CITATION:	*Deveraux v Cash* [2019] NTSC 78
PARTIES:	DEVERAUX, Kymberly v CASH, Jason
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	88 of 2019 (21931241)
DELIVERED:	15 October 2019
HEARING DATES:	14 October 2019
JUDGMENT OF:	Grant CJ

CATCHWORDS:

LAND LAW – CAVEATS –CAVEATABLE INTEREST – WHAT CONSTITUTES A CAVEATABLE INTEREST

Plaintiff as caveator must establish a serious issue to be tried as to the interest claimed and the balance of convenience must favour maintenance of the caveat – An interest under a claimed constructive trust is caveatable – Despite some improbability and implausibility in the plaintiff's account likelihood of success not so low as to deny trial of the substantive issue – Balance of convenience favours maintenance of *status quo* – Application for removal of caveat dismissed.

Land Title Act 2000 (NT) s 138, s 143, s 145, s 146, s 197

Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57, *Barfuss & Ors v Altmann* [2008] NTCCA 1, *Hayes v O'Sullivan* (2001) 24 WAR 40, *Legune Land Pty Ltd v Northern Territory Land Corporation and Northern Territory of Australia* [2012] NTSC 99, *Mijo Developments v Royal Agnes Waters* [2007] NSWSC 199, *Municipal District of Concord v Coles* (1906) 3 CLR 96, *Ogilvie v Ryan* [1976] 2 NSWLR 504, *Re McKean's Caveat* (1988) 1 Qd R 524, *Sinclair v Hope Investments Pty Ltd* (1982) 2 NSWLR 870, *Surfers Paradise Investments Pty Limited v United Investments Pty Limited, Eilazak Pty Limited* [1997] QSC 179, *Young v Young* [2011] VSC 188, referred to.

REPRESENTATION:

Counsel:

Plaintiff:	L Tattersall
Defendant	P Cheong

Solicitors:

Plaintiff:	Minter Ellison
Defendant	Hunt & Hunt

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Deveraux v Cash [2019] NTSC 78
No. 88 of 2019 (21931241)

BETWEEN:

KYMBERLY DEVERAUX
Plaintiff

AND:

JASON CASH
Defendant

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 15 October 2019)

THE COURT:

[1] This is an application by the defendant by Amended Summons filed on 4 October 2019 seeking orders:

(a) that the caveat lodged by the plaintiff over the defendant's property at 185 Ewart Road, Lambells Lagoon in the Northern Territory of Australia (**the property**) be removed pursuant to s 143 of the *Land Title Act 2000* (NT); and

(b) for compensation for loss or damage sustained as a result of the lodgement of the caveat without reasonable cause pursuant to s 146 of the *Land Title Act*.

Procedural history

[2] The application is brought in proceedings commenced by the plaintiff seeking leave to lodge a caveat over the property pursuant to s 145 of the *Land Title Act*. That leave was required because the plaintiff had previously lodged a caveat over the property which had lapsed on 22 June 2016. Although the Originating Motion named the defendant as a party, the application for leave was heard *ex parte* on 20 August 2019 without notice to the defendant.

[3] The Court granted leave on that day subject to the usual undertaking as to damages, and subject to the requirement that the orders, together with the Originating Motion, Summons and Affidavit of the plaintiff made on 19 August 2019 be served on the defendant by close of business on 22 August 2019. The defendant was also given liberty to apply on short notice to set aside the orders.

[4] The defendant initially made application to set aside the orders by summons filed on 24 September 2019. However, by that stage the caveat had already been lodged and the relief sought was subsequently amended in the terms described above.

The onus on the plaintiff

[5] The approach to be adopted in the circumstances is similar to an application for the grant of an interim injunction. Even though the defendant is the moving party for removal, the plaintiff as caveator

must establish a serious issue to be tried as to the interest claimed and the balance of convenience must favour maintenance of the caveat: *Legune Land Pty Ltd v Northern Territory Land Corporation and Northern Territory of Australia* [2012] NTSC 99; *Surfers Paradise Investments Pty Limited v United Investments Pty Limited, Eilazak Pty Limited* [1997] QSC 179.

[6] Although the Courts in those cases used the formulation "serious issue to be tried", the prevailing view is that the Australian authorities require the plaintiff to make out a "*prima facie* case": see *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at [65]-[72] per Gummow and Hayne JJ, cited by the Northern Territory Court of Appeal in *Barfuss & Ors v Altmann* [2008] NTCCA 1 at [18].

