

## **CAVEATS OR INJUNCTIONS: FAMILY LAW PROPERTY SETTLEMENT CASES**

### **Abstract**

An important consideration when separating from your husband or wife or De facto partner, is how to protect any interest that you may have in real property, such as the family home. The information contained here, is based on the Family Law Act 1975 (Cth) and the Real Property Act 1886 (SA). This Information Booklet should be read together with our other publication 'Family Law & Property Settlement: What you need to Know'

Eugenia Matthews  
[admin@matthewslawyers.com.au](mailto:admin@matthewslawyers.com.au) or [matthewslawyers@gmail.com](mailto:matthewslawyers@gmail.com)

**Disclaimer:** The information contained in this booklet is of a general nature only. It should not be relied upon. It is not a substitute for legal advice.

## Contents

What is a Caveat?.....	2
There are 2 types of caveats .....	2
Legislation: Real Property Act 1886 (SA): (hereinafter the ‘Act’) .....	2
Risk of Registering a Caveat with the Lands Titles Office.....	3
When is it appropriate to register a caveat with the Lands Titles Office?.....	4
When is it inappropriate to register a caveat with the Lands Titles Office? .....	4
Injunction: Another option: Section 114 of the Family Law Act 1975 (Cth) .....	4
Granting the Injunction: Section 114 of the Family Law Act 1975 (Cth) .....	5
Enforcement of an injunction: .....	6
What should I do next? .....	6
Conclusion .....	6
APPENDIX A: SECTION 191 REAL PROPERTY ACT 1886 (SA) .....	7
APPENDIX B: SECTION 114 FAMILY LAW ACT 1975 (CTH) .....	10
APPENDIX C: SECTION 106B FAMILY LAW ACT 1975 (CTH) .....	12

## CAVEATS OR INJUNCTIONS: FAMILY LAW PROPERTY SETTLEMENT CASES

### What is a Caveat?

A caveat in real estate is an expression of interest in a property that prevents any new dealings from occurring that relate to that property. They are registered with the Lands Titles Office.

The term Caveat derives from the ‘Latin’ expression which means to beware or to be careful. They are often considered “warnings” or “red flags” for prospective purchasers, to let them know there is another party with an interest to the property. In other words, a caveat refers to a formal notice to the registered proprietor of the real estate (the owner) that the individual registering the caveat (the caveator) is claiming an interest in the property. It prevents the owner of the property dealing with it, until the interest claimed by the caveator is determined by the parties involved or determined by the Court.<sup>1</sup> The High Court of Australia in J & H Just (Holdings) Pty Ltd v Bank of New South Wales (1971) CLR 546 at 558 has stated that the:

“... primary purpose of a caveat is not to give notice to the world of an interest. It is to warn the Registrar-General of a claim. The word caveat has long been used in law to describe a notice given to an official not to take some step without giving the caveator the opportunity to oppose it ... If a person intending to deal with the registered proprietor becomes aware of a caveat , it is notice to him of a claim that an interest is outstanding [on foot]: and then caveat emptor [buyer beware].”

Once a caveat is lodged it does not actually create an interest in property. It **protects** that property from being dealt with in any way including selling, transferring or further encumbering the property until that caveat is withdrawn, lapsed or cancelled.

A caveat not only prevents the legal owner from dealing with that property, it is a notice to any third party (e.g. a financier looking to issue a mortgage over the property) that the caveator (the person lodging the caveat) has an interest in that property.

### There are 2 types of caveats

The first type is known as an ‘absolute caveat’. The second type is known as a ‘permissive caveat’.

#### First type:

Absolute caveats do not allow any dealings to occur on that property until the caveat has been removed.

#### Second type:

Permissive caveats allow for dealings on the property if the caveator consents to the dealing.

### Legislation: Real Property Act 1886 (SA): (hereinafter the ‘Act’)

---

<sup>1</sup> J & H Just (Holdings) Pty Ltd v Bank of New South Wales (1971) CLR 546.

