

Caveats

A caveat is a form that you **lodge at the titles office it has the effect of freezing the register**, any other dealing just bounces off, says who you are what is the land and your claim in it.

A caveat **operates as an injunction to the Registrar** because it restrains him/her from registering any **dealings or interests in land which are prohibited by the caveat** until the caveat is removed.

Caveats **are commonly used by a purchaser of land who has an equitable fee simple interest under a specifically enforceable contract** of sale.

If the purchaser lodges a caveat, **no other interest over the land can be lodged without the caveators knowledge.**

Interests that CAN be Caveated:

Leases for less than 3 years

Purchaser under a contract of sale

The claim of a beneficiary under a trust (*Schmidt v 28 Myola St*)

A purchaser with a vendor's lien (idiots charge, lien over an unpaid sum and they are living in the house)

A person with an agreement for a mortgage lease easement or an unregistered profit e prendre

Option to purchase provided the terms and conditions are set out in the option (*Laybutt v Amoco*)

A specifically enforceable contract of sale gives rise to an equitable fee simple interest in the purchase property (*Barry v Heider; cf Tanwar*)

A person holding an unregistered but registrable instrument has an equitable interest (*Barry v Heider*)

Interests that CANNOT be Caveated:

Personal rights and Contractual rights are not caveatable

A person with a bare license to occupy the land (contractor)

Mere contractual rights that don't give a proprietary interest (contractual license – right to go on to land and use it for a limited time i.e. hotel room – terminated at will but can claim damages)

In Victoria a mortgagor's right to have an improper mortgagee's sale set aside has been held to be a mere equity and, as such, is not a right capable of supporting a caveat (*Swanston Mortgage*)

Lodging a Caveat:

Any person claiming an estate in land may lodge with the Registrar a caveat forbidding the registration of any instrument which may conflict with the estate claimed **s.89(1) TLA**

In order to lodge a caveat over the land you must be entitled to claim a recognised proprietary interest in the land (*Swanston*)
An equitable interest in land is sufficient (*Crompton*)

Removing a Caveat:

The caveator can withdraw their caveat **s.89(1) TLA** After an inconsistent dealing is lodged the caveat will expire in 30 days **s.90(1)** The caveator may apply for to the supreme court for an extension **s.90(3) TLA**

Removal of a Caveat: *Piroshenko v Grojsman*

Once a caveat has been lodged under **s.89(1) TLA** the RP or another person adversely effected may seek to remove the caveat under **s.90(3)** In considering application for removal the court may make any order it thinks fit, and utilizes the test set out in *ABC v O'Neill* for determining whether to remove or not (*Piroshenko*)

1. Prima Facie Case with the Probability of success:

- Probability of success = 'a sufficient likelihood of success to justify the preservation of the status quo pending the trial',

2. The Balance of Convenience Favors the Granting of Injunction:

- The applicant must satisfy the court that if relief were refused he or she would suffer a greater injury than the defendant would suffer if the injunction were granted

Although the test is an aid, **s. 90(3)** is drafted broadly and the court can make such order it sees fit (*Piroshenko*)

Setting Aside Fraudulent Transaction but Caveating your own Title to Protect from Fraud or ME Sales in Bad Faith:

NT, NSW, QLD legislation specific permits that as a RP you may caveat your own title, additionally case authorities generally give support to the notion that a RP may lodge a caveat against their own title

BUT in Victoria the **CoA** held in *Swanston* in order to lodge a caveat the RP must demonstrate they have a separate and distinct interest from the registered title,

Swanston acknowledged that the RP had an equity cable of equitable remedies but did not give rise to a proprietary interest capable of supporting a caveat.

Arguably *Brooking J* in *Swanston* incorrectly interpreted an applied the HC decision in *Latec Investments* leading to wide criticism of *Swanston*

Provision	Effect
s.89(1)	Lodging: Any person claiming an estate, or interest in land may lodge with the register a caveat forbidding the registration of any instrument which may conflict with the estate or interest claimed
<i>Swanston</i>	Lodging: You can only ever lodge a caveat where you are claiming an estate in land or an interest in land
<i>Crompton</i>	Lodging: The estate or interest in land needn't be capable of registration, any equitable interest is sufficient
s.89(3)	Notice: The register shall give the RP of the estate or interest notice of the caveat
s.89(1)	Removal: The Caveator may at any time withdraw a caveat they have lodged
s.90(1)	Removal: After an inconsistent dealing is lodged the caveat will expire in 30 days
s.90(3)	Removal: Any person adversely effected may apply to the court for removal of the caveat
s.118	Compensation: If you improperly lodge a caveat you will be liable to pay compensation for any loss that you have caused
s.89A	Current Owner: The RP can bring proceedings to have the caveat removed
s.85A(5)	Where the registrar is satisfied that the person claiming to be the RP of an estate or interest in the land, the Caveator has 35 days the either remove the caveat or proved written notice to the registrar that proceeding are on foot, if the caveator fails to do so the Caveat will lapse
s.91(2B)	Mortgagees: The registration for a an instrument of transfer executed by a ME shall not be effected by the existence of any caveated lodged after the mortgage was lodged and a caveat lodged by a second ME will not prevent a proper sale by first the registered ME
s.61	Adverse Possession: A person may lodge a caveat against the grant of a title based on an adverse possession claim
s.106(1)(a)	Queen: Registrar may enter a caveat on behalf of the Queen or a person under a disability for that person's protection restraining any dealing in any land

