registration of dealings with the land until notice has been given to the caveator. This enables the caveator to pursue such remedies as he may have against the person lodging the dealing for registration. The purpose of the caveat is not to give notice to the world or to persons who may consider dealing with the registered proprietor of the caveator's estate or interest though if noted on the certificate of title, it may operate to give such notice.'
- In essence, a caveat prevents registration of inconsistent interests and allows the caveator time to substantiate their interest
- By lodging a caveat, the race to the register is halted in favour of the existing state of affairs

These comments make mention of two competing objectives. To some extent these objectives exhibit tension with one another:

- 1 Notice**
Caveats are a means of giving notice to others of interests in land that the caveator claims; or
- 2 Statutory injunction**
Caveats are merely a statutory injunction preventing the Registrar from registering inconsistent interests.

The second of these functions is synonymous with the view of caveats as protectors of equitable interests:

The caveat system thus affords protection to the holders of equitable interests, but usually places the onus upon them to ensure that no dealing inconsistent with their interests is registered. (Sackville and Neave, 6th ed at 516)

The relevant policy issue is whether the caveat provisions adequately fulfil either or both of these functions. Certainly, notice is incomplete: the scope of caveatable interests does not encompass

all unregistrable proprietary interests (eg, mere equities). Once lodged, a caveat affords complete protection against inconsistent dealings. However, many parties are either unaware of the existence of caveats or else assume that their lodgement is unnecessary or would be in bad faith in the circumstances. The protective quality of caveats is thus, to some extent, limited by social phenomena.

Questions of policy aside, the central issue arising in connection with the use of caveats is: what sort of interest must be held to support lodgement of a caveat?

D Overview of the Caveat Mechanism

Registration normally displaces unregistered interests in the absence of an exception to indefeasibility. However, the holder of such an interest may, prior to registration, lodge a caveat to protect against such displacement.

Section 89:

- (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 and may, at any time, by lodging with the Registrar an instrument in an appropriate approved form, withdraw the caveat as to the whole or any part of the land.

Any person may lodge a caveat to protect any estate or interest under any unregistered instrument or dealing. The nature of the interest must be specified, but the validity of the claim need not be substantiated. For example, where an equitable charge is claimed (as by an unregistered mortgagee), the amount of the charge must be stated, as must the nature of the charge, the instrument and any relevant facts giving rise to the interest claimed by the caveator (*Kerabee Park Pty Ltd v Daley*).

Note that if a caveat is lodged without reasonable cause, the registered proprietor may claim for loss suffered by the lodgement (and costs for the application for removal will normally be awarded against the caveator).

In order for the caveat to be removed, it must either lapse or an application must be lodged by the registered proprietor:

Section 89A:

- (1) The registered proprietor may apply to have the caveat removed.

If, having been notified of the pending registration of an inconsistent dealing, the caveator does nothing to assert their interest in the land, the caveat will eventually lapse:

Section 90:

Once the Registrar has given notice to the caveator that a dealing has been lodged for registration, the caveator has 30 days to bring an action, otherwise the caveat will lapse.

For the duration of the caveat's lodgement, no dealing may affect land that is the subject of the caveat:

Section 91 — Effect of the caveat:

The Registrar shall not record a change in proprietorship or any dealing which may affect the estate or interest claimed in the caveat.

Primary issues:

- 1 **What interests can be caveated?**
What is the meaning of 'any estate or interest in land' in s 89?
- 2 **Priorities**
What effect do caveats have on priority disputes?
- 3 **Objectives of the Torrens system**
Does the Torrens system offer certainty in land dealings? Does the caveat system undermine the mirror or curtain principles?
- 4 **Efficacy**
How effective is the caveat system in protecting unregistered interests and dealings? Should it offer greater protection?