Section 191(a) to 191(a) is the relevant provision. The section is printed in its entirety in Appendix A.

Caveats that can be registered with the Lands Titles Office:

Section 191(1) of the Act stipulates that:

“Any settlor of land or beneficiary claiming … or any person claiming to be *interested at law or in equity*, whether under an agreement, or under an unregistered instrument, or otherwise howsoever in any land, may lodge a caveat in the Lands Titles Registration Office … [to] *prohibit absolutely* the registration or recording of any instrument dealing with the land; unless such dealing is determined by “the parties involved or determined by the Court.”<sup>2</sup>

Types of interests that can be registered with the Lands Titles Office have been enumerated by the Court in ‘Woodberry v Gilbert (1907) 3 Tas. L.R. 7. In that case the Court determined seven types of caveatable interests:

1. A right to the present or future possession of the land, either as the owner of the fee simple, or as a tenant for life, or for years, or for some shorter period of time.
2. A right to the proceeds of the sale of the land or to a share thereof; or to payment of a sum of money secured by mortgage of the land.
3. A right to rent or to an annuity charged on the land.
4. A right to take a natural product of it.
5. A right to the rents and profits of the land.
6. A right to water from a well on the land or from a stream running through the land.
7. A right to enter upon the land for the purpose of securing the benefit of a contract for the purchase of anything situated or growing on the land.

#### [\*\*Risk of Registering a Caveat with the Lands Titles Office:\*\*](#)

Provided a caveatable interest in the property can be established and the caveat is lodged for a proper purpose, a caveat can be a cost effective and a means of protecting matrimonial property interests or to prevent the disposal of or otherwise dealing in real property. If however, a caveat is lodged over real property and is later determined by the Court that the caveator did not have a proper basis or they did not have a caveatable interest, the caveator may be liable for any damages incurred by the legal owner, if they have suffered a financial loss as a consequence of the caveat.

---

<sup>2</sup> J & H Just (Holdings) Pty Ltd v Bank of New South Wales (1971) CLR 546.

## [When is it appropriate to register a caveat with the Lands Titles Office?](#)

In relation to family law property settlement proceedings, the High Court of Australia has held that a caveatable interest can arise.<sup>3</sup>

An equitable caveatable interest may arise during property settlement negotiations due to a party's financial or non-financial contribution towards property. This may include financial support towards the mortgage or liabilities of that property or from providing maintenance or improvements (undertaking renovations) to the property.

Real estate is often one of the most valuable assets of the relationship. Where real property is owned by only one spouse or by a corporate entity, depending on the circumstances, taking steps to ensure that any real property is not sold or otherwise disposed of without the knowledge of both parties, can give peace of mind. It is an important consideration.

If you are aware your former partner intends to sell matrimonial property which you have an equitable interest in, but where you are not a registered owner of it with the Lands Titles Office, Matthews Lawyers strongly advises you to seek immediate legal advice to protect your rights.

## [When is it inappropriate to register a caveat with the Lands Titles Office?](#)

Registering a caveat with the Lands Titles Office, may not be the most appropriate course of action when considering your specific circumstances and there may be better solutions to protect your interests. It may not be appropriate to register a caveat, if your former partner has an interested purchaser for their investment property and neither of you wish to retain that property. Here it may be better, for the parties to agree to sell the property and retain the proceeds of the sale in a trust account of the Conveyancer or the Solicitor for one of the parties, until the family law property settlement is finalised.

## [Injunction: Another option: Section 114 of the Family Law Act 1975 \(Cth\)](#)

An injunction is an order made by a court that requires a person to do, or refrain from doing, a particular act. In family law, an injunction is sought in relation to property settlement proceedings (financial matters). An injunction can also be sought in relation to children's issues (parenting matter).