[7] There is little practical difference between the formulations of "*prima facie* case" and "serious question to be tried", and under both tests it is unnecessary for the plaintiff to establish a probability of ultimate success. Rather, the plaintiff must show a sufficient likelihood of success to justify in the circumstances the preservation of the *status quo* pending trial of the substantive issue. The strength of the likelihood required will depend on the nature of the rights the plaintiff asserts and the practical consequences likely to flow from a refusal to remove the caveat: *Australian Broadcasting Corporation v O'Neill* at [66], [71].

Background

[8] The plaintiff purchased the property with her former *de facto* partner on 16 November 2001 for the price of $235,000. That relationship broke down in or about 2005, and title was transferred to the plaintiff as sole owner by Deed of Settlement on 13 September 2005.

[9] The plaintiff and the defendant commenced a relationship in late 2008 or early 2009. The defendant was at that time renting a property at Howard Springs, and the plaintiff and her young son stayed most nights at the defendant's property in the early stages of the relationship.

[10] At that time the plaintiff was in full-time employment at a rehabilitation facility. Although there is some dispute between the parties as to whether the plaintiff "lost" that job or resigned for reasons to do with childcare and travel, it is common ground that the employment finished in or about April 2009. Apart from a number of short periods of casual employment which did not continue for reasons not presently relevant, the plaintiff was thereafter in receipt of Centrelink benefits. The plaintiff deposes that she also received child support from her former partner and some unspecified income from a family business, but no further detail is given in relation to the quantum or frequency of those payments.

[11] In or about September 2009 the lease on the property the defendant was renting at Howard Springs expired and the defendant commenced living

with the plaintiff and her young son at the property. That arrangement was the product of the natural evolution of the relationship between the plaintiff and the defendant and the fact that the plaintiff was having difficulty meeting the mortgage payments on the property due to her straitened financial circumstances. From the time he moved into the property the defendant paid the plaintiff approximately $500 per week in the form of rent, which he understood the plaintiff was putting towards payments for the mortgage and other bills. The defendant also assisted in undertaking repair and maintenance work on the property.

[12] The plaintiff and the defendant experienced some difficulties in their relationship during the course of 2010 which led to the defendant moving out of the property for a period of time before moving back in towards the end of that year. However, during that period living apart he continued making the same contribution to expenses. The plaintiff fell pregnant during the course of 2010 and gave birth to their son in January 2011.

[13] Throughout her relationship with the defendant the plaintiff had been engaged in long-running family law proceedings with her former *de facto* partner over custody of the child of that relationship. In or about June 2011 the plaintiff asked the defendant to guarantee a loan against the property in order to fund those proceedings. The defendant agreed to do so, albeit reluctantly. At that time, the mortgage over the property was approximately $190,000. With the defendant as a

personal guarantor, the plaintiff took out a new loan which was also secured against the property in the amount of $270,000 and paid out the existing mortgage.

[14] The loan amount was drawn down on 3 August 2011. The home loan statement from that time recorded both the plaintiff and defendant as borrowers. After the payment of the existing mortgage debt and legal and associated fees, the plaintiff received $70,000 under that loan arrangement and remained the sole registered owner of the property. The plaintiff applied approximately $5,000 of that amount to the maintenance and improvement of the property and the balance was applied to legal expenses in the family law proceedings.

[15] From 3 August 2011 to the time he subsequently acquired legal title to the property on 22 October 2013, the defendant made every fortnightly payment in satisfaction of the liability under the loan. The plaintiff has made no financial contribution to the repayment of the mortgage liability specifically or to the property generally since 3 August 2011.

[16] On 7 May 2013 the plaintiff was involved in an incident with her former partner, his mother and another person. The plaintiff was charged with a range of offences relating to that incident which are not presently relevant, and the court recorded a finding that she was unfit to stand trial within the meaning of the *Criminal Code 1983* (NT). During the conduct of a special hearing a jury found that the plaintiff

had committed various offences and she was made subject to a custodial supervision order under the provisions of Part IIA of the *Criminal Code*. She remains subject to that order.

[17] Following her arrest in relation to that incident, the plaintiff transferred the property to the defendant. While there is a factual dispute about the circumstances which led to that transfer, the objective contemporaneous documents disclose the following matters. The instrument of transfer recorded the value of the interest transferred and consideration as $625,000. That instrument was executed by the plaintiff and the defendant on 25 September 2013 and was registered at the Land Titles Office on 22 October 2013.