E *Scope of Caveatable Interests*

- 1 *Equitable interests able to be protected by caveats*

Section 89 of the *Transfer of Land Act 1958* (Vic) limits the lodgement of caveats to protect an 'estate or interest in land'. The interpretation of this phrase has given rise to a great deal of litigation and uncertainty. However, the following propositions are clearly correct:

- Purely personal rights cannot be caveated;
 - Eg, not rights arising under a contract
 - Eg, not a licence to occupy or access land
 - Eg, not a right of first refusal or pre-emption (*Bob Jane T-Marts v Baptist Union*)
- A caveat cannot be lodged to protect a mere equity (*Swanston Mortgage v Trepan Investments*);
- A registered proprietor cannot normally caveat to protect its own title (*Swanston Mortgage v Trepan Investments*), though this is not entirely clear.

Bob Jane T-Marts Pty Ltd v Baptist Union of Victoria (200x) ???:Facts

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Issues

- Did Bob Jane have an interest in the land sufficient to support a caveat?
- Could an interim injunction be granted?

Reasoning

- An option is an interest in land and that will support a caveat
 - However, simply having a right of refusal (pre-emption) is a contractual right and is therefore insufficient to support a caveat
 - A right of pre-emption or a right of first refusal is not an option and does not give rise to an interest in land
- Once the triggering event occurs, a right of first refusal transmogrifies into an option, which is proprietary
- Application
 - Once Baptist Union decided to sell the land, and decided upon a price and terms of sale, Bob Jane's right becomes an option to purchase
 - This will support a caveat
- In this case an interlocutory injunction granted as it was the only means of protecting Bob Jane's proprietary interest

Decision

- Once it became an option, it could be caveated
- The injunction could also be granted

2 *Unregistrable equitable interests*

For several years there was uncertainty about whether all equitable estates or interests in land could support a caveat, or just those which were registrable or gave rise to a registrable instrument. This debate has now largely been eclipsed, but there is no resolution authoritative in Victoria.

Possible views about the matter include:

- (i) All equitable interests can be caveated;
- (ii) Only those equitable interests based on a registrable (but not yet registered interest) can be caveated; or
- (iii) Those equitable interests based on a transaction under which the caveator has a right to require the other party to produce a registrable instrument can be caveated.

Classic Heights v Black Hole Enterprises adopts a narrow view of caveatable interests. It is authority for the proposition that only interests which are registrable or would entitle the caveator to a registrable instrument may be caveated.

Classic Heights Pty Limited v Black Hole Enterprises Pty Limited (?) ???:Facts

- Concerned an unregistrable lease

Issue

- Must there be a registrable instrument?

Reasoning

- Relied on *Miller v Minister of Mines* [1963] AC 484, 497
- The caveat procedure is an interim procedure designed to freeze the position until an opportunity has been given to a person claiming rights under an unregistered instrument to regularise the position *by registering the instrument*
- Therefore, only interests in categories (ii) and (iii) can be caveated

Decision

- Caveatable interests are limited to documents which are registrable or which would entitle the caveator to obtain a registrable instrument
- This represents a narrow view of the phrase 'estate or interest in land'

Crampton v French adopted a broader view, holding that all equitable interests are estates or interests in land for the purposes of s 89.

***Crampton v French* (1995) VConvR ¶154-529:**Facts

- Concerned an unregistrable equitable charge

Issue

- Must there be a registrable instrument?
- If not, can a caveat to protect an equitable interest (a charge) even though there is no entitlement to a registrable instrument?

Reasoning

- Not to permit a caveat would leave a person 'almost if not entirely defenceless against an incompatible but registrable interest': at 66,291
- Harper J:
 - The language of s 89 limits caveatable interests to those:
 - that arise under a document that is registrable
 - that are based on a transaction which will entitle the caveator to call for a registrable document
- If there were equitable interests that could not be caveated they would be almost defenceless against an incompatible but registered interest
- Justification is to protect unregistered interests
- Productive of injustice
- An unlikely consequence of the Torrens system
- Broad view of caveatable equitable interests is arguably the better view