An injunction is another option to registering a caveat on matrimonial real property with the Lands Titles Office, to avoid any unnecessary risks associated with registering a caveat, by the party who wants to protect the matrimonial asset. The party may apply to the Federal Circuit & Family Court of Australia, for an interim injunction Order under section 114 of the *Family Law Act 1975* to prevent the other party from dealing with a particular asset, of their own accord and without their knowledge and consent, or the consent of the Federal Circuit & Family Court of Australia. It is also possible, at this time, to apply for other interim property orders, for the matrimonial assets that you wish to protect in your family law matter which are not real property.

---

<sup>3</sup> Baumgartner v Baumgartner (1987) CLR 137.

Injunctions in property settlement proceedings are used to prevent or restrict a party from acting to reduce assets available for division in a property settlement. It is an effective way to preserve the pool of assets and to stop one party from dealing with property without the knowledge and consent of the other party. A court will grant an injunction, if it considers that there is a real risk the applicant would suffer damage if it were not granted.

The court's powers in restraining a party from doing a particular thing are wide. Examples include restraining a party from:

1. dealing with real estate owned by parties to the relationship, such as by selling it or increasing the mortgage on it;
2. starting high-risk activities, in addition to their normal business;
3. disposing of superannuation, shares, or investment funds;
4. using or occupying the former matrimonial home;
5. damaging the other party's property.

#### [Granting the Injunction: Section 114 of the Family Law Act 1975 \(Cth\)](#)

Section 114 of the Family Law Act 1975 provides the court's power to make injunctions. The court must be satisfied it is just and convenient to make the order. The order can be made with or without conditions. The granting of an injunction usually requires an undertaking as to damages. The party seeking the injunction, undertakes to compensate the party against whom the injunction is taken, if that party suffers any loss or damage as a result of it.

The criteria for the court to grant an injunction are:

1. the applicant must have a basis for the claim under the *Act* (eg property settlement, spousal maintenance)
2. objective evidence must be supplied to establish a risk, threat or intention to dispose of or diminish assets;
3. the injunction terms must be tailored to the circumstances and be no more restrictive than is necessary to protect the applicant.

If urgent injunctive relief is sought, and a high level of risk is evident from the applicant's claim, the usual procedural fairness – of the injunction being served and listed for hearing at short notice – may be dispensed with and a decision made "ex parte". An ex parte hearing means the matter is heard by the Court, "in the absence of the other party." The party seeking the injunction, if it is heard 'ex parte' is required to serve a copy of the injunction on the other party. The matter is adjourned for further hearing, usually within

two to three weeks.

Under section 114(6), if a party to a marriage is bankrupt, a court can grant an injunction restraining a bankruptcy trustee from distributing dividends among the bankrupt party's creditors. Please see our other Information Booklet on Family Law, Bankruptcy and Insolvency: [Bankruptcy & Insolvency - Matthews Lawyers](#)

There is a further safeguard found in section 106B of the Family Law Act 1975 (Cth). Under this section, the Federal Circuit & Family Court of Australia, can set aside any transaction of a party, or a third party on behalf of that party, which was made or has been planned, to defeat an existing or expected order. An example, in this circumstance, is when a party disposes of property, or an interest in a company, to a family member, to reduce the matrimonial asset pool. If this occurs, the Federal Circuit & Family Court of Australia, on an application by one of the parties to a marriage or De facto relationship, can reverse the transaction, to ensure the property is considered in the property settlement.

#### [Enforcement of an injunction:](#)

There are several ways to enforce an injunction if it is breached or contravened. Penalties for breaching or contravening an order of the Federal Circuit & Family Court of Australia, include a bond, fine or period of imprisonment.

If an order of injunction, regarding matrimonial real property, is breached or contravened, the person protected by the injunction can file a contravention application with the Federal Circuit & Family Court of Australia, seeking enforcement of the order.

#### [What should I do next?](#)

Ultimately, lodging a caveat may or may not be your best course of action in family law proceedings. The best course of action is highly dependent on your personal circumstances. Matthews Lawyers, strongly advised that you obtain legal advice from us today as to whether a caveat is appropriate in your family law matter or whether an alternate option available to you to protect any interest you have, or may have, in a property is more appropriate.