[18] At that time the mortgage debt stood at $261,697.96. On the basis of the bank's valuation of the property, which I infer was $625,000, the bank was only prepared to lend the defendant a further $214,190. That amount, together with fees for the release of the plaintiff as a borrower, the bank valuation and the loan increase, increased the defendant's total liability secured by the mortgage over the property to $476,697.96. That is reflective of a margin of approximately 20% between the upstamped mortgage debt and the attributed value of $625,000. Thereafter, the defendant became the sole registered proprietor of the property and the sole borrower on the home loan account, and continued making the sole contribution to the liability under the mortgage debt.

[19] Of the $214,190 which the defendant was able to borrow on the property, he received $182,155.30 into his account after the amount of $30,937.50 was deducted to pay the stamp duty liability, and the deduction of amounts for miscellaneous lodgement and registration fees. The defendant then paid approximately $110,000 to the plaintiff's lawyers for the defence of the criminal proceedings, approximately $2000 for clothes for the plaintiff to wear to court, approximately $10,000 into the plaintiff's prison account, $5000 to the plaintiff's father for legal expenses he had incurred in relation to the plaintiff's bail proceedings, and a further unspecified amount to pay off debts the defendant had accumulated in the course of the plaintiff's criminal proceedings. At a later point in time, the defendant paid a further $30,000 towards the plaintiff's legal fees.

[20] The defendant also says that in December 2016 he received an inheritance of $212,605.80. He applied a significant proportion of that inheritance to improving the property, including fitting a new kitchen, renovating the bathroom, erecting fencing, installing air-conditioning and a car hoist, and purchasing items for the maintenance of the property.

[21] I turn then to the opposing accounts of the circumstances which led to the transfer of the property. The defendant says that it was the plaintiff who suggested that she sell the property to him. The defendant says she gave a number of reasons for that suggestion. The first reason was

that the plaintiff's legal representatives wanted their fees paid before they did any further work in defence of the criminal charges brought against her. By purchasing the property from the plaintiff, the defendant would be able to release the plaintiff's equity for the payment of her legal expenses. The second reason was that the plaintiff was resigned to the fact that she would be held in custody for a long period, and in those circumstances she wanted the defendant and their son to have the property. The third reason was that if the defendant purchased the property from the plaintiff it could not be seized by police for the purpose of meeting any liability under criminal property forfeiture legislation (or perhaps criminal compensation legislation).

[22] The defendant says the plaintiff was at all times aware that the transaction was in the form of a purchase of the property by him; that at no time was there any discussion, arrangement or understanding that the property would be transferred back to the plaintiff when she was released from custody; and that at the time the instrument of transfer was signed in the presence of a justice of the peace the plaintiff read the documents carefully and well understood the effect of the transaction.

[23] The plaintiff does not dispute that it was she who suggested the transfer of the property to the defendant. She says that she made that suggestion for three reasons, although she does not prioritise the

reasons in this order. First, she needed money for her legal defence and the refinancing of the mortgage would release her equity in the property for that purpose. Secondly, she was of the view that the defendant could get "a better mortgage deal" if he refinanced the mortgage. Thirdly, the defendant had a credit card debt of $30,000 and refinancing would allow him to pay that debt.

[24] The plaintiff says that the arrangement was always subject to the express agreement and understanding that on her release from prison the defendant would transfer the property back into her name, and there was no discussion about him purchasing the property from her. The plaintiff says further that at the time she signed the documents she felt under a lot of pressure to do so and did not look through them properly. She says that although she had lawyers acting for her at the time, and she asked for legal advice in relation to the transfer proposal, she did not receive any legal advice. I take it from that that she did not pursue that advice either. The plaintiff says that at the time she signed the documents she thought their effect was simply to transfer the title to the defendant's name to hold on her behalf, rather than a sale of the property to him.

[25] The plaintiff also says that she felt under pressure to sign the transfer documentation. While that may be so, that pressure was not the result of any undue influence or unconscionable conduct on the part of the defendant, and nor does the plaintiff allege that to be the case. It was

the result of the predicament in which she found herself at the time. She was facing criminal charges and wanted to access her equity in the property to pay for legal representation, and an arrangement with the defendant by which he borrowed more money and took title to the property was a means by which to achieve that.

[26] I should observe here that the proceedings under Part IIA of the *Criminal Code* to which I have earlier referred necessarily suggest that at the time of the incident which occurred in May 2013, and/or at the time of her trial, the plaintiff was suffering from some form of mental impairment. No evidence in relation to the nature or effect of that impairment has been received in these proceedings. The plaintiff does not suggest that she suffered from any condition which rendered her vulnerable to undue influence or coercion, or affected her powers of comprehension, at the time she signed the transfer documents in September 2013.

