

The danger of lodging caveats without reasonable cause

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There have been two recent Supreme Court decisions, *Deutsch v Rodkin & Ors* [2012] VSC 450 and *Pearl Lingerie Australia Pty Ltd v TGY Pty Ltd & Giarratana* [2012] VSC 451, which demonstrate the danger of lodging caveats over property without reasonable cause. The judgements act as a warning to prospective caveators and their agents, that where a caveat is lodged without reasonable cause, the caveator may be liable for substantial damages and payment of the legal costs of any person affected by the caveat.

Who does it impact?

Any person wishing to lodge a caveat over property, any person causing another party to lodge a caveat, and solicitors or agents acting for caveators.

What is a Caveatable Interest?

A caveat may be placed on a property by any person or agent of any person 'claiming any estate or interest in land under any unregistered instrument or dealing or by devolution in law or otherwise', pursuant to section 89 *Transfer of Land Act 1958* (Vic) ("the Act"). The effect of a caveat is to forbid the registration of any interest in land either 'absolutely or conditionally'¹.

Deutsch v Rodkin & Ors

Facts

In the case of *Deutsch v Rodkin & Ors*, the plaintiff lodged an application for compensation under section 118 of the Act, against numerous caveators and the Registrar of Titles for the registration of various caveats.

One of the caveators, Robert Deutsch, was involved in a legal dispute with his brother, who was the plaintiff's husband. He had previously attempted to place a freezing order over the assets of the plaintiff's husband, which was dismissed by the Court on the grounds that there was no basis for this.

Following this, five caveats in successive order were placed over the plaintiff's property by Mr Deutsch's children. The first was removed administratively under section 89A of the Act and following this, the plaintiff then commenced proceedings under section 90(3) to remove the second, third, fourth and fifth caveats. In each case, the caveator did not appear to support the caveats and they were removed. In addition, Justice Bell made orders restraining those caveators from lodging any further caveats and the Registrar of Titles from registering the same.

Later, a sixth caveat was lodged by another of Mr Deutsch's sons, and while the Registrar of Titles refused to register this caveat, it was nevertheless recorded as affecting the property under a 'notice of action'.

The damages alleged by the plaintiff in the section 118 proceeding, included damages for cancellation of an auction, costs associated with the delay of the sale (interest and legal costs) and the reduction in price of the property due to lodgement of the caveats. The plaintiff also sought exemplary damages, claiming that the defendants should be ordered to pay a punitive amount to the plaintiff for the tortious claim of conspiring to cause the plaintiff injury, by preventing the sale of the property.

The plaintiff's estate agent gave evidence that because of the nature of the community and the knowledge of the family feud, the caveats had a significant effect on the plaintiff's ability to sell the property and the price.

Legal Principles Applied

Section 118 of the Act provides:

"Compensation for lodging caveat without reasonable cause - 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."

Judgement

The Court found that the defendants did not have a caveatable interest in the property and awarded the plaintiff damages of over \$350,000, for the reduced sale price and costs associated with the delay in the sale of the property and exemplary damages of \$25,000. The exemplary damages were damages awarded to punish the defendants in circumstances where a tort was committed involving a 'deliberate, intentional, or reckless disregard of the plaintiff's rights'².

Pearl Lingerie Australia Pty Ltd v TGY Pty Ltd & Giarratana

Facts

The case involved an application by the plaintiff against Mr Giarratana and TGY Pty Ltd (a company of which Mr Giarratana was a director) to remove caveats under section 90(3) of the Act.

Mr Giarratana claimed an 'estate in fee simple' over the whole of the property and alleged that the plaintiff held the land for itself and Mr Giarratana pursuant to an implied, resulting constructive trust. Mr Giarratana submitted that the plaintiff entered into a joint venture agreement with him and two others. However, the Court noted throughout, that the agreement was not in writing and was subject to a contract being executed.

Legal Principles Applied

Section 90 (3) of the Act provides:

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

The plaintiff claimed the caveat should be removed and asked for indemnity costs on the basis that the solicitor for the defendants did not properly investigate whether their clients had an interest in the property, and had been previously warned that if the caveat was not removed, that the plaintiff would seek costs on an indemnity basis from the Court.

Judgement

The Court found that the joint venture agreement was not a contractual agreement, but an agreement that was subject to the parties entering into formal written contract³. Further, even if there was a joint venture, this did not create a caveatable interest in the property, but instead, was an agreement to provide finance for a joint venture and the proper action against the plaintiff was a claim for compensation. The Court found that the defendant's had no proper basis to lodge a caveat and ordered its removal.

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On the question of costs, the Court found that the solicitor for the defendants and the defendants were jointly and severally liable to pay the plaintiff's costs on an indemnity basis. In making the order, the Court noted that Mr Giarratana's wife, Tina Giarratana, who was represented by the same solicitor as the defendants, was the defendant in a proceeding in which a previous caveat was removed and indemnity costs were awarded against her. In that proceeding, Justice Ferguson warned the defendant not to lodge any further caveats. In addition, the plaintiff's solicitor wrote to the defendant's solicitor asking for the removal of the caveat, noting that they will hold the defendant liable for any loss suffered by the plaintiff and will personally seek an indemnity costs order against the solicitor. However, despite these warnings, the solicitor for the defendants maintained the caveats 'without any prospect of success and in wilful disregard of known facts and law'⁴ and the Court also found they placed the caveats as a bargaining chip in their dealings with the plaintiff.

Suggested action

Caveators and their solicitors or agents should carefully consider whether the caveator has an estate or interest in the property, prior to lodging a caveat over a property. The benefit of taking proper and detailed instructions cannot be understated.

When entering into joint venture or financing contracts in relation to property, the parties should ensure they enter into a written contract that creates a charge or security interest over the property for any debts that arise under the contract and authorises the lodgement of a caveat to secure such interest.

Conclusion

The important point demonstrated in both of these cases is that a caveator must have an estate or interest in the property they are lodging the caveat over, not merely an action or claim in compensation against the proprietor. There is the potential if a caveat is not lodged with reasonable cause, for the caveator and their agents to be liable for a wide range of damages and legal costs associated with the improper lodgement of a caveat.

The Commercial Transactions team at TurksLegal is able to provide clear, accurate and concise advice on all matters relating to caveatable interests and caveat lodgement.

1 Section 89 Transfer of Land Act 1958 (Vic)

2 Victoria v Walker [2010] VSCA 340 at 12.

3 3rd category of Masters v Cameron (1954) 91 CLR 353.

4 'Pearl Lingerie Australia Pty Ltd v TGY Pty Ltd & Giarratana [2012] VSC 451 at 27'

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