#### [Conclusion:](#)

Caveats and injunctions are effective ways, to protect and preserve a legal or equitable matrimonial property interest, but whether it is the best method in your situation, requires consideration. It may be that an injunction is best for you. To find out which option is best for you, legal advice is important. Matthews Lawyers is able to assist you. Call our office to speak with one of our experience Solicitors – 0401 269 091.

## APPENDIX A: SECTION 191 REAL PROPERTY ACT 1886 (SA)

### Caveats

(1) Any settlor of land or beneficiary claiming under a will or settlement, or any person claiming to be interested at law or in equity, whether under an agreement, or under an unregistered instrument, or otherwise howsoever in any land, may lodge a caveat in the Lands Titles Registration Office:

(a) **Purpose of caveat**

A caveat may –

- (i) Prohibit absolutely the registration or recording of any instrument dealing with the land; or
- (ii) Provide that the registration or recording of an instrument dealing with the land may only occur subject to the claim of the caveator, and provided that, if any conditions are expressed in the caveat, the instrument complies with those condition;

(ab) **Instrument subject to claim of caveator**

If a caveator lodges a caveat providing that the registration or recording of an instrument dealing with land will be subject to the claim of the caveator, any instrument dealing with that land registered or recorded after the lodgement of the caveat will be taken to be registered or recorded subject to that claim;

(ac) **Form of caveat**

- (i) Be in the appropriate form; and
- (ii) Be executed by the caveator or his or her agent; and
- (iii) Contain an address within South Australia to which notices may be sent or at which proceedings may be served; and
- (iv) Contain information (if any) prescribed by the regulations for the purposes of this paragraph;

(b) **Registrar-General to make memorandum of receipt**

Upon the receipt of a caveat the Registrar-General shall make a memorandum thereon of the date and hour of the receipt thereof, and shall enter a memorandum thereof in the Register Book, and shall forthwith send a notice of such caveat through the post office to the person against whose title such caveat shall have been lodged, directed to his or her address appearing in the Register Book;

(c) **Not to register or record instruments contrary to caveat**

So long as a caveat remains in force, the Register-General must not, contrary to the requirements of the caveat, register or record an instrument affecting the land in respect of which the caveat has been lodged; except that despite the receipt of a caveat, the

Registrar-General must, subject to the other provisions of this Act, proceed with and complete the registration or recording of any instrument affecting the land produced for registration or recording before the lodgement of the caveat in the Lands Titles Registration Office;

**(d) Persons interested may summon caveator**

The registered proprietor or any other person claiming estate or interest in the land may, by summons, call on any caveator, including the Registrar-General, to attend before the Court to show cause why the caveat should not be removed; and the Court may after allowing the parties a reasonable opportunity to be heard, make such order as appears just in the circumstances; (if the caveator does not appear in response to the summons, the Court may, if satisfied that the summons was duly served, proceed to hear and determine the application in the caveator's absence);

**(e) Caveatee may apply to have caveat removed**

The caveatee may, except when the caveat is lodged by a settlor, or by a beneficiary under a will or settlement, or by the Registrar-General under Part 19 of this Act, make application in writing to the Registrar-General to remove the caveat, and shall in such application give an address in South Australia to which notices or proceedings relating to the caveat may be sent, and the Registrar-General shall thereupon give twenty-one days' notice in writing to the caveator, requiring that the caveat be withdrawn;

**(f) Mode of removing or discharging caveat**

The Registrar-General shall, after the lapse of twenty-one days from the posting of such notice to the address mentioned in the caveat, or of such extended time as may be ordered by the Court, remove the caveat from the Register Book by entering therein a memorandum that the same is discharged;

**(fa) Action to establish validity of claim**

A caveator may bring an action in the Court to establish the validity of the claim on which the caveat is based;

**(g) Caveator may apply to Court for order to extend time**

The Court may, on the caveator's application, extend the period of 21 days until an action under paragraph (fa) is determined or for any other period;