[27] On a cursory and preliminary assessment, there is an inherent improbability about the plaintiff's account. If her purpose was, as she says, to secure funding for her legal representation, and the defendant was willing to facilitate that purpose, it was unnecessary to transfer the property. It would have been open to the plaintiff and defendant to increase the level of the mortgage debt with her retaining sole proprietorship, as they had done in August 2011. It was also

unnecessary to transfer the property in order to secure a better rate of interest.

[28] Perhaps most importantly, it would seem implausible that the defendant would have agreed to take legal title to the property; to almost double his liability under the mortgage debt; to continue to bear financial responsibility for meeting the mortgage liability as he had done primarily since September 2009 and solely since August 2011; and to continue to do so for an indefinite period, only to then transfer the property back to the plaintiff at a time of her choosing on the basis that he had no beneficial or continuing legal interest in the property. That implausibility is not displaced by the fact that in a technical and legal sense the defendant would have retained a right to indemnity from the trust property for his contributions.

[29] There is also some dispute about the purchase price paid by the defendant for the property. The plaintiff claims that was a gross undervaluation on the basis that when she was considering selling the property in late 2012 or early 2013 she had the property appraised for sale and received an offer of $750,000. There is no other evidence in relation to that appraisal or offer. There is no expert evidence in relation to the value of the property as at the date of transfer on 22 October 2013. There is only indirect evidence as to its value at that time.

[30] The first piece of indirect evidence is the fact that the purchase price of $625,000 would appear to have been based on a bank valuation conducted at the time, although it may be accepted that bank valuations tend to be conservative given the bank's position as prospective mortgagee.

[31] As I have already described, the plaintiff and her former partner bought the property in November 2001 for $235,000. The Building Advisory Service information on the Search Certificate indicates that a house, a further single dwelling and a carport were located on the property at that time and were all in compliance with the Building Code. There is also reference to a farm shed for which a permit was not issued until March 2019. There is no evidence of any significant improvements to the property between 2001 and the date of transfer on 22 October 2013.

[32] There is no information as to what the property was valued at in September 2005 when it was transferred to the plaintiff as sole proprietor as part of the settlement of her former relationship.

[33] The unimproved capital value of the property for ratings purposes was recorded as $375,000 on 1 July 2012. That had dropped to $345,000 on 1 July 2015, and further to $295,000 on 1 July 2018.

[34] The defendant first advertised the property for sale for $720,000 in April 2019. It did not sell at that price. The price was then reduced to $650,000 and again did not sell at that price. It is now listed for sale at

$635,000 and the defendant presently has a prospective buyer interested in or about that amount.

[35] Having regard to that evidence, I am unable to find what the market value of the property was as at October 2013, and nor is it necessary to do so in determining this application. However, having regard to the contextual evidence I have just detailed it cannot be said that the purchase price of $625,000 was a gross or manifest undervaluation. I make that finding with particular regard to the improvements undertaken by the defendant following December 2016 and the price at which the property is now listed for sale, even allowing for the fact that the Darwin property market is currently depressed.

[36] Having made those observations, there are aspects of this transfer which are atypical of an ordinary purchase arrangement. In the ordinary course, the vendor would receive the difference between the outstanding mortgage liability and the purchase price after the deduction of fees. The defendant says that at the time he agreed to the transfer with the plaintiff there was no discussion of their respective shares or entitlements in the property, and no discussion as to how the balance of the purchase price was to be applied beyond the payment of her outstanding legal fees.

[37] In this case, the outstanding mortgage liability at the time of transfer was $261,697.96. The balance of the purchase price after satisfaction

of that liability would be in the order of $360,000, but the defendant was only able to obtain a further $214,190 from the bank on refinancing. On the defendant's deposition he applied approximately $160,000 to the plaintiff's legal fees, debts and related matters. Even if it is accepted that under the arrangement the plaintiff was to bear the stamp duty liability, and that account was to be taken of the defendant's payment of the mortgage liability since 3 August 2011, there would remain in excess of $100,000 of the purchase price which was not applied on the plaintiff's account.

[38] On that scenario, it would be necessary to imply as a term of the purchase arrangement that the plaintiff would accept in full and final settlement of her entitlement on the purchase whatever amount the defendant was able to raise by way of further financing over the property for application to her legal fees and debts. That proposition also has an air of implausibility.

Whether there is a caveatable interest

[39] The plaintiff's contention may only succeed if she is able to establish on a *prima facie* basis that the interest she claims is a caveatable interest. This is because s 138 of the *Land Title Act* relevantly provides that a caveat may be lodged by "a person claiming an interest in a lot". There is a long line of authority to the effect that the interest must be a legal or equitable interest in the land in order to qualify as a caveatable interest (in the absence of some express statutory

extension): see, for example, *Municipal District of Concord v Coles* (1906) 3 CLR 96. The interest must be a proprietary interest rather than a claim *in personam*.