Priority Disputes Equitable Interest v. Equitable Interest

Example:

D buys a property for \$1,000,000. He obtains two mortgages to finance the purchase. He loans \$700,000 from (A) on Monday, and \$300,000 from (B) on Thursday. He executes the agreements, and all the mortgage documentation for registration.

Neither lender registers their mortgages – that is they both have equitable mortgages.

(B) quickly registers his mortgage. (A) registers after (B).

A month later D defaults, and the lenders want to sell the property. Which lender gets to go first, and recoup the most money?

Notice Test: *Moffett v Dillon*. Only Applies in Victoria

Was 2nd interest acquired with notice, actual, constructive or imputed (s.199 PLA) of the existence of the 1st interest?

If yes, the 1st interest holder will have priority

It is irrelevant that one interest is in registrable form and the other is not *Moffett*

Ess:

Conduct of the prior interest holder has induced the later holder to believe that the prior holder no longer exists (*estoppel*), or Where the 1st interest holder agrees to postponement or waives his priority

s.199 PLA Notice: Notice may be that of the RP or their agent and be actual or constructive looking at all the circumstance

at amounts to Notice? *Smith* Caveat can give notice to the world in equitable interest, this is not inconsistent with the purpose of the caveat system which is to prevent registration of dealing until the caveat has been given notice

2. Merits Test a. Better Equity Test

Test: If their equities are in all other respects equal, priority of time gives the better equity (*Rice*)

1. The Nature of the Respective Interests,
 - I.e. An equitable lien, mortgage, lease, fee simples etc.
 - These interests could be of equal worth in their nature and quality with nothing to distinguish them (*Rice*)
2. The Circumstances and Manner of their Acquisition,
 - Possession of title deeds/certificate does not necessarily give him a better equity,
 - And a right to title deed but failure to get them does not count against them
3. Conduct of the parties,
 - Have one party's actions armed the purchaser with the means of dealing with the estate as though they were absolute owners free from encumbrance and enabled them to assure the equitable mortgagee that the title was unencumbered in law and in equity
 - Example giving a receipt for payment in full when you have a vendor's lien

2. Merits Test b. Prima Facie First in time : *Abigail v Lapin*

The stating proposition is that the first in time is given priority, apart from priority in time the test must be whether either are guilty of some act or default that prejudices their claim (*Abigail v Lapin*)

1. Look at who came first,
2. Consider their conduct, 1 will go first in time goes unless you can show a reason to disentitle them

Inconsistent Interest Cases; Reasonable Foreseeability

Analysis: *Heid*; *Platt*; *Just Holdings*

- “Was it reasonably foreseeable at the time of the relevant conduct that a subsequent interest would be created in the belief that the prior interest did not exist?”
 - Did (A) act recklessly or with negligence, that a reasonable man would reasonably foresee as creating a belief that a prior interest did not exist (*Heid* – allowing Cis lawyer to work for him too)
 - it was not necessary reasonably foreseeable that a failure to Caveat would result in the creation of a subsequent interest where negotiations were between father and daughter (*Platt*)
- Where the RP creates a prior interest in (A) and then an inconsistent subsequent interest in (B)

Arming Cases; Estoppel Analysis: *Heid*; *Abigail*

- Should (A) be estopped from asserting its equitable interest over (C) due to its arming conduct?
- If (A) arms (B) with indicia (transfer/certificate of title/receipt or acknowledgement of payment in full) to create a belief in (C) that (B) holds a title unencumbered from any equitable interest, then (A) should be estoppel from asserting their equitable title over (C). *Heid*
- Where the RP arms a 3rd party with the means to represent himself as the unencumbered owner and this leads to the creation of a subsequent equitable interests

Factors to Consider:

Caveats: A failure to caveat is not a positive duty and will not be in and of itself fatal or warrant postponement (*Heid*; *Lapin*). It is a relevant factor to be considered in the light of all the circumstances (*Lapin*) The significance of a failure to lodge a caveat depends on the nature and purpose of the caveat (*Just Holdings*) Recent cases indicate that the purpose of a caveat is not to notify the world, but as an injunction on the registrar to register inconsistent interests (*Just Holdings*; *Platt*), in this sense it is a facility provided by the TLA not an obligations (*Smith*). Nonetheless, the obiter of Callinan J in *Garnock* (cf. Gleeson CJ) perhaps indicates a failure to caveat is postponing conduct stating its purpose is to give notice to the world. This possible suggests the Court's future direction.