**(h) May withdraw caveat: But Court may order payment costs**

Any caveator may, by notice in writing to the Registrar-General, withdraw his or her caveat at any time; but the Court may, notwithstanding such withdrawal, order payment by the caveator to the caveatee or other person interested of any costs incurred by the caveatee prior to the receipt by him or her of notice in writing of the withdrawal of the caveat;

**(i) Entry to be made**

An Entry shall be made by the Registrar-General in the Register or any order made by the Court relating to any caveat, or of the withdrawal, lapse, or removal of any caveat;

**(j) Caveator, except Registrar-General, liable to make compensation**

Any caveator other than the Registrar-General who shall have lodged or refused or neglected to withdraw any caveat wrongfully and without reasonable cause, shall be liable to make compensation to any person who may have sustained damage thereby, and such compensation may be recovered by action: Provided that, if proceedings, the amount of such compensation may be assessed by the Court acting in the same proceedings; or the Court may direct an action to be brought to ascertain and recover such amount;

(k) **Not to lodge further caveat with permission**

It shall not be lawful for any caveator other than the Registrar-General, or for anyone acting on behalf of such caveator, to lodge a further caveat relating to the same matter without the permission of the Court;

(l) **Court may order costs if caveat by Registrar-General is removed by Court**

Where any caveat lodged by the Registrar-General shall be removed by the Court, such Court may order the costs sustained by the person at whose instance such caveat was removed to be paid out of the estate on behalf of which such caveat was entered.

(2) Despite subsection (1), the Registrar-General may, after a caveat has been lodged in accordance with this section, register or record in respect of the land to which the caveat applies –

- (a) Another caveat or instrument that has the effect of a caveat; or
- (b) Another instrument of a kind prescribed by the regulations, unless the registration or recording of that instrument is specifically prohibited by the lodged caveat.

(3) To avoid doubt, a registered proprietor of land may lodge a caveat under this section in respect of land for which he or she is the registered proprietor.

(4) In this section –

‘record’ means make a record in the Register Book.

## APPENDIX B: SECTION 114 FAMILY LAW ACT 1975 (CTH)

### Injunctions

(1) In proceedings of the kind referred to in paragraph (e) of the definition of **matrimonial cause** in subsection 4(1), the court may make such order or grant such injunction as it considers proper with respect to the matter to which the proceedings relate, including:

- (a) an injunction for the personal protection of a party to the marriage;
- (b) an injunction restraining a party to the marriage from entering or remaining in the matrimonial home or the premises in which the other party to the marriage resides, or restraining a party to the marriage from entering or remaining in a specified area, being an area in which the matrimonial home is, or the premises in which the other party to the marriage resides are, situated;
- (c) an injunction restraining a party to the marriage from entering the place of work of the other party to the marriage;
- (d) an injunction for the protection of the marital relationship;
- (e) an injunction in relation to the property of a party to the marriage; or
- (f) an injunction relating to the use or occupancy of the matrimonial home.

(2A) In a de facto financial cause (other than proceedings referred to in, or relating to, paragraph (e) or (f) of the definition of **de facto financial cause** in subsection 4(1)) the court may:

- (a) make such order or grant such injunction as it considers proper with respect to the use or occupancy of a specified residence of the parties to the de facto relationship or either of them; and
- (b) if it makes an order or grants an injunction under paragraph (a)--make such order or grant such injunction as it considers proper with respect to restraining a party to the de facto relationship from entering or remaining in:
  - (i) that residence; or
  - (ii) a specified area in which that residence is situated; and
- (c) make such order or grant such injunction as it considers proper with respect to the property of the parties to the de facto relationship or either of them.

Sections 90SB and 90SK apply in relation to an order or injunction under this subsection in a corresponding way to the way in which those sections apply in relation to an order under section 90SM.

Note 1: This subsection does not apply to proceedings referred to in paragraph (g) of the definition of ***de facto financial cause*** that relate to proceedings referred to in paragraph (e) or (f) of that definition.

Note 2: The same requirements in sections 90SB (length of relationship etc.) and 90SK (geographical requirements) for section 90SM orders must be satisfied for orders and injunctions under this subsection.