Decision

- All equitable interests can be caveated

Swanston Mortgage v Trepan Investments (1994) Vic SC:Facts

- Swanston, the mortgagee in possession, sells the subject land to a purchaser by way of transfer
- The purchaser was required to pay the principal amount by a certain date
- The money is not paid by that date; Trepan has an equity of redemption at this point
- Swanston, the mortgagee, does not give notice until 19 months later that they will exercise their power of sale
- The transfer to Trepan has not been registered
- Swanston sells to Bartrop, a third party, for \$1.65m
- Trepan, the mortgagor, claimed the sale undervalued the land (having found a buyer willing to pay \$1.9m)
- Before Bartrop can register its transfer, Trepan lodges a caveat because of the undervaluing on the basis that it has a right to set aside the sale for fraud
- Trepan is, at this point, still the registered proprietor
 - It seems likely that they lodged a caveat simply to give themselves slightly more time to repay the principal
- The mortgagee brings an action seeking to remove the caveat
- The trial judge refuses to remove the caveat

Issue

- Is Trepan's interest in setting aside the sale to Bartrop a caveatable interest under s 89?

Reasoning

- A right to set aside a mortgage transaction for fraud is a mere equity
 - Relied on Menzies J in *Latec Investments*
 - Adopting the approach of Menzies and Kitto JJ in *Latec*, the right is not an equitable interest until the court gives effect to the right
 - Therefore the right is not 'an estate or interest in land' until the court gives effect to the right
 - Eg, an equity of redemption: a party does not obtain the equitable interest until the court grants relief in their favour
 - The Court treats the question as one of priorities, determining the issue of classification on the basis of a priority dispute rather than its other characteristics
 - 'What is the priority of this right?' rather than 'is this right devisable?'
 - It is arguable that rights should be classified differently depending on the context in which the classification takes place and the purpose for which they are sought to be applied
- Mere equities and caveats
 - *Latec* did not decide whether a mere equity could give rise to a caveat
 - However, there is a relevant difference between equitable interests and mere equities
 - Are mere equities 'interests in land' within the meaning of section 89?
 - No

Decision

- Trepan has an insufficient interest to lodge a caveat
- There are two bases for this conclusion:
 - *Latec*: right to have a transaction set aside is a mere equity (Kitto J); not an equitable interest in itself; therefore, it does not meet the s 89 definition ('estate or interest in land')

- Can't lodge a caveat to protect one's own title: need a separate and distinct interest (see below)
- Therefore, the registered proprietor cannot lodge a caveat and it can be removed

This reasoning is somewhat problematic for several reasons, though for all practical purposes it appears now to correctly state the law in Victoria:

- *Swanston Mortgage* is problematic for its reliance upon *Latec*, which was decided in relation to general law land. The position under the Torrens system is very different. Here the mortgage would be governed by a statutory right of reversion;
- The decision is also problematic because of its assumption that a mere equity is the best classification of a right to set aside a sale for fraud — the conclusion of Kitto and Menzies JJ in *Latec* is not the only way to classify such a right;
- The classification of an equity to set aside a sale for fraud has been expressed to depend on the context in which the issue arises; thus, the *Latec* may reign in the arena of priorities, but for the purposes of caveats may be considered sufficient; and
- Further, the registered proprietor already has the best title, so why shouldn't that be sufficient to lodge a caveat?
 - Practical difficulties may arise if the registered proprietor cannot lodge a caveat
 - What if their certificate was stolen? Surely they would want to lodge a caveat to prevent registration of any unauthorised dealing, especially if their right to set it aside is only a mere equity
 - *Swanston Mortgages* therefore makes it harder for registered proprietors to protect and maintain their registration

4 Registered proprietors

Can a registered proprietor caveat to protect its own registered title? It is unclear whether this is possible. Some cases support the view that a registered proprietor may caveat to protect their legal fee simple. However, the predominant view is that a 'separate and distinct' equitable interest is required (*Forsyth v Blundell*).

***Forsyth v Blundell* (1973) HCA:**

Issue

- Can the registered proprietor lodge a caveat over their own land?