[40] The statutory provisions for caveats in the *Land Title Act* would appear to be modelled on the *Land Title Act 1994* (Qld). The Queensland legislation contains a similar provision. However, the position under statute in that jurisdiction is different to the one presenting here. There is no definition of the term "interest" appearing in the *Land Title Act 1994* (Qld), but s 36 of the *Acts Interpretation Act 1954* (Qld) contains the following definition:

> Interest, in relation to land or other property, means—
>
> (a) a legal or equitable estate in the land or other property; or
> (b) a right, power or privilege over, or in relation to, the land or other property."

[41] The incorporation of that definition may elevate a right into an interest in land in circumstances where it may not otherwise qualify as a proprietary interest: see, for example, *Mijo Developments v Royal Agnes Waters* [2007] NSWSC 199.

[42] The *Interpretation Act 1978* (NT) does not define "interest". It does define "land" to include an estate or interest in the land, and "estate" to include any estate or interest at law or in equity. Those definitions do not assist the present enquiry, but they are consistent with the fact that throughout the *Land Title Act* the term "interest" is used in a manner

commensurate with an interest in land or an interest in a lot: see for example, *Land Title Act* ss 186, 192 and 204.

[43] The plaintiff concedes that in order to qualify as a caveatable interest the right claimed must be a proprietary interest. That interest is said to lie in the fact that the nature of the dealings as described by the plaintiff created a constructive or implied trust at the time of the transfer, or gave rise to a promissory estoppel. The plaintiff also asserted initially that she had an equitable lien over the property for the balance of the purchase price. That submission was withdrawn in the face of s 197 of the *Land Title Act*, which provides expressly that a vendor does not have equitable lien over a lot because of a purchaser's failure to pay all or part of the purchase price.

[44] It is inappropriate in an interlocutory application of this type to embark upon a determination of the facts in issue unless the objective contemporaneous evidence is such that the account of one or other party clearly cannot be accepted. That is not the case in the present matter. Taking the plaintiff's assertions on face, she says there was an express agreement between her and the defendant by which he took legal title on the understanding that it would be transferred back to her upon her release from custody.

[45] A trust will be constructed where the trustee obtains title from the beneficiary in the understanding that the beneficiary will retain the

beneficial interest: *Ogilvie v Ryan* [1976] 2 NSWLR 504. An equitable interest on which the cause of action is based, such as the interest under a constructive trust, is caveatable: see *Hayes v O'Sullivan* (2001) 24 WAR 40; *Young v Young* [2011] VSC 188. While the imposition of a constructive trust is remedial in the sense that unless and until relief is granted by a court the plaintiff will have no legal or equitable interest in the land, the fact that the assistance of the court is needed to vindicate the right does not deny its character as a caveatable interest. This is because the right to enforce a proprietary claim gives an equitable interest, as distinct from a purely personal right or a mere equity: see, for example, *Sinclair v Hope Investments Pty Ltd* (1982) 2 NSWLR 870; *Re McKean's Caveat* (1988) 1 Qd R 524. That conclusion makes it unnecessary for these purposes to consider the plaintiff's alternative claim that there is an implied trust referable to the outstanding balance of the purchase price.

[46] This is not to say that the plaintiff will ultimately establish the existence of a constructive or implied trust. It is only to say that the interest the plaintiff asserts is a caveatable interest and it cannot be concluded at this stage and without a hearing of the issue that her likelihood of success is not high enough to justify the preservation of the *status quo* pending trial of the substantive issue.

Balance of convenience

[47] I turn then to consider the balance of convenience. If the caveat is removed and the property is sold the plaintiff will be deprived of an interest in property of a character which might attract an order for specific performance, and would be left only with a claim *in personam* against the defendant in circumstances which might make the pursuit of that claim difficult. On the other hand, the only prejudice presently presenting to the defendant if the caveat is left in place pending resolution of the plaintiff's claim is that he will not be able to sell the property and relocate to Perth in the immediate future. That may have an adverse financial consequences for the defendant, but none that can be identified with any precision or certainty at this stage.

[48] In those circumstances, the balance of convenience favours leaving the caveat in place until resolution of the substantive issue. That makes it unnecessary to consider the application for compensation.

Disposition

[49] The application for removal of the caveat lodged by the plaintiff over the property is dismissed.

[50] I will hear the parties in relation to the future conduct of the matter.

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