(3) A court exercising jurisdiction under this Act in proceedings other than proceedings to which subsection (1) applies may grant an injunction, by interlocutory order or otherwise (including an injunction in aid of the enforcement of a decree), in any case in which it appears to the court to be just or convenient to do so and either unconditionally or upon such terms and conditions as the court considers appropriate.

(4) If a party to a marriage is a bankrupt, a court may, on the application of the other party to the marriage, by interlocutory order, grant an injunction under subsection (3) restraining the bankruptcy trustee from declaring and distributing dividends amongst the bankrupt's creditors.

(5) Subsection (4) does not limit subsection (3).

(6) If a party to a marriage is a debtor subject to a personal insolvency agreement, a court may, on the application of the other party to the marriage, by interlocutory order, grant an injunction under subsection (3) restraining the trustee of the agreement from disposing of (whether by sale, gift or otherwise) property subject to the agreement.

(7) Subsection (6) does not limit subsection (3).

## APPENDIX C: SECTION 106B FAMILY LAW ACT 1975 (CTH)

### Transactions to defeat claims

(1) In proceedings under this Act, the court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party, which is made or proposed to be made to defeat an existing or anticipated order in those proceedings or which, irrespective of intention, is likely to defeat any such order.

(1A) If:

- (a) a party to a marriage, or a party to a de facto relationship, is a bankrupt; and
- (b) the bankruptcy trustee is a party to proceedings under this Act;

the court may set aside or restrain the making of an instrument or disposition:

- (c) which is made or proposed to be made by or on behalf of, or by direction or in the interest of, the bankrupt; and
- (d) which is made or proposed to be made to defeat an existing or anticipated order in those proceedings or which, irrespective of intention, is likely to defeat any such order.

(1B) If:

- (a) a party to a marriage, or a party to a de facto relationship, is a debtor subject to a personal insolvency agreement; and
- (b) the trustee of the agreement is a party to proceedings under this Act;

the court may set aside or restrain the making of an instrument or disposition:

- (c) which is made or proposed to be made by or on behalf of, or by direction or in the interest of, the debtor; and
- (d) which is made or proposed to be made to defeat an existing or anticipated order in those proceedings or which, irrespective of intention, is likely to defeat any such order.

(2) The court may order that any money or real or personal property dealt with by any instrument or disposition referred to in subsection (1), (1A) or (1B) may be taken in execution or charged with the payment of such sums for costs or maintenance as the court directs, or that the proceeds of a sale must be paid into court to abide its order.

(3) The court must have regard to the interests of, and shall make any order proper for the protection of, a bona fide purchaser or other person interested.

(4) A party or a person acting in collusion with a party may be ordered to pay the costs of any other party or of a bona fide purchaser or other person interested of and incidental to any such instrument or disposition and the setting aside or restraining of the instrument or disposition.

(4AA) An application may be made to the court for an order under this section by:

(a) a party to the proceedings; or

(b) a creditor of a party to the proceedings if the creditor may not be able to recover his or her debt if the instrument or disposition were made; or

(c) any other person whose interests would be affected by the making of the instrument or disposition.

(4A) In addition to the powers the court has under this section, the court may also do any or all of the things listed in subsection 80(1) or 90SS(1).

(5) In this section:

**"disposition"** includes:

(a) a sale or gift; and

(b) the issue, grant, creation, transfer or cancellation of, or a variation of the rights attaching to, an interest in a company or a trust.

**"interest"**:

(a) in a company includes:

(i) a share in or debenture of the company; and

(ii) an option over a share in or debenture of the company (whether the share or debenture is issued or not); and

(b) in a trust includes:

(i) a beneficial interest in the trust; and

(ii) the interest of a settlor in property subject to the trust; and

(iii) a power of appointment under the trust; and

(iv) a power to rescind or vary a provision of, or to rescind or vary the effect of the exercise of a power under, the trust; and

(v) an interest that is conditional, contingent or deferred.