Access to the Certificate of Titles: If (A) does not have possession of the Certificate of Title, they cannot not rely on another inconsistent being created. (*Just Holdings*) Where (A) has possession of the Certificate of Title, this acts as a reasonable form of protection from (C)'s interest (*Just Holdings*) This will be adequate protection even where no caveat is lodged by (A) as without the Certificate no other dealings could be lodged (*Just Holdings*) Possession of title deeds/certificates does not necessarily give (A) or (C) a better equity, (*Rice*) If (C) possessed the title of deeds or asked for it, they are more likely to prevail (*Just Holdings*- JH didn't require DCT or question whether the bank was really holding it for safekeeping)

Reaching the Titles Register: If (C) did a title search for a caveat, they are more likely to prevail. (*Abigail*- the failure to do so wasn't determinative, possibly because even if they had the title on the register was depicted being clear)

Other Circumstances: Giving receipts to state full payment has been made discharging your interest and arming the (B) with the means of dealing with the estate as though they were absolute owners free from encumbrance (e) Family situation - company run by parents- “inconceivable” that they would sell in breach of the option to purchase so no need to caveat (*Jacobs*)

Priority Disputes and Mortgages:

- This considers priority disputes between the original RP and the new RP with the ME has exercised its powers of sale in good faith upon default (s.77(1)).
 - The new RP acquires an indefeasible title free of the mortgage (s.77(4)), provided there has been no fraud (s.42(1)),
 - So that the original RP may not have this title set aside even if the ME's sale was unlawful.
- The rules will differ depending on if the new purchaser is registered (**post registration**) or is yet to become registered (**pre-registration**)

Pre-Registration:

Example: New RP has not yet been registered and you find out that there has been fraud.

Caveat:

- *Swanston* says you cannot caveat your own title without showing a separate and distinct interest in the land as a fee simple title holder the operation of the doctrine of merger will likely prevent any separate and distinct interest from existing – i.e. you cannot caveat
- But you could use s.106 to lodge a Queens Caveat to ask the registrar to caveat on your behalf because you suspect fraud, but this will likely be a lengthy time process, and caveat likely would be unsuccessful.

Injunction:

- You can apply for an injunction in cases of suspected fraud pre-registration, your action will be the equity of redemption (*Forsyth*)
- Issue is that they are discretionary, and time consuming, but the court may be willing to give you one to preserve the status quo

Post Registration:

Where the new RP has registered their title there are 2 scenarios:

1. Fraudulent transactions
 - a. where a 3rd Party interest is created
 - b. where no 3rd Party interest is created
2. No fraud

1a. Fraud where a 3rd party interest is created

Example: Original RP has a mortgage, ME sell to New RP and New RP sell to another person who pays valuable consideration and who has not been fraudulent.

- In *Latec* the majority held that the MR right to set aside transfer for fraud was a mere equity that could not prevail against a subsequent equitable interest of a bona fide purchaser for value without notice (*Latec*)
- I.e. where there has been a transfer to a TPA who pays consideration and is not fraudulent MR cannot get the fee simple back.

D would argue that classification for the purpose of a priority dispute is that P's right to set aside the fraudulent transaction is only a mere equity. And as such not an interest that is caveatable or would win in a priority dispute. (Latec Kitto and Menzies JJ) P would argue that authorities establish where there is a fraudulent conveyance, the original owner of the property has an equitable interest capable of assigning. On this view I would have an equitable interest from the start not a mere equity (Latec Taylor JJ)

1b. Fraud where NO 3rd party interest is created

Example: The Original RP has a mortgage, the ME sell to 3rd Party, 3rd Party is involved in a fraud, if the fraud is exposed all the new RP acquires is the ME's interest, i.e. a mortgage, not the Original RP's fee simple interest.

- If the purchaser's interest is held to be defeasible for fraud, the purchaser is treated in equity as having acquired only the ME's interest, not the MR's,
- Therefore, the Purchaser holds the registered title subject to the former MR's right of redemption
- If the MR pays the debt the Purchaser must transfer the land to him (*Latec*)

2. No Fraud

- The New purchaser will have the benefit of indefeasibility and all the estate of the MR will vest in the purchaser (s.77(4))
- The prior RP is damaged to the extent of the debt against the ME