Reasoning

- If the registered proprietor could not lodge a caveat against their own title, this would produce significant practical difficulties for registered proprietors who want to protect their title
- Arguably the registered proprietor already has best title
- However, it is still suggested that they need some additional proprietary interest in order to support a caveat

Swanston Mortgage also adopted this approach, denying protection based on registered ownership alone and instead searching for some additional equitable interest. On the facts, no such interest existed.

Swanston Mortgage v Trepan Investments (1994) Vic SC:Issue

- Can Trepan, the registered proprietor, lodge a caveat to protect his own land?

Reasoning

- Can a registered proprietor caveat to protect his own title? No
 - Not unless and until he or she has an interest in the land that is separate and distinct from his or her title as registered proprietor
 - There needs to be something besides the title; that is, a distinct equitable interest
 - Trepan's separate interest could here be said to be their equity of redemption as mortgagor
 - However, it does not become an equitable interest until after registration of the transfer to Bartrop
 - The 'equity of redemption' only arises when the purchaser from the mortgagee is registered
 - However it is not strictly necessary to decide this point
 - Here there is therefore no separate and distinct interest at the time at which Trepan lodged the caveat

Decision

- Trepan has an insufficient interest to lodge a caveat
- Can't lodge a caveat to protect one's own title: need a separate and distinct interest
 - Wasn't specifically decided (*obiter*)
 - But probably not possible for a registered proprietor to caveat their own registered interest

Swanston's treatment of the issue does raise some problematic questions of policy for registered proprietors of land:

- What can a registered proprietor do to protect title from fraudulent dealings? (Exception to indefeasibility)
- Is it necessary that they have any protection beyond registration? (Arguably not)
- What if the duplicate certificate of title is stolen? (This is problematic)
 - For example, in *Grgic*, Mr Grgic's son had possession of the duplicate certificate of title, and used this to secure a mortgage over the land in his favour

II *Electronic Conveyancing*

A *Context*

The modern practice of real estate takes place in infinitely more complicated times than existed at the time the Torrens system was introduced. Today, the stakes of ownership are greater, the value of land higher, the legislative environment more complex, planning regulations more intrusive, contingencies more prevalent, consequences more severe, and the fragmentation of ownership greater than ever before. In short, there are more unregistered interests and restrictions than ever contemplated by Robert Torrens, and these can cause severe problems for purchasers (and occupiers) of land.

Electronic conveyancing may alleviate some of these problems by noting additional interests or restrictions upon the register. It may also prevent fraud by making it more difficult to register a forged document.

B *Original Model*

The original electronic model consisted of an online file management system shared between real estate agents, lawyers and conveyancers. The entire conveyancing file would be run electronically, from before the signing of the contract (which would involve the real estate agents) to the transfer of legal ownership. However, there were problems interfacing with the estate agents, and problems with ensuring the accuracy of lodged contracts of sale. The benefits of this streamlined model were not worth the risk that an error would be made at this stage.

C *Proposed Model*

The proposed system does not adopt an electronic process until the contracts are signed. After that point, an electronic file is created and the parties contribute later in the transaction. Once each party flags their side of the transaction with 'green lights', the process moves forward. Indefeasibility is automatic and money changes hands electronically, minus automatic deductions for stamp duty, land tax, and the like.

Under this model, an electronic signature would be required by a representative of the registered proprietor (but not necessarily the registered proprietor herself). Preceding this is a paper authorisation form, signed by the client, authorising their agent to conduct the particulars of the transaction on their behalf.

D *Impact on Fraud*

Electronic conveyancing is unlikely to reduce fraud. Fraud is a 'fact of life' when dealing with interests as valuable as those held in land. However, an electronic system may alter the circumstances in which and the parties against whom fraud is perpetrated, by making it harder for thieves of a certificate of title to register an interest, and easier to alter any single conveyancing folio electronically. Consequently, instances of fraud may be shifted to parties better able to bear loss, though this is hardly a convincing justification for